



Town of Cummington

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Zoning Board of Appeals

Special Permit Decision/Minutes/Record

The members of the Cummington Zoning Board of Appeals hereby certify that the following is a record of all the board's proceedings pertaining to the application of Cummington DG Series LLC for "A proposed 'retail sales' use in the Village District." at 337 Berkshire Trail (the former apple storage building site), Assessor's map 23D, lot 4; as provided by sections 4-30.3, and 5-20 of the zoning bylaw.

The application to the board was received by Town Clerk on October 17, 2018. The application is attached as Exhibit 1, and made part of this record.

A notice of public hearing on this special permit, a true copy of which is attached as Exhibit 2 and made part of this record, was:

1. published in the Country Journal, a newspaper of general circulation in Cummington, on November 8th, and November 15th, 2018, and;
2. posted on the bulletin boards of the Community House, Post Office, and The Creamery at least 14 days before the hearing on December 6, 2018 and;
3. mailed on or before November 20, 2018 postage prepaid, to the applicant, abutters to the property in question, owners of land directly opposite from the property in question on any private or public way, and abutters to abutters whose property is located within 300 feet of the property line of the property in question. The notice was mailed to the names of persons, and to the addresses as provided by the most recent tax list kept by the Board of Assessors in Cummington, with the assessors certifying such names and addresses, and attached as Exhibit 3, and made part of this record, and;
4. mailed to the Planning Boards of Ashfield, Chesterfield, Goshen, Plainfield, Peru, Windsor, and Worthington.

The public hearing of this special permit application was commenced on December 6, 2018 at the Community House, at which time opportunity was given to all those interested to be heard in favor of, or opposition to, issuance of said special permit. The hearing was called to order at 7:05pm by Zoning Board of Appeals (ZBA) Clerk, Michael Holden.

Additional ZBA members in attendance were Carla Ness, chair; Kenneth Howes, Ernest Strong, Mark Bevan, members; and Eric Smith, alternate member. In an abundance of caution Ness and Bevan had completed §19 Disclosure Form (Financial Interest in a Particular Matter), because Ness had loaned The Old Creamery Co-op money at its inception; and Bevan has provided unpaid IT work. The nature of this form required that the appointing body (in this case the select board) decide whether or not they could/should participate. Because the select board did not have a scheduled meeting until after the hearing, Ness and Bevan recused themselves until the select board made its determination. They witnessed all the proceedings but did not participate.

Chad Brubaker of Liscotti Development was present representing the applicant.

Additionally, approximately 175 members of the public showed up to attend the hearing, unfortunately the auditorium of the Community House only seats 99. There is an adjacent room, referred to as the library that seats an additional 25. The remainder of the people waited outside in the cold, even though they could not hear the proceedings.

The clerk read the meeting notice that was published in the Country Journal on 11/08/18 and 11/15/18.

Earlier in the week Ness had received a phone call from Mathew Bombaci of Bohler Engineering (the firm Liscotti Development contracted with to provide engineering) asking for a continuance of the hearing. She explained that the Public Notice of the Hearing had already been published and that it was not possible at this late date to change the hearing date, time, or place. Holden also received a call with the same request, and gave the same response. Neither was aware that the other had been called until they spoke with each other later on. The reason both were given was, the "applicant wasn't available that one night", yet it wasn't the applicant calling, it was someone from Bohler Engineering. On December 4, 2018 Ness received a letter from Bohler Engineering asking for a continuance because "The Applicant is continuing to work with the Town and their selected engineering peer review consultants relative to a previously filed and active application. As such, the Applicant would like to ensure that the current project materials and updates that may result from those discussions are available and incorporated as part of the public hearing process." In other words, they were not ready. It appeared that the recent development by the Massachusetts Department of Environmental Protection (MassDEP) which classified what the applicant had identified as an intermittent stream, to be in fact a perennial stream, thus creating the need for some re-engineering. Brubaker introduced himself and referenced the aforementioned letter, then asked for a continuance of the hearing. The participating members Holden, Howes, Strong, and Smith expressed strong frustration and disappointment that he was not prepared to make a presentation of the project as a whole, and then simply ask for a continuance with regard to the unresolved wetlands issues. The public as well was frustrated by this, some referring to it as "simply a stall tactic".

Because no presentation was made, and Brubaker was ill prepared to field questions, the board felt it would be imprudent to allow the public to testify, make statements, or ask questions at this time. Although disappointing, most understood the reasoning.

That left only the question of the continuance. The hearing remained open and the public was allowed to participate in the discussion with Brubaker as to how to handle the continuance request.

Some on the board, and in the public, felt that it would be within the board's discretion to simply deny the permit based on the fact that no testimony was presented. Others felt that the applicant should withdraw, and reapply once all the wetlands and Conservation Commission (ConCom) issues were resolved. But this would have its own set of penalties for the applicant, the two year prohibition on reapplying. A motion was then made and seconded "To allow the applicant to withdraw on the condition that they do not reapply until all the wetlands and Conservation Commission issues are resolved, and those permits issued." thereby waiving the two year prohibition. Before the board could vote Brubaker stated that he was not authorized to accept such an offer, and was only instructed to ask for a continuance.

The discussion of how to resolve this continued for quite some time.

In the letter asking for the continuance was a list of available dates, the earliest being December 13, 2018. The ConCom's next meeting was scheduled for December 17, 2018 and it didn't make sense to continue the ZBA Hearing to a date prior to that. Then the holidays were creeping in, so the earliest practical date looked to be January 17, 2019. A motion was made and seconded that "The hearing be continued until January 17, 2019 on the condition that 7 sets of the updated documents be provided to the ZBA on or before December 13, 2018." (Because that was the earliest date the applicant said they could be ready, and it would give a full month for review.) The motion passed unanimously by the 4 voting members, Holden, Howes, Strong, and Smith; and Brubaker acknowledged they would comply.

Although this continuance was disappointing to many, it did provide for both the applicant and the public time to become further prepared. With the hearing date set, now came the question of venue. Representatives of the Village Church (directly across the street from the Community House) offered its use, and stated that the sanctuary seats 248 and there is an annex room that holds another 50 and is connected to the sanctuary via a P/A system. Offer accepted.

8:30PM: Cummington DG Series, LLC ZBA Hearing continued to January 17, 2019 at 7:00PM in the Village Church on Main Street.

January 17, 2019

The continuance of the hearing was called to order at 7:00pm by Zoning Board of Appeals (ZBA) Chair, Carla Ness by again reading the published Public Notice of the Hearing.

About 200 members of the public attended, everyone found a comfortable seat. No one cordoned off in another room, and no one outside in the cold.

The applicant's representatives introduced themselves. Mathew Bombaci of Bohler Engineering, and Chad Brubaker of Liscotti Development, representing Cummington DG Series, LLC (applicant) who has retained Bohler Engineering to design the project. Bombaci produced large format drawings for the audience to see; the same drawings that had been submitted with the application, and included in this record. He then stated that the project was a 9,100 sq. ft. retail space with associated parking, stormwater management, landscaping, and one driveway entrance on Route 9 (aka 337 Berkshire Trail). They would also be removing the existing "Apple Storage Building". He further explained that the applicant was in the process of securing necessary permitting from the Conservation Commission and

MassDEP for stormwater management and wetland issues, and is receiving a technical peer review on behalf of the ConCom. "We've received those comments and responded to those, and had no issue with any of the comments that they had."

Percolation tests for Title 5 septic completed, town water available on site, and gas will be an onsite propane tank. All lighting to be horizontally shielded LED lighting. He offered that the architectural design had been arrived at "based on preliminary discussions with the town".¹

Next he spoke to the "...six criteria for the retail use special permit in the village district". All of the arguments for these six conditions are included in the application packet Letter from Bohler Engineering dated October 18, 2018, and included in the record as Exhibit 1.

More information about stormwater management, and then mentioned proposed building's size compared to the existing "...it's about 120% bigger than the existing building there..."² There will be 28 parking spaces, anticipating 30 customers per hour. Will be a retail use.

Second part of the presentation concerns the floodplain, which according to the bylaw is based on the FIRM maps (Flood Insurance Rate Maps) a more detailed explanation is also provided in the October 18, 2018 letter.

"...in summary our project is reducing the impervious area on site, we're providing a stormwater management system where this none, we're providing more flood storage than exists there today, we've developed architectural drawings we feel are aesthetically pleasing or at least as well as it can be and kind of meets the character of the town, and the use itself is compatible it exists elsewhere in town, and it's not so expansive as could be developed here there's no building coverage requirements and it's actually less than what's there today."

Ness asked which entity would actually own the property. Bombaci explained that "Liscotti Development would be the prospective owners of the land and then they would tenant the building out to a user." Ness, "Okay, so you guys are still in like a purchase & sale agreement with the current owner?" Bombaci, "Correct."

A sign-up sheet to speak or ask questions had been circulated through the public. 25 individuals had signed up.

Select board member Monica Vandoloski spoke first, she simply thanked everyone for such a large turnout, and asked the assembly to consider volunteering, or running for office, and that lots positions and boards need qualified civic minded individuals to participate.

Tom Lessor, an attorney from Northampton representing a group of residents from Cummington spoke and identified Tighe & Bond as the peer review engineers for the town's Conservation Commission, and that they had submitted 5 pages of comments which "...had not been responded to and they are due next Tuesday" (January 22nd) to allow ConCom review prior to a January 28th hearing. "The Conservation Commission has evidence that the floodplain compensation is not adequate, that the riverfront area prevents this from being developed and that will be heard by the Conservation Commission." He stated that there were two ways that a project can proceed, the first being if the bylaw allowed it as a matter of right; the second being, by the granting of a special permit. There is no right to a special permit, the conditions for granting must be met and the bylaw spells out those conditions. He referenced each pertinent section in the bylaw.

Russell Sears III, select board chair, spoke next and addressed to proposed development. "The Notice of the Public Hearing said we were talking about a project in the Village District. If you read the section of the bylaws about the Village District and what the purpose of the Village District is, the Village District was designed to take projects like this to protect the character of the rest of the town. It's meant for light retail such businesses. That piece of property has sat vacant for a long time, I don't know if you want to see it set idle for another ten years. The part that everybody doesn't realize is, this is a pretty valuable project to this town as far as the value of what they're doing. You may object to it on the basis of it being competition to the store up the road, I personally think it brings very little competition to the building up the road. I don't know there is an alternative better project that could go there. I think they've done a lot of work, I think they've answered most every question that everybody's had, and I think they've done a pretty decent job of doing it. I just wish that people would concentrate on those sections of the bylaw tonight that apply, and none of the Rural-Residential phrases and characterizations apply tonight. Everything is about what can happen in the Village District. Thank you."

At this point Ness read aloud Section 4-30.2 Village Districts (V) of the Zoning Bylaw, as well as some of the Floodplain regulations from the bylaw.

John Bye, Cummington Cultural Council, "Cummington has a rich array of cultural resources. We have many independent artists, craftspeople, musicians, and writers. We have important cultural institutions: Kingman Tavern³, Bryant Homestead⁴, Greenwood Music Camp⁵, and the Cummington Fair⁶. We are blessed with a walkable Main Street, a town park, a gazebo and pavilion, our former school building, the Community House Gallery, and the classic look of a small New England town.

In an effort to knit together and advance the development of these multiple cultural assets our Selectboard with the Hilltown CDC has applied for an 'Our Town' grant from the National Endowment for the Arts. The town has pledged \$50,000 in matching funds to this effort. If we are awarded this grant the town will have \$100,000 to apply to the development, maintenance, and promotion of the Cummington Village Cultural District. Cummington will be recognized for its exceptional cultural richness. Our artists and institutions will benefit from increased exposure and recognition in the wider world. The development of Cummington as a community which cares and nourishes its cultural resources will benefit many who already live and work here, and enhance the experience of those who visit. This may well lead to other opportunities for the town. Unfortunately, the proposed Dollar General store will be located at the visual and functional gateway to the town and the Cultural District. It will become Cummington's front door. Its size, roughly equivalent to the Public Safety Complex, design and purpose are entirely out of character with the town. At the very moment the town is taking steps to define and support its unique cultural resources this generic oversized, out of place store threatens to dominate and undermine this effort. Importantly, the first step the Cultural District designation is community engagement in the process. Fully half of the \$100,000 can be spent on thoughtful planning and decision making for the district. The balance can be used for implementation. A Dollar General on the doorstep of the town will diminish possibilities for the district, and focus much of the planning on how to mitigate its negative impact rather than how to celebrate and enhance what we already have. This is not about being a snob. Its about thoughtful planning decision making which promotes the character and resources already present in the community."

Pat Keith, Historical Commission Chair, "The Historical Commission recommends that the Zoning Board deny permission to build on the land currently housing the storage house alternatively called the Apple Storage and/or the packing house on the corner of Rt. 9 and Fairgrounds Road. We feel a 9,100 sq. ft. building, with parking area and extensive lighting is not in keeping with the rural historical character of this town. People move to this town because of the rural quality of its woods, meadows, rivers, and streams. The Kingman Tavern holds the history of a people who took great pride in its small town character. Read 'Only One Cummington', go to the museum and look at the pictures gracing its walls and you will see the story of a farming community that took great pride in this heritage. What other town of this size in this Commonwealth has a six unit museum built by the people, for the people to store that history? The Historical Commission tonight is speaking for them, and all the people yet to come."

Alice Cozzilino, resident, "What do you think of when you hear the word 'village'? I think of all the treasured aspects of what we in Cummington now have. A small town of diverse people who coexist with care and respect. I picture parents walking in town with small children and pets. I see villagers walking to the post office, the playground, and the beautiful Westfield River. I picture families attending church together. I imagine bright days and dark nights." "We don't have to resist change; we can't. But we can choose change that allows us to shepherd and care for that which we hold dear. Our unique, rural character."

People expressed concern for property values, especially abutters fearing such a sharp and sudden change to the character of their neighborhood, and many speakers addressed their concern over the proposed tenant's effect on local businesses and thereby effect local character. After about 13 speakers had had their turn, and because Sears had been the only one to speak in favor of the project, Ness asked the audience if there was anyone on the list who would like to speak in support of the project, "...or even if you haven't signed the list..." Not one person asked to speak.

The most common theme running through all of the other speakers' statements was that they cherished the rural character of our town. Referencing the actions, and lifestyles of the inhabitants that create the sense of community. Or the quaintness of Main Street, where the homes are both, architecturally interesting and modest. Each with its own unique style no two alike, and are exemplary of a small rural New England town; along with the Community House, the Village Church, the Kingman Tavern, and the recently fully restored Parsonage House⁷.

Bombaci, "...obviously rural character was a big sticking point in town, and obviously people have a lot of love for their town. We designed the project as best as we could to meet that character... we put quite a bit of effort trying to meet the character..."

Holden, "...I think your corporation is missing the point about what the character of a town is. It's not just what a building looks like... in our town we've never had a business of this size and scope." "...this is not about the corporate citizenry of the Dollar General, not at all, okay; and it's not also about the survival or not, of the Creamery. It's about the town, and what it's going to grow to be like. If an entity of this size and scope is allowed into our Village District, then the next applicant has something to point to... what would prevent anyone from buying three parcels in a row on Main Street and putting in another similar or dissimilar business but of such large scope and size that it begins to change our town."

Many letters were submitted to the board, along with a petition signed by 240 residents, and landowners of Cummington. 778 persons in total signed the petition asking that the project not be approved. Ilse and Robert Godfrey, and Conrad Liebenow each own homes directly across the street from the proposed development site. Through letters they have expressed their concerns for the negative impacts the project would have on their property values; the noise and nuisance of the 32 entrances and 32 exits per hour of vehicles; the late hours of operation; and the Godfrey's fear for well being of their beautiful pond which is downstream of the proposed site.

The Public Hearing was closed at 8:30pm, the public was invited to stay for the meeting, but if they were going to leave please do so at this time, about half the audience remained. After a short break the board continued.

Ness' first two issues were that of meeting the character concerns, and the floodplain concerns. Then other members expressed, that because the ConCom was already involved, and perhaps better suited, we should defer to the ConCom on this aspect. The approach, in general, was to hold off on discussing conditions, hours, etc. until after some sense of whether or not it would be approved was garnered. Strong stated that he had lived in town his whole life, and that the packing house had been in and out of business and was falling down now. He was supportive because it was finally going to be taken down. All expressed surprise at the lack of anyone speaking (or writing) in favor of the project. Especially considering the percentage of townspeople who attended.

Discussion came back to the size of the project, and how Cummington has never had anything on this large of scale before, and because of that the character has developed to what the town is today.

Bevan mentioned that what he heard from the townspeople was overwhelmingly about the character issue, and how the project didn't measure up.

Howes and Strong both felt that there was a need to be met by the project, even though perhaps it was a bit out of scale. Both thought a smaller store would have been a better fit. (Note: the applicant made no presentation of an alternative building, and did not ask for any additional time, or for a continuance to prepare an alternative plan)

Holden felt that it was in large part, the rural character that attracted people to move here, and that as the population (as in national population) grows, more people will be interested in moving here for the safe, rural character. He stated that he did not believe the project met the character of the town, and questioned whether it would support the values of the surrounding properties.

Both Ness and Bevan expressed strong opinions about the project not meeting the character of the town. Bevan also questioned whether it would protect the health of the community.

The issuance of a Special Permit is only permitted upon satisfying several tests or criteria that are in the Zoning Bylaw. The first paragraph of the bylaw states its purpose clearly. (emphasis added)

"1-10 Purpose

*To promote the general welfare of the Town of Cummington, to protect the health and safety of its inhabitants, to encourage the most appropriate use of land within the Town, to retain our natural resources, **to maintain the agricultural and rural character of the Town**, to reduce the hazard from fire by regulating the location and use of buildings and the open spaces around them, **and to protect,***

conserve and increase the value of property, the Town of Cummington, under authority of the Zoning Act, does hereby enact this By-law.

3-30 Special Permits

3-30.3 A Special Permit ***shall only*** be issued if the Special Permit granting authority finds that such use meets the following conditions:

a. That the use is in harmony with the general purpose and intent of this Zoning By-law.

The terms rural character and small town character are always subjective and relative, and need to be interpreted through the eyes of those who reside in a given community. Certainly a new transplant to Greenfield might relish in its small town character if she had moved there from NYC, or Boston, or even just Springfield. Yet the arrival, in Greenfield, of a longtime resident of Cummington would be met with perceived city challenges. It's relative. Generally when people speak of rural character or small town character it means there's a lack of big city issues (another relative term). The density, traffic, commercialism, and crime certainly come to mind. Cummington is a town of approximately 800 people, it wouldn't take much effort to know everyone's name, and some people almost do.

We submit that there is nothing about a 9,100 sq. ft. retail sales space that helps to "*maintain the... rural character of the Town.*" Presently, there are three retail sales entities in Cummington. A combination deli/bakery/grocery that is 3,017 sq. ft., but approximately 1,000 sq. ft. of that is dedicated to kitchen, deli, prep, walk-in freezers, etc., and a dining area with tables and seating. There is a hardware store that has less than 1,200 sq. ft. of retail sales space, and there is a "farm stand" (±300 sq. ft.) that sells eggs, limited dry goods, pet foods, etc., and literally has a shoebox, with money and calculator, on the counter for customers to "ring up" their purchases and make their own change. All three of these have true country architecture, and these light retail venues are as much a part of the rural character of Cummington as rolling landscapes, country homes, and tree lined streets. A 9,100 sq. ft. space would dwarf these even if they were combined into one.

"4-30 Purpose, Intent and Additional Use and Special Permit Condition of Districts

The purpose of these regulations, in all districts, is to preserve the rural character of the Town of Cummington and to protect the town's natural resources, especially the prime water supplies.

"4-30 2. Village Districts (V)

a. Purpose

To provide centralized and compact centers for certain clean use business establishments which will serve residential uses in a compatible manner.

A 9,100 sq. ft. retail sales space in the Village District would clearly not "*serve the residential uses in a compatible manner*" and would diminish the present small town rural character that is so identifiably Cummington.

A letter from John W. Kuhn, architect with Kuhn & Riddle Architects of Amherst, MA addresses this eloquently. "It is a functioning village of colonial architecture, a 19th century Congregation Church, several unassuming local businesses, a historical museum (the Kingman Tavern), and town offices in a Community House, built in 1922, where town meetings are held. The town retains a rural village quality that is both charming and historic. This is the precedent for the type of businesses and

architecture that should be pursued in the V-Village zone as a whole. The proposed structure does not fit this precedent. It is 9,100 square feet in size. This is an extremely large footprint for this location and for the V-Village zone." "The proposed design is a box clad in red siding and fake roofs. In fact, the proposed design includes a panoply of roof types: a gable roof, a mansard roof and a flat roof. The attempt to look like a 'rural barn' is not going to fool anybody." "Their franchise architecture works best, in my opinion, in strip malls or stretches of commercial infrastructure – next to fast food joints and big box stores where all are vying for attention. This branding and design does not work within the rural character of a small New England village such as Cummington."

The comments and concerns of both the Cultural Council and the Historical Commission have also addressed the proposed project's lack of ability to meet the character requirement, and are recorded earlier in this document.

There are 148 homes, businesses, and municipal buildings in the Village Districts, of these 2 are utilities (Verizon, Eversource), and 2 offer retail sales. Cummington thoughtfully and deliberately does not have any commercial zoning districts. The only businesses that are allowed "by right" are home based businesses "that employ no more than three (3) persons from the outside of, or in addition to, the resident family members." This holds for both the Rural-Residential and Village Districts, all other businesses require a Special Permit.

"4-30 2. Village Districts (V)

b. Intent

*It is the intent of this Zoning By-law that **certain light retail**, service establishments be permitted in the Village Districts and that **inoffensive business**, or other similar retail service or office uses **may** be permitted by Special Permit as provided.*

c. Special Conditions for Grant of a Special Permit

A Special Permit may be granted in the Village Districts if the Special Permit granting authority finds that the following conditions are met:

1) That the use will not be detrimental to the public good or to the character of the Town of Cummington."

The ZBA has determined that because of the size and scope of the project it is not a "light retail" use, and would absolutely begin to erode the existing small town character of Cummington which would be extremely detrimental to the public good.

When the state legislature passed the Home Rule amendment in the late 1960's and then followed it with an updated Zoning Act, it was the first time that Cities and Towns had local control over how their town was governed and how it would manage growth. Cummington opted to not create a commercial zoning district, and instead allowed home based businesses by right, and all others to be subject to the special permitting process so that those could be vetted to insure compliance with the conditions for a grant. The first condition to be met being "That the use will not be detrimental to the public good or to the character of the Town of Cummington."

The purpose of zoning is for "the preservation in the public interest of certain neighborhoods against uses which are believed to be deleterious to such neighborhoods."⁸ Given the genuine rural character of the town as a whole, and the Village Districts specifically, the size and scope of the intended project, at 9,100 sq. ft. cannot be considered "light retail", nor to "not be detrimental... to the character of the Town of Cummington."

The following motion was made, seconded: "To approve the Special Permit for the proposed retail building development submitted by Cummington DG Series LLC