

From Southborough Residents: Frederica Gillespie
Sam Stivers
Louise and Jack Barron

November 29, 2016

Mr. Andrew R. Dennington, Chair
Southborough Zoning Board of Appeals
Southborough Town House
17 Common Street
Southborough, MA 01772

Dear Mr. Dennington and Board Members:

We are writing to offer our comments about the variance and special permit applications from Lamar Central Outdoor LLC to construct a digital billboard on Route 9. We are aware that that this use variance application is grandfathered, although the recent Special Town Meeting overwhelmingly voted to eliminate use variances. However, we feel that the ZBA should consider the clear meaning of that vote, where 481 voted in favor to eliminate use variances with only 25 opposed—or over 95% of Town Meeting attendees voted against the ability of the ZBA to issue use variances.

Furthermore, in a previous legal opinion, our current Town Counsel stated *“Use variances are the highest form of zoning relief available and, based upon their all-encompassing nature and effect as a literal zoning change, they are no longer permitted in the statutory scheme of the c.40A provided however that municipalities that have incorporated them in their zoning by-law may allow them to continue in effect.”* and *“It is noted and reiterated again in the context of this opinion that given the broad nature and expanse of ZBA authority as to use variances, the provision should be stricken by subsequent Town Meeting action since the use variance concept is tantamount to a zoning change and does not allow consistency in zoning regulation.”*

Based on these facts, we urge you to use utmost caution in considering this application and make sure that all of the legal requirements for this application are met before proceeding with your deliberations. In fact, we believe that this project doesn't come close to meeting the basic legal requirements, that the deficiencies are extensive and that the variance application should therefore be denied.

In addition to our general concerns about the use variance, we believe you should deny this request based on the following facts:

1. The project does not satisfy the legal standards for approval of a variance per Mass General Law (MGL) and our zoning code, and particularly, the reasons for approval as provided by the applicant are irrelevant with respect to the required legal standards.
2. The variance application isn't complete and it doesn't meet the ZBA's Submittal Requirements—so it should not even be considered until the instructions for submittal listed on the ZBA's website are complied with.
3. The variance application is deficient in requesting the extensive zoning relief needed for at least the following reasons:
 - a. The Southborough Building Commissioner/ Zoning Officer's 8/16/16 "Report" is inadequate in describing the zoning relief needed.
 - b. The Hearing Notice does not identify all of the relief required and a second hearing would need to be held to move forward.
4. The project does not meet the requirements for a special permit for signs, and therefore that application should not be considered.
5. There have apparently been questionable actions by the applicant by his going to the Southborough Recreation Commission and also approaching school and youth sports organizations with requests for support in exchange for cash donations and free services. Relative to the Recreation Commission particularly, this appears to be an attempt to influence a public body in exchange for financial compensation—which we believe should be investigated by the Attorney General.

We offer the following details to support the above facts:

1. 174-25.A(3) of the zoning bylaw requires that a variance can only be issued for "***substantial hardship***" due to "***circumstances relating to soil conditions, topography or shape of land or structures***". There is no substantial hardship in this case because the lot is already being fully utilized. Furthermore, there is a new building on the lot which did not require a variance, which is proof that the property has none of the required circumstances for a hardship. The ZBA is not only bound by our zoning code, but also MGL Chapter 40A Section 10 which requires the ZBA to **specifically find these circumstances exist in order to grant a variance.**

2. The use variance application isn't complete and doesn't meet the ZBA's own Submittal Requirements:
 - a. Submittal Requirements per the ZBA, *APPLICANT BURDEN OF PROOF: Applicants for a Variance are advised that their "Application submission and presentation in the public hearing must, specifically address..." the hardships required for a variance per 174-25 A(3) (see #1 above) The applicant makes no claims of these hardships in the application.*
 - b. The legally required hardships needed to be listed in #12 of the application; instead, the applicant lists several irrelevant justifications. Particularly, the zoning bylaw absolutely does not provide for zoning relief based on being near the Framingham town line. And the fact that there is "no zoning district which allows this type of business in Southborough" is not a hardship to allow a variance but rather the fact our zoning code specifically prohibits billboards is a reason to deny this request. The other listed justifications are equally as irrelevant.
 - c. #10 on the application doesn't list all the sections of our zoning code that this project doesn't comply with
 - d. # 11 doesn't list all the relief required
 - e. The application is also not in compliance with the Submittal Requirements for plans which must show "***the setbacks required by the bylaw for all property boundary lines;***"
3. The variance application is deficient in requesting the extensive zoning relief needed; the application only lists 174-8.5(D), 174-11 (C)2 (b and c) and 174 -11(D):
 - a. Under 174-8 Schedule of Use Regulations the project does not comply with the following:
 - i. 174-8(A) "*No building or structure shall be constructed 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 hereinafter set forth as permitted in the district in which such building, structure or land is located...*" Note: billboards are not only not listed as an allowed use, they are specifically prohibited.
 - ii. 174-8(B) "*Further, no building shall be constructed and no building, structure or land or any part thereof shall be used and no lot shall be changed in size or shape unless in conformity*

with the dimensional regulations set forth for each district.”
The billboard does not conform with dimensional regulations for Business highway (more on that below).

- iii. 174-8 (C)(2) *“Not more than one principal permitted use shall be located on any lot, ... The Board of Appeals may, by special permit, allow several different uses **if otherwise permitted in the district** or several buildings on the same lot if such uses or buildings are deemed to be compatible, **meet the requirements of § 174-9** ...”* The project does not meet the requirements for a special permit for more than one use on one lot as the use is not permitted in the Business Highway District and it does not meet the requirements of § 174-9, as specified in 174-9 (D)4 - Large signs.
- b. Under 174-8.5 Business Highway Zoning, not only is a use variance needed but the project is substantially out of compliance with the development standards. We note that per the bylaw definitions this is not an accessory structure and so it must therefore comply with the following
 - i. 174-8.5(E)3(a) requires a 75-ft setback from Route 9 (the applicant proposes an 11-ft setback from Route 9)
 - ii. 174-8.5(E)3(c) requires a side setback of 50-ft (the applicant proposes an 11-ft setback from the side line)
 - iii. 174-8.5(E)4 lists “Maximum height: 45 feet, three stories”. The project comes in at 50-ft – 5 feet taller than the zoning bylaw allows for an office building on Route 9.
- c. Under the Sign section of our zoning code, in addition to the 3 sections listed on the application that the project does not comply with, the following sections apply in this case:
 - i. 174-11 (C)2 (a) *“The only signs allowed in the Town of Southborough are signs that advertise, call attention to or indicate the person occupying the premises on which the sign is erected or maintained or the business transacted thereon or that advertise the property itself or any part thereof as for sale or rent and which contain no other matter.”*
 - ii. 174-11 (C)2 (d) *“No sign may be illuminated between 10:00 p.m. and 6:00 a.m. except signs identifying police or fire stations or businesses open to serve the public on site.”*

- iii. 174-11 (C)2 (h) “*Banners, pennants, streamers, ribbons, spinners and **other moving**, fluttering, revolving or **changing devices** and strings of lights shall not be used as signs or parts thereof...*”
 - iv. 174-11 (C)3 “*Illumination of signs. Illumination shall be by white, steady, stationary light shielded and directed solely (or by silhouette) at the sign.*”
 - v. 174-11(C)4 “*Maximum number of signs allowed. Unless otherwise provided herein there shall be not more than two of the four following types of signs: wall, window, standing or awning for each business establishment*” It is unclear if the project meets this requirement because the application does not list how many signs the other establishment on the premise plans to have—but it seems very unlikely that this requirement will be met by the proposed plan.
 - vi. 174-11(C)5 (b) Maximum area of signs allowed on Rt 9 is 75 square feet. The proposed sign has an area of 672 square feet or 1,344 square feet if it is two-sided as we believe it is (but this wasn’t clear on the application materials). Also included in the 75 square feet must be the other signs on the lot. Again that information wasn’t included on the application.
4. The project does not meet the requirements for a special permit for signs, and therefore the special permit application should not be under consideration for the following reasons:
- a. 174-11(E) specifically states “*The Board of Appeals shall consider requests for special permits in accordance with §§ 174-9, 174-11 and 174-25 of this Zoning Bylaw. The Board of Appeals may grant a special permit for a sign not meeting limitations of sign height, maximum number of signs allowed, illuminations of signs, maximum area of signs allowed and minimum setback; **provided, however, that the sign is otherwise in compliance with the provisions of this section...***” this project is not otherwise in compliance with this section in that:
 - i. Billboards are specifically prohibited;
 - ii. Flashing, moving, changing message and animated signs are prohibited;
 - iii. Moving, fluttering, revolving or changing devices are prohibited; and

- iv. The only signs allowed in the Town of Southborough are signs that advertise, call attention to or indicate the person occupying the premises.
 - b. Additionally, the application does not meet the second requirement for a special permit: [174-11(E)1] *“In no case, however, shall approval be granted for”* a standing sign on Route 9 Business Highway District, because:
 - i. 174-11(E)1 (c) [1] [c] prohibits signs on RT 9 that exceed 25 feet in height (the proposed sign is 50 feet in height)
 - ii. 174-11(E)1 (c) [2] [c] prohibits signs on RT 9 that exceed 200 square feet in area, the proposed sign is at least 672 square feet, and probably 1344 square feet in area.
5. As for the questionable payments for support, this is most likely something for the Attorney General’s office to investigate. We do however believe that there is reason for concern that members of the ZBA may be unduly influenced by others who have been influenced by the offer of cash payments and services in exchange for the support of their organizations. We attach the Recreation Commission Draft Minutes of September 20, 2016, as evidence of these offers of cash for support. We understand that other private youth sport and school organizations have also been approached with this same offer, and we understand that the organizations declined to officially support, but we also understand that their members were encouraged to support as individuals.

Our recommendation is that the variance(s) and special permit(s) should be denied because: (i) they do not meet the Burden of Proof required for the specific legally acceptable standards necessary to prove substantial hardship; and (ii) a special permit can’t be considered because the project does not meet the requirements for a special permit

Sincerely,

Frederica Gillespie

Sam Stivers

Louise and Jack Barron

CC Board of Selectmen, Planning Board