

Great Barrington Zoning Board of Appeals

Minutes of Dec. 1, 2011, meeting.

Attending were Vice Chairman Carolyn Ivory, Madonna Meagher, Michael Wise and alternates Donald Hagberg and John Katz. The meeting opened at 7:30 p.m. at the Great Barrington Fire Station. The board on a motion by Mr. Wise, seconded by Mr. Katz, approved the minutes of the Oct. 13, 2011, meeting, with one correction suggested by Town Counsel David Doneski.

Ms. Ivory outlined the evening's procedure for the continued hearing on an appeal by **Gary O'Brien Property Services LLC** of the building commissioner's cease-and-desist order. The continued hearing was advertised in the *Berkshire Record* for Oct. 20, 2011. The secretary said the hearing was also posted at Town Hall and indicated, for the record, receipt of four documents: Judith Kales' letter dated Nov. 15, indicating that she and some neighbors did not wish to meet with O'Brien attorney Edward G. McCormick; a proposed decision from Mr. McCormick's office, with suggested conditions on Mr. O'Brien's operations; a memorandum from Mr. Doneski; and a brief from Jeremia Pollard, presented on behalf of Building Commissioner Ed May.

Paul Feldman, attorney for the appellant, said the draft findings and suggested conditions were a response to the board's earlier discussion. In answer to a question from Mr. Wise, Mr. Feldman said conditions are within the board's purview and could be enforced. Mr. Feldman said it is appropriate for the board to define what non-conforming uses are authorized on the property, as previously outlined in the 1996 agreement for judgment. In answer to a question from Mr. Katz, Mr. Feldman said Mr. O'Brien feels his use of the property grows from its pre-existing non-conforming origins and do not represent a change of use. Mr. O'Brien has volunteered to meet the proposed conditions.

Mr. Pollard made three points to the board: That (1) the claim of pre-existing, non-conforming status is dubious; that (2) there has been a substantial change in the use on the property; and (3) that the appeal was not filed in a timely manner. To point 1, he said Leamon Roger lived on the property and ran his business there. The present owner does not live there and, from previous testimony of neighbors, there has been an increase in noise and traffic to the facility. Regarding 2, there is still a trash hauling business based at the property as well as Mr. O'Brien's landscaping and property maintenance business. This, Mr. Pollard said, is not a reasonable evolution under the three-part Powers decision. He argued that Mr. O'Brien had not fully explained the evolution of use at the property, and that the affidavits submitted showed extensions of use after the adoption of zoning in Great Barrington. Mr. Pollard added that repair of vehicles had not been established as a pre-existing use. And on point 3, Mr. O'Brien ignored the building commissioner's first cease-and-desist order of August 2010 and only filed an appeal when a second C&D was issued. As to proposed conditions, Mr. Pollard said they are unilateral and are suggested without opportunity for neighbors to voice concerns and make suggestions. In answer to a question from Mr. Wise, Mr. Pollard said the first 30-day period lapsed while the town was trying to obtain compliance, and the town was not waiving its enforcement rights. In answer to a question from Mr. Katz about the 1996 agreement, Mr. Pollard said the document does not say one way or another what the existing Roger business was. There was discussion of issues regarding the dwelling on the property. Mr. Katz suggested a property having a non-resident owner didn't seem to be grounds to take away grandfathered rights to operate a business.

Mr. Feldman said the law is clear that non-conforming, pre-existing businesses are protected. Owner occupancy is not a legitimate legal issue in this case, he said. Regarding Mr. Pollard's

point 2, Mr. Feldman said the agreement for judgment in fact gives a good basis for determining the nature of Mr. Roger's business. As to the increase in a business's volume as grounds for exceeding acceptable grandfathering limits, he discussed case law and said yes, there can be a point of "overburdening," but Mr. O'Brien is far from reaching it. On point 3, Mr. Feldman said Mr. O'Brien was allowed to continue his business after the first C&D was issued in the belief an anticipated horticultural use of the property could be further proof of legitimacy. Mr. O'Brien found that adding a horticultural aspect to his landscaping business would have been unwieldy, Mr. Feldman said, and he abandoned it. Regarding two businesses being based on the property, Mr. Feldman said the order didn't mention this. (Mr. Pollard later read a sentence from the order that did mention two businesses.) Mr. Feldman said that would be an ownership issue, but it is a use issue that the Zoning Board of Appeals must deal with. Mr. Feldman also responded to information in Mr. Doneski's memo regarding the need for an expanded business to have evolved naturally from a pre-existing non-conforming one. He said the business use is the same: A base for vehicles and equipment to serve customers off-premises.

Ms. Meagher said no one is living in the old Roger house. Mr. McCormick said it has been empty for about a year. Mr. Feldman said the property is in a residential zone, and a residence will always be an allowed use.

Mr. Pollard said that two businesses on the property make for a clear change in use. He said the 1996 agreement created rights for Mr. Roger but were not transferred to other businesses.

Mr. Doneski briefly reviewed his memorandum to the ZBA and spoke of the basic principles of pre-existing, non-conforming uses and their protection. He pointed to the three point test and said the board needs to make positive findings on all. He said the board has to look at when uses on the property were established and if they were continuous. He said the ZBA through a special permit may reestablish an abandoned or discontinued use. Mr. Doneski discussed the matter of volume. He said if the board wants to consider conditions it should make them an integral part of the decision. He said he does not recommend the use of conditions.

At 9 p.m., Vice Chairman Ivory polled members on the three points that need to be made.

Does the current use of the property reflect the nature and purpose of the prior use? Mr. Wise said the original owner was a resident who operated a small trucking business in the 1930s. The present owner lives elsewhere and the business is a corporation with a large fleet of trucks. So no, it is not the same. Ms. Meagher also said it is not the same. Mr. Hagberg said vehicles are housed on the property, as previously, and leave the premises to work for customers, so it is the same. Mr. Katz also said it is essentially the same business. Ms. Ivory said the O'Brien business reflects prior use. Ms. Ivory noted opinion was 3-2.

Is there a difference in the quality or character, as well as the degree, of use? Mr. Hagberg said he sees no appreciable difference in the degree of use. Mr. Wise said there is a difference between a family-run business and a business run as an asset. Mr. Katz said the business is not different in character or degree of use. Ms. Meagher saw a difference in quality and character, stating that there had been an evolution from a small 'mom and pop' operation to an investment property type business. Ms. Ivory said she did not. Ms. Ivory noted opinion was 3-2.

Is the current use different in kind in its effect on the neighborhood? Mr. Wise said there may be less increase in impact since 1996, but more since 1932, when the town adopted zoning regulations. He said there was an increase in intensity of effect on the neighborhood, raising an additional level of concern. Mr. Hagberg said the board may not have full information, but he

sees it as the same use. He said it may not be desirable to neighbors but it is rightful for Mr. O'Brien to operate there. Mr. Katz said it is more pertinent to look at when the town bylaw was changed, in the 1970s, when conditions were established that were taken into account in the 1996 decision of agreement. Ms. Meagher said the O'Brien business has made a different effect on neighbors, as, for example, in the fact that while Roger Trucking Operations have a regular, daily start and finish time the O'Brien business operations do not; there is greater traffic in winter when more trucks are coming and going to plow snow, and if there is a snow storm at 3:00 a.m. plow workers will have to come to the site and take their plows out onto the roads, with resulting truck noise. She said there was no evidence that Roger Trucking operated at 3:00 a.m. Ms. Ivory said the business has an effect on neighbors, but the business is long established there. Ms. Ivory noted opinion was 3-2.

Mr. Doneski advised the board needs four positive votes to overturn the decision of the building commissioner. Mr. Hagberg said Mr. Wise focused on the original 1930s business, but the business has gone through natural and legitimate growth. Mr. Wise said he bases his opinion on a strictly logical reading of what is required of the board. He said suggested conditions on the board's decision are toothless. Mr. Wise said that after the 1996 agreement there appears to have been a shrinkage in use of the property, i.e. it could no longer operate as a transfer station. If the board is to allow a regrowth to an abandoned level of use at the property, it should do so through a special permit. Mr. Katz said defended the use of conditions. He said the 1996 agreement defines the business at that time.

Mr. Kaz moved to overturn the building commissioner's decision premised upon the imposition of the standards and conditions that the appellant has proposed. Mr. Hagberg seconded. The vote was Mr. Hagberg, Mr. Katz and Ms. Ivory in favor, Ms. Meagher and Mr. Wise opposed. The motion failed to carry. Mr. Doneski agreed to write the decision. On a motion by Mr. Hagberg, seconded by Mr. Wise, and voted unanimously, Mr. Wise was appointed temporary clerk in order to sign the record of proceedings.

The meeting adjourned at 9:30 p.m.

Respectfully submitted

Bernard A. Drew

A handwritten signature in blue ink that reads "Bernard A. Drew". The signature is written in a cursive, flowing style.

