

Great Barrington Zoning Board of Appeals

Minutes of Oct. 13, 2011, meeting.

Attending were Vice Chairman Carolyn Ivory, Madonna Meagher, Michael Wise and alternates Don Hagberg and John Katz. The meeting opened at 7:30 p.m.

On a motion by Mr. Hagberg, seconded by Mr. Wise, the board unanimously approved the minutes of the Sept. 8, 2011, meeting, with two corrections, one in a date that should have read 1976 and another in describing testimony of Mr. Shanahan, including mention of years ago two or three vehicles at the Roger property that eventually increased.

The evening's business was the continued hearing on an appeal by **Gary O'Brien** of a building commissioner cease-and-desist order. The continued hearing was advertised in the *Berkshire Record* for Sept. 16, 2011. Ms. Ivory announced that member Kathy Kotleski had recused herself because she felt she was in conflict, as her husband operates a trash hauling business.

Attorney Paul Feldman said his client was entitled to a five-member board [it takes four votes to overturn a decision of the building commissioner, Town Counsel David Doneski said]. After a brief recess to confer with his client, he asked that the hearing be continued until an alternate could be seated. Chairman Ron Majdalany earlier recused himself. Alternate Don Hagberg was already seated. John Katz, who attended the first hearing, heard testimony but was not appointed an alternate until a week later. Mr. Feldman agreed that Mr. Katz could now sit on the panel, but the hearing would have to begin over again. The secretary read the original public notice of the hearing. The secretary read into the record affidavits provided submitted by Judith Kales, David Jensen, Frances Kollman and Jeanne Stewart Chesanow. All stated that activity on the former Roger property had increased over the last several years, especially noise, vehicle traffic and bright lights on the building. ZBA members were also in receipt of a six-page memorandum from Mr. Feldman as to his client's position, and a one-page memo from town counsel pointing out the three points the board needs to find on to determine there has been a change of use on the Roger property by the O'Brien business.

Mr. Feldman began his presentation by suggesting that in the four affidavits just read, abutters sometimes attributed noises and activities inaccurately. One document, he said as an example, described activity on the property observed Sept. 9. The business was not operating that day, Mr. Feldman said, so any activity was non-business related. He suggested some of the disagreements with the property's use go back several years and to previous owners. Mr. Feldman said that the 1996 court agreement has been interpreted as to just describe the Roger business as being allowed, but what is protected is a pre-existing, non-conforming use that has the right to continue, unless it is found to have changed in some way. The 1996 agreement brought an end to a transfer station at the site, but otherwise did not inhibit activity, he said. He said affidavits by Robert Brownson and June Williamson, Roger family members, tell the range of things going on then.

Mr. Feldman submitted three aerial photographs, the oldest from 1995, to show some aspects of how the property was used and has been cleaned up. He said there have long been multiple trucks parked there. He said Mr. O'Brien's running the engine of a race car was not a prohibited use. He said Mr. O'Brien's business has six pickup trucks, three dump trucks, one bucket truck, one Bobcat, two excavators, snow plow blades, trailers, lawn mowers, empty Dumpster containers. The business remains the same as in Leamon Roger's day: parking and dispatch of vehicles, maintenance of equipment, maintenance of an office. An increase in the volume of activity, he said, is not a change of use. He summarized affidavits of Mr. Brownson and Ms. Williamson, rather than read them into the record. [See affidavits.] He described the case of *Derby Refining v. City of Chelsea* as to what constitutes a change of use. As a matter of law, he said, a landscaper's yard is protected just as much as Roger's trash hauling equipment yard was.

Mr. Feldman said a finding of "substantially more detrimental to a neighborhood" is a standard for a special permit, but not for determining a change of use. He said his client believes the building commissioner made a misjudgment, based in part on insufficient information available to him, in issuing his cease order. In answer to a question, he said his client filed an appeal, rather than sought a special permit, in the belief that he had protection under the law. To seek an SP would acknowledge there had been some change of use.

He said the property had been cleaned up, some trees removed, some gravel spread, accounting for some noise. When Mr. Katz suggested there had been an impact on the neighborhood, Mr. Feldman said the same garage building was there as in the Roger era, trucks and equipment were stored in the same fashion. In

answer to another question from Mr. Katz, Mr. Feldman said if his client does not prevail, he has the recourse of seeking a review in Land Court. He said he had not discussed the possibility with Mr. O'Brien, but Mr. O'Brien could also seek an SP. And if he failed to obtain an SP, he could appeal that. Mr. Feldman said his client has not used the property for two months, and has been keeping equipment in Otis. Ms. Meagher asked if Roger Trucking is still there. Robert Brownson keeps two Roger Trucking trucks there, as a courtesy, not paying rent, Mr. Feldman said. Should it come to making stipulations, Mr. Feldman said, his client would be comfortable with changing the lighting and taking measures to abate noise. He said his client was willing to approach and talk with neighbors.

Mr. Wise asked what the relevant date was regarding establishment of pre-existing, non-conforming status at the property, in 1975 or in 1932, when the town first adopted a zoning bylaw. At the earlier date, it was the Hugh Taggart homestead and the owner did odd jobs, some involving a truck. Mr. Feldman said the 1996 agreement sets out a minimum, so it is not necessary to look earlier.

Charles Williams of 48 Blue Hill Road said Robert Brownson, his nephew, presently handles containers in a way to fill them with as much material as possible, but is not conducting a transfer station. This activity can be noisy. Patricia Ryan asked about the criteria of substantial detriment to the neighborhood. Mr. Feldman said that phrase is not part of the three-part test the ZBA needs to use.

Those three items, according to Mr. Doneskai, are:

- Does the current use of the property reflect the nature and purpose of the prior use?
- Is there a difference in the quality or character, as well as the degree, of use?
- Is the current use different in kind in its effect on the neighborhood?

Jack Musgrave of the Planning Board asked Mr. Feldman about change of use. Mr. Feldman said if the ZBA determines there has been a change of use, then Mr. O'Brien would have to file for an SP and would be entitled to status of pre-existing, non-conforming and would be subject to no more substantially detrimental than a previous use.

Mr. Hagberg moved to close the public hearing at 9:25 p.m. Mr. Wise seconded and the vote was unanimous.

Ms. Ivory went through sections of the 1996 agreement to see if the board could determine whether the present owner was doing the same things. The transfer station has closed and there is no more handling of demolition debris on the premises, it was determined, but the board did not know whether certain agreement statements regarding containers were the case or not.

Mr. Hagberg said it appeared the use was the same as previously. The business on the property sent vehicles off-site to perform work, then parked and maintained those vehicles on the grounds. Mr. Wise suggested a dedicated garbage collection business was a change of use from the farmer and truck business of Mr. Taggart. Mr. Katz said he would have preferred to have seen an SP before the board, to enable the board to attach conditions. Mr. Wise said the current use is obviously a landscaper's yard and is not allowed in a residential zone. Mr. Katz said that is not different in substance from a trash collection business. Discussion came around to whether the board could attach conditions to an appeal decision. Mr. Katz and Mr. Wise spoke of case law they had researched. Mr. Wise pointed out that the Chelsea case cited by Mr. Feldman involved a petroleum-handling business that was in the middle of several tank farms, whereas the O'Brien business is in the middle of a residential neighborhood. Mr. Katz said he was concerned about complaints from neighbors. He said that if conditions are to be created, they should come from the appellant.

Mr. Feldman asked if he could present a concept for conditions. Mr. Doneski said that in a brief conference in the hall, he had agreed that Mr. Feldman could ask this question of the board. Mr. Feldman said conditions might pertain to shielding the lighting, installing a stockade fence to mitigate noise and paving the road so trailers carrying lawn mowers and motorized vehicles wouldn't be so noisy as they left and entered the grounds. Mr. Wise also raised the issue of regulating hours. Ms. Meagher pointed out that this would be difficult for the winter, when vehicle need to leave to plow snow when there is a snowstorm.

Mr. Doneski said the board has 100 days, or until Oct. 22, to render a decision. With some board members going away, it was difficult to determine a third hearing date. Mr. O'Brien, in writing, gave the board an extension until Dec. 2. Mr. Feldman said there would be an attempt to meet with neighbors. The board on a motion by Mr. Hagberg, seconded by Mr. Wise, voted unanimously to continue the deliberations to Thursday,

Dec. 1, 2011, at 7:30 p.m. at the new fire station on State Road. Mr. Feldman said he would provide copies of proposed conditions to board members by Monday that week. Town Manager Kevin O'Donnell took the O'Brien letter to file with the town clerk.

The meeting adjourned at 10:55 p.m.

Respectfully submitted

Bernard A. Drew

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