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BOARD OF APPEALS

Hearing #22-12

**DECISION ON PETITION TO OVERTURN A DECISION OF THE ZONING
ENFORCEMENT OFFICER WITH RESPECT TO
100 DISCOVERY WAY**

A public hearing of the Acton Board of Appeals was held via video/phone conference on Tuesday, December 6, 2022, at 7:45 PM, on the petition of Rachel Wulsin for a petition to overturn a decision of the Zoning Enforcement Officer (ZEO) with respect to 100 Discovery Way. The property is located in the Office Park - 2 (OP-2) zoning district.

Present at the video/phone hearing were Ken Kozik, Chairman, Adam Hoffman, Member, and David Schena, Alternate Member. Also present were the petitioner, Rachel Wulsin, her legal representative Dennis Murphy of Hill Law, Kristen Guichard, Acton Zoning Enforcement Officer (ZEO), other Acton Planning Department employees and numerous members of the public.

Mr. Kozik opened the hearing, explained how the Board procedurally operates and how the meeting will be conducted, including input from the public. More specifically, Mr. Kozik stated the following:

- Comments from the public would be limited to only Acton residents (or their legal representative) who clearly state their names & addresses.
- Comments from the public will be limited to determining whether the proposed "Energy Storage facility" equates to a "warehouse" as defined in the section 3.6.1 of the Acton Zoning Bylaws and/or does the proposed "Energy Storage Facility" facilitate the collection of solar energy under MGL 40A Section 3.
- Comments from the public will be limited to two (2) minutes and only if non-repetitive.

- No comments pertaining to health & safety will be entertained. These comments should be addressed to the separate Board of Health meeting involving the Hazardous Materials Control Bylaw, and to the separate Selectboard/Planning Department site plan meeting.

Mr. Kozik then began with stating the history of this matter. More specifically: In July 2022, Blue Wave filed an application for a site plan special permit with the Acton Planning Department, which forwarded it to the Selectboard. In July 2022, Blue Wave filed a Hazardous Materials Permit application with the Board of Health. In September 2022, Rachel Wulsin, of 12 Brucewood Road, Acton, filed a request for zoning determination with ZEO, challenging the classification of the Blue Wave Energy Storage Facility as a warehouse. In September 20, 2022, the ZEO responded to Ms. Wulsin's request, concluding that Energy Storage Facility is a warehouse and thus an allowed use under Acton's Zoning Bylaws.

Mr. Kozik then asked Kristen Guichard, Acton Zoning Enforcement Officer (ZEO), to discuss how she arrived upon her decision. Ms. Guichard stated that given that the Blue Wave business model was for a proposed energy storage facility, it fell under MGL 40A, Section 3, which states:

No zoning ordinance or by-law shall prohibit or unreasonably regulate the installation of solar energy systems or the building of structures that facilitate the collection of solar energy, except where necessary to protect the public health, safety or welfare.

Ms. Guichard concluded that the Town of Acton could not prohibit the use and then turned to the Acton Zoning Bylaws to determine a proper classification. After a thorough analysis, Ms. Guichard concluded that Blue Wave's "Energy Storage Facility" fit under the definition of Zoning Bylaw 3.6.1 **Warehouse**, which is defined as:

A BUILDING used primarily for the enclosed storage of goods, and materials for any length of time; including receiving, repackaging, and/or reshipping; and including office, administrative, and support facilities related to the foregoing, but not a Distribution Center as defined in Section 3.6.2; a personal self-storage facility or mini-warehouse.

Ms. Guichard supported her conclusion with the fact that Blue Wave's Energy Storage Facility had fully enclosed exterior walls that hold batteries for the storage of electricity. She also concluded after a reading of the Uniform Commercial Code (UCC) that "electricity" was considered a "good," and therefore goods were being stored in the Energy Storage Facility. Thus, as a warehouse, the proposed Energy Storage Facility was allowed by right in the Office Park-2 (OP-2) zoning district.

Mr. Kozik then asked the petitioner, Rachel Wulsin, of 12 Brucewood Road, to begin and offer her rationale of why this Board should overturn the decision of Ms. Guichard. Ms. Wulsin was represented by Dennis Murphy of Hill Law, who offered the following reasons of why the ZEO's decision should be overturned.

First, Mr. Murphy argued that the proposed facility was not an allowed use under the zoning bylaw, specifically Section 3.1.

Second, Mr. Murphy argued that the proposed Facility did not qualify for zoning protection under G.L. c. 40A, § 3, ¶ 9.

Mr. Murphy concluded in summary by stating that the ZEO's zoning determination regarding the legality of the facility on the 100 Discovery Road site was erroneous for two principal reasons: (1) it incorrectly characterizes the Facility as a Warehouse under the Zoning Bylaw, and the Facility does not otherwise fall within any other category of permitted uses; and (2) it mistakenly concludes that the Facility is eligible for protection under G.L. c. 40A, § 3, ¶ 9. The Facility is, in fact, not legal on the proposed site, and therefore the ZBA should overturn the determination.

Mr. Kozik then opened the hearing to public comments, which focused primarily on how the facility was not a warehouse under any interpretation.

With no further input, Mr. Hoffman made a motion to close the public hearing. Mr. Schena seconded the motion. The Board unanimously voted to close the hearing.

The Board of Appeals, after considering the materials submitted with the Petition, together with the information developed at the hearing, finds that:

1. The Petitioner seeks to overturn a decision of the Zoning Enforcement Officer (ZEO) with respect to 100 Discovery Way. The property is located in the Office Park - 2 (OP-2) zoning district.
2. The Zoning Bylaw does not contain a separate definition for Energy Storage System.
3. The interpretation of the ZEO was well-reasoned, where Section 3.6.1 defines Warehouse as "A BUILDING used primarily for the enclosed storage of goods, and materials for any length of time; including receiving, repackaging, and/or reshipping; and including office, administrative, and support facilities related to the foregoing, but not a Distribution Center as defined in Section 3.6.2; a personal self-storage facility or mini-warehouse."
4. The proposed energy storage system will have fully enclosed exterior walls and a roof that hold batteries that store electric energy within.
5. Massachusetts recognizes the Uniform Commercial Code (UCC), which established that electricity is a "good" since it is fully enclosed and movable.
6. The Office Park-2 (OP-2) Zoning District allows a warehouse by right.
7. Energy Storage Systems are protected under MGL 40A Section 3.

Therefore, the Board of Appeals, after reviewing the available materials and based upon the above findings, voted unanimously to **DENY the PETITION TO OVERTURN THE DECISION OF THE ZONING ENFORCEMENT OFFICER.**

TOWN OF ACTON BOARD OF APPEALS

Kenneth F. Kozik

Kenneth F. Kozik, Chairman

Adam Hoffman

Adam Hoffman

David Schena

David Schena