

# The Berkshire Eagle

## Lenox zoning board sued for approving auction house permit

By Clarence Fanto, Eagle correspondent Aug 26, 2021



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STEPHANIE ZOLLSHAN — THE BERKSHIRE EAGLE

**LENOX** — A resident has filed a lawsuit against the town's zoning board for its approval of a proposed auction gallery at the site of the abandoned Aspinwall Adult Equestrian Center.

But, an attorney representing the gallery owner says work on the project will proceed, at his client's risk, despite and during the legal challenge.

John Fontaine aims to relocate his long-established Fontaine's Auction Gallery to 393 Main St. from 1485 W. Housatonic St. (Route 20) in Pittsfield. The business, which also has locations in Boston and Nashua, N.H., was founded in 1960. Fontaine purchased the Lenox site, which was in foreclosure, in 2017.

At a June 1 meeting, the five-member zoning board voted unanimously to grant the special permits and waivers sought by Fontaine's company, Aspinwall Acquisition LLC.

In its written decision filed June 17, the Zoning Board of Appeals stated that "the proposed change of use will not be substantially more detrimental than the existing or re-established use to the surroundings or the neighborhood."

But, a neighbor, Jenifer D. Picard, who lives directly adjacent to the site, argues in her lawsuit that the approval was unlawful because the site is in a residential zone — the stable site was permitted to operate because it predated zoning

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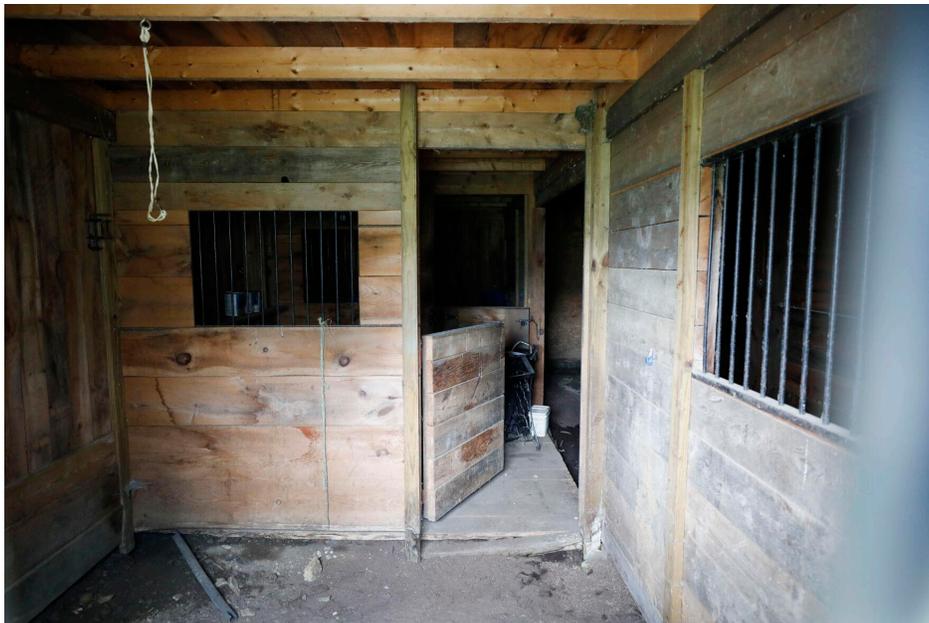
laws.

The appeal lodged against the ZBA members' decision and Aspinwall Acquisition was filed in Massachusetts Land Court last month by attorney Alexandra Glover of Lazan Glover & Puciloski LLP in Great Barrington, who represents Picard.

The lawsuit contends that the ZBA exceeded its authority through a "legally untenable, unreasonable, whimsical, capricious, and arbitrary" decision. Attorney Matthew Mozian, representing Fontaine, told The Eagle that the project would continue, despite and during the legal challenge. Lenox Town Counsel Joel Bard of KP Law in Boston declined to comment on the lawsuit.

The appeal asks the Land Court to throw out the zoning board's decision and to rule that the only legal use of the property is by "a properly decided special permit to revive an abandoned pre-existing nonconforming use, but not to add multiple new nonconforming uses" approved by the ZBA.

The complaint also seeks payment to Picard of attorney's fees and other legal expenses and "to award such other relief as may be just and appropriate." Instead, board members found that the proposed new commercial use as an auction house would be "beneficial to the town and neighborhood, involving less traffic and no foul odors."



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The board first approved Fontaine's request to revive the nonconforming riding stable use, paving the way for the change-of-use permit.

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The ZBA also permitted the addition of two affordable annual-rental units to the three-apartment plan for the renovated building, citing the town's need for workforce housing.

The decision followed three public hearings and a site visit to the former riding stable. In addition to the stable property purchased in mid-2017, Fontaine also is buying an adjacent parcel of land previously owned by the town. The land sale was approved by town meeting voters in 2019, and then by the Legislature and by Gov. Charlie Baker in January 2021, as required for municipal property transfers.

Picard had appeared before the board during the public hearings, represented by attorney Glover, who voiced concerns about the impact of commercial activities directly adjacent to her client's home.

The entire "Aspinwall property," as it was designated, is in the town's residential 1-acre zoning district on Main Street (Route 7A), adjacent to the town's Department of Public Works garage and opposite the Massachusetts Department of Transportation Region 1 headquarters.

The riding stable had been a preexisting, nonconforming use and its single apartment had been allowed through a zoning board special permit.

Glover also challenged the reestablishment of a previous, nonconforming use followed by a change to commercial uses not otherwise allowed in the residential district.



The lawsuit argues that commercial stables are prohibited in the residential zoning district on property of less than 5 acres without a special permit. But, since the stable was abandoned for well over two years, the appeal states, the property lost its protected status as a preexisting, nonconforming use and now is subject



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Among the conditions imposed by the ZBA's approval of the proposed auction house:

- No short-term or summer apartment rentals;
- Downward-cast lighting for the parking lot, which would be seasonally adjusted by a timer and limited to after-dark business hours of 9 a.m. to 5 p.m. Monday through Saturday, and 9 a.m. to 6 p.m. on days when auctions are scheduled.
- A limit of eight auctions per year at the site, with occupancy limited to 60 people and no outdoor events by any commercial business.
- Parking limited to designated spaces, and no walk-in sales to the public, except for post-auction purchases.

The lawsuit maintains that the board granted a special permit to Fontaine's Aspinwall Acquisition "to construct and operate no fewer than five unpermitted uses in a residential district."

"In order to accomplish this feat," Glover's complaint states, "the applicant first requested a special permit to restore the property to a pre-existing nonconforming riding stable. However, this was a complete fiction. The applicant never intended to operate a stable."

The appeal alleges that Fontaine "simultaneously requested to convert the fictional revived riding stable to the multiple uses it actually desired, unrelated to a commercial stable, that are not permitted in this residential district" — including redevelopment of the vacant barn into an auction gallery, retail space, office space, warehouse facility and multi-family dwelling."

Glover argued that "these are uses fundamentally different from a riding stable. They are all flatly prohibited, for obvious reasons, in this residential zoning district."

The lawsuit also names Lenox ZBA Chairman Robert Fuster Jr., board member Shawn Leary Considine, who wrote the decision, as well as members Ned Douglas, Kimberly Duval and Albert Harper.

It states that Picard's house, at 285 Main St., originally was part of the equestrian center's property and is located extremely close to the property line as well as to the former stable's barn.



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Picard, the plaintiff, is “well familiar with the impact caused by the stable as she lived in her home while the stable was still in operation,” the appeal points out. “The use was low-impact, quiet and had minimal traffic. The stable did not interfere with the plaintiff’s use and enjoyment of her home, and the plaintiff would have no objection to the return of the previous stable operation.”

Attorney Michael Pill, co-counsel for Fontaine’s Aspinwall Acquisition, cited a provision of the Lenox zoning bylaw stating that “a nonconforming use or structure which has been abandoned or not used for a period of two years shall lose its protected status and be subject to all of the provisions of this Zoning Bylaw; provided, however, that such use or structure may be restored to its protected status by special permit from the Board of Appeals.” Then, he pointed out, a change of use can be granted by the same board.

Referring to the lawsuit, Pill, of Green Miles Lipton LLP in Northampton, cited a maxim he learned in law school — “If you have the facts, pound the facts, if you have the law, pound the law, if you have neither, pound the table.” He told The Eagle he would not have joined the case as co-counsel if he didn’t believe Aspinwall Acquisitions had “a very solid case.”

But, he added, “there is no such thing as a slam dunk. We live in a world where what seems like a sure winner may lose and what seems like a hopeless loser may win.”

Pill stated that the Lenox ZBA carefully considered the matter.

“What the facts and the law will show is that the permit to Aspinwall was validly issued,” he said.

“It’s fair to say that [lead counsel] Matt Mozian and Aspinwall have been ready and willing to reach a reasonable settlement,” Pill pointed out. “There appears to be continuing disagreement about what is reasonable. They’re businesspeople, and their preference is to get on with their business, rather than get bogged down in litigation. They, Matt and I are hopeful that we can reach an agreement on what would be reasonable.”