

**TOWN OF MOUNT WASHINGTON  
ZONING BOARD OF APPEALS**

**Public Hearing, Torrico Barn**

**August 14 & 22, 2013**

**MINUTES – Approved November 10, 2015**

On August 14, 2013, the Mount Washington Zoning Board of Appeals convened at the town hall for a meeting and a public hearing on the application of Cathy and Tom Torrico for a variance from the town bylaw. The public hearing had been preceded by a site visit at 6:30 p.m. The meeting opened at 7:30 p.m.

In attendance were ZBA members John Alexander, Ray Kasevich, Eleanor Tillinghast, Paul Van Deusen, and Mackenzie Waggaman.

The ZBA members reviewed the draft minutes of May 30, 2013. It was noted that the spelling of Cathy Torrico's first name was incorrect, and that error was fixed. Ray made a motion to accept the minutes as amended, Mack seconded the motion. It was approved by John, Ray, Eleanor, and Mack. Paul abstained.

John Alexander as chairperson then opened the public hearing. Cathy and Tom Torrico were in the audience and represented by Don Torrico.

Don Torrico submitted a revised application. John Alexander will check with town clerk Gail Garrett about making this the official version.

Don Torrico said the Torricos were seeking a variance from the dimensional requirements of the town bylaw. At first he said the appeal to the ZBA was based on the agricultural exemption afforded under M.G.L. Chapter 40A, Section 3, specifically, the unreasonable regulation of setbacks under that section. Later, he said they were not looking for an agricultural exemption.

During a discussion on the conditions that must be met for a variance under state law, Vicki Torrico, a town assessor in the audience, said there is one zoning district in town.

There was considerable discussion about the differences between applying for a variance versus applying for an agricultural exemption. Don Torrico asked if the Torricos could move forward with the same application if they decided to seek an agricultural exemption. There was a question as to whether or not the ZBA could consider a variance and an agricultural exemption in a parallel process, at the same time. What is the proper process for reviewing an application for an agricultural exemption? Can the ZBA review an agricultural exemption under Section 3 of Chapter 40A under a continuation of the public hearing without reposting the hearing? John Alexander

said he would discuss these questions with town counsel Beth Goodman.

It was also requested that John Alexander ask of the attorney the definition of “hardship” under Section 10 of Chapter 40A.

Eleanor Tillinghast made a motion to continue the hearing to August 22, 2013, 7:00 p.m., Paul Van Deusen seconded, and the vote to continue was unanimous.

On August 22, 2013, the public hearing was continued, and opened by the chairperson at 7:00 p.m. All the ZBA board members were in attendance.

Cathy and Tom Torrico and their representative Don Torrico were present in the audience.

Don Torrico said the applicants were seeking an agricultural exemption from the town’s 100-foot setback under M.G.L. Chapter 40A, Section 3. He made a presentation to the ZBA, saying that the Torrico property is 5.05 acres so is exempt under Section 3. He said it also meets the definition of agriculture under section 215.3 of the town’s bylaw.

Mack Waggaman read a section from the town bylaw showing that the 100-foot setback is explicitly required for agricultural buildings, too.

Don Torrico said state law supersedes town bylaw.

It was agreed that the first vote of the ZBA should be on whether or not the primary purpose of the Torrico property is for commercial agriculture.

Mack Waggaman said he was concerned that anyone with a small kitchen garden could get an exemption from the setback. Brian Torrico in the audience (the son of Cathy and Tom Torrico) said the ZBA should set restrictions as part of its grant of an agricultural exemption. John Alexander said, yes, the ZBA should set restrictions as part of its vote.

Don Torrico said, of the Torricos' 5.05 acres, 2.02 acres is used for agricultural purposes, 0.05 is for the residence, and 2.9 acres is open space and forest. He said all cleared land other than the house is used for agriculture. Cathy Torrico said they sell more than \$5,000 of eggs annually, and that amount does not include poultry sales.

John says this is a commercial agriculture property based on acreage used and sales.

Mack Waggaman said he agrees that, based on acreage and sales, the Torricos are involved in commercial agriculture.

There was a discussion among ZBA members, and John Alexander asked if anyone opposed going forward with granting an agricultural exemption and writing restrictions.

Eleanor Tillinghast made a motion to grant an agricultural exemption to the Torrico property subject to restrictions to be determined at a vote later in the meeting, Mack Waggaman seconded the motion. The vote in favor was unanimous.

There was more discussion about the conditions for an agricultural exemption. John Alexander said the ZBA cannot set restrictions, only issue findings. Eleanor Tillinghast said she was very upset that John Alexander had previously said the board could set restrictions as part of the agricultural exemption and was now saying that was not the case.

Eleanor Tillinghast made a motion to amend the previous vote to read that an agricultural exemption shall be granted to the Torrico property, under M.G.L. Chapter 40A Section 3. Mack Waggaman seconded the motion. The vote in favor was unanimous.

One by one, the ZBA members listed their findings in favor of an agricultural exemption.

Paul Van Deusen said his reason is that the Torricos clearly have a commercial agricultural operation using at least 2 acres and earning more than \$1,000 per acre.

Ray Kasevich said that, based upon actual site visitation, walking the site and seeing the animals convinced him that the land is being used for agriculture purposes; the walkaround is proof positive. He added that the photovoltaic array to be installed on the barn is a forward leap in a wonderful sustainable resource for the mountain, so we will all understand how efficient it is related to cost. From the analysis he has seen, offered by the applicant, those numbers will be available and analyzed over time so that we can all see the results.

John Alexander said he agreed with Ray Kasevich, and said the site visit convinced him that the primary use is agriculture, and the finances convinced him that it is commercial.

Mack Waggaman said he would use the same language as John Alexander, and added that the Torricos have documented a history of commercial use going back at least three years.

Eleanor Tillinghast said her finding is that the primary purpose of the cleared land is for agricultural uses, the historical use of the property has been commercial agriculture, and the sales support that. She wanted to emphasize that this vote is not a precedent for future agriculture properties, that each must be

considered on its merits. She added that it appears from the Torricos' commitment to the mountain community that they will continue to use the property for commercial agricultural purposes.

With the ZBA board having agreed that the Torricos' property is exempt under M.G.L. Chapter 40A, Section 3, Eleanor Tillinghast made a motion to grant relief for the proposed Torrico barn structure from the town bylaw sections 215-13C and D so that the barn can be constructed 60 feet from the front setback. Ray Kasevich seconded the motion. Discussion followed. John Alexander called for a vote. All voted in favor except Mack Waggaman, who voted against the motion.

Each of the ZBA members then listed their findings.

John Alexander's findings are that the intent of the state law is to protect and help farmers and farm use. He wants to uphold that as long as it doesn't conflict with the purposes of the town bylaws, which he feels it does not because the town bylaw is to preserve rural character from which this doesn't derogate. And he feels that the solar on the barn is an integral part of the agricultural use and that it should all fall into the same protection. The fact that pushing the structure back from the front setback will bring it closer to the stream and send more runoff into the stream is another reason.

Paul Van Deusen agreed with John Alexander, and added that he feels that the Torricos presented credible evidence that it would increase the cost to move the structure back.

Ray Kasevich said he agreed with Paul and John. He added that soil conditions closer to the road and further from the stream are more conducive to supporting the barn structure, are more favorable for construction, and would have less impact on changes in runoff.

Eleanor Tillinghast's findings are that the ZBA had already voted for the exemption. The purpose of the town bylaw is not undermined by the construction of a barn for agricultural use 60 feet from the public road. She added that approval as discussed in no way establishes a precedent for solar installations.

Mack Waggaman said he voted no because he was concerned about setting a precedent. There were no objective data offered during the hearing about the soil, slope, and solar; there are a lot of trees shading the property. He needed more expert testimony. As far as the wetland issue, he didn't see that as an issue; he didn't think that 40 feet will have an impact on drainage. He is uncomfortable about setting a precedent. He checked with the state and it will not grant an exemption for new structures in a wetland area. There should be a high benchmark. He does not understand why the barn can't be moved back 40 feet back. He is concerned about the barn becoming a second home, about being turned to another use.



Paul Van Deusen made a motion that the ZBA find that a variance is not necessary in this case because the property qualifies for protection under chapter 40A section 3 as a commercial agricultural use and the requested setback relief was granted under chapter 40A section 3. Ray seconded the motion. All ZBA members voted in favor of the motion.

Eleanor Tillinghast a motion to close the hearing. Paul seconded. All members voted in favor of the motion. The hearing was closed at 9:14 p.m.

