

Great Barrington Zoning Board of Appeals

Minutes of Feb. 20, 2018, Meeting

Vice-Chairman Carolyn Ivory opened the Great Barrington Zoning Board of Appeals meeting and a public hearing at 7:32 p.m. at the Great Barrington Town Hall. Attending were members Kathy Kotleski, Steve McAlester and Michael Wise and alternates John Katz and Don Hagberg. Also, Town Counsel Ilana Quirk.

The recording secretary read the notice for the appeal filed Dec. 28, 2018, by **GJO LLC** (Gary O'Brien) of a cease-and-desist order issued Nov. 22, 2017, by Zoning Enforcement Officer Ed May regarding property at 11 Roger Road. The hearing notice was advertised in *The Berkshire Record* on Jan. 19 and 26, 2018, and posted by the town clerk. Abutters of record were notified by mail. Correspondence received before and during the hearing is listed at the end.

Attorney Paul Feldman (with Great Barrington Attorney Kathleen McCormick representing the appellant) said his client maintains the cease order errs in stating there is a violation of the 1996 court agreement for judgment between the Town of Great Barrington and former owner of the property Leamon Roger. There was thought of asking to withdraw the appeal petition, but it had already been advertised, so will present case and address the charge that heavy equipment rumbles in early hours up and down the road in excess of what's permitted under the pre-existing non-conforming status.

Mr. Feldman said Mr. May pointed out a new parking area that had been installed without site plan review by the Planning Board. He said the lot has been removed and Mr. O'Brien will seek the site review.

Traffic on Roger Road, he said, is consistent with the previous non-conforming use. He said the town's issue with Mr. Roger in 1996 was use of the property as a transfer station, in conjunction with Mr. Roger's trash hauling business. Transfer of refuse materials on the property was prohibited; Roger could continue to garage trucks on the site and store roll-off containers. Mr. Feldman said two affidavits (originally presented to the ZBA in 2011) say Roger had 12 to 15 trucks. Mr. O'Brien acquired the property in 2010 and housed landscaping trucks there. When Mr. May issued a cease-and-desist order against the landscaper/contractor yard, Mr. O'Brien appealed. The ZBA in 2011 voted 3-2 in Mr. O'Brien's favor, but a supermajority of four votes was needed to override the building inspector. So Mr. O'Brien moved that business to Lee but continued to keep seven or eight dump trucks and plow trucks on Roger Road. That, he said, is essentially the same as Roger's business — and should be allowed reasonable growth. He said there are four large trucks for plowing, and they come and go depending on weather conditions. Roger also did commercial plowing, Mr. Feldman said.

The level of truck activity is not greater than when Mr. Roger owned the property, and there is less traffic midday now. It doesn't have to be an identical use. The residential area has grown around the business property. To be considered a change of use, considering case law, it would have to be 30 times great volume. The property has important and recognized rights that need to be protected, Mr. Feldman said. He said he appreciates the traffic can at times be disruptive to neighbors, but it's what the town bylaw allows.

Mr. Katz asked if there are other ways to measure business volume.

Mr. Feldman said truck trips are fewer than in the Roger era. Plow trucks come and go as dispatched. The hours of operation generally match those of the town highway department plows.

In response to a question from Mr. Wise, Mr. Feldman said the Roger business was larger than the O'Brien, citing a Robert Brownson affidavit. Mr. Wise suggested the trash hauling business was less intense between 1996 and 2011. Mr. Feldman said that even if activities diminished, the non-conforming status remained.

In response to another question from Mr. Wise, Mr. Feldman said the more recent Roger Trucking business has left the property. Mr. O'Brien said it left in 2013.

Mr. Katz asked what the tipping point would be, as far as business growth, for it to exceed its non-conforming status. Mr. Feldman reiterated there are seven or eight trucks kept there now, historically there were a dozen or 15. Mr. Katz said he would like the issue to be resolved and not come back to the ZBA. Mr. Feldman said this is not the forum; it's not a special permit hearing.

Attorney Donald Dubendorf, representing Mr. May and the town, said case law cited by Mr. Feldman is site-specific and should not necessarily be extrapolated to the Roger Road situation. It's necessary to protect the rights of residents in the neighborhood.

He offered concrete evidence for the board to consider, including waste haulage permits and incorporation papers. He said general hauler Hugh Taggard [father of Leamon Roger's wife Sara, from whom she acquired the business in 1945] was the first to keep a vehicle on the site. Roger came to specialize in trash hauling. Trash hauling is regulated by the commonwealth, and requires town Board of Health permits. This distinguishes the business from landscaping or gravel hauling or snow plowing. He said the 2011 cease order against the landscaping/contractor yard also disallowed snow plowing. He said the property owner can seek special permits for other uses, and give neighbors opportunity to participate in the permitting process.

Mr. Dubendorf said Mr. O'Brien has more than one business; Irish Trucking LLC is one, self-described in incorporation records as a different type of business. He said the history of the site is relevant but difficult to capture. It's a battle of affidavits. The building inspector made a determination that landscaping and snowplowing didn't belong. What was allowed in 1996 was a waste disposal trucking business.

In response to questions from Ms. Ivory and Mr. Katz, Mr. Dubendorf said Irish Trucking wasn't mentioned in the 1996 judgment and snowplowing wasn't allowed under the 2011 cease order. He said the building inspector does not want to halt all activity, but only what exceeds the 1996 judgment. That judgment focused on transfer station activities and the possibility of the property becoming a dumpsite. In discussion of the number of trucks on the site, Mr. Wise suggested the Roger 1994 incorporation description of 6 to 8 vehicles would seem sufficient to describe the 1996 situation. He suggested if there's no current waste hauling activity based at the site, it may have lost its non-conforming status.

He said there's conflicting testimony of what's gone on since 2011. Ms. Kotleski suggested three-axle trucks are three-axle trucks. Mr. Dubendorf said the trash hauling activity is regulated and therefore different from other trucking activities. So a special permit is needed.

Mr. Feldman responded that whether a truck carries dirt or garbage, it's not a different use. He mentioned the Brownson and June Williamson affidavits as to early site

activity. He said people who have recently moved in should have known about the trucking business. He said that an O'Brien Landscaping truck that Mr. Dubendorf say at the property was leased to Irish Trucking for snow plowing purposes. He said the need to apply for a special permit is not a protection for the property owner.

Attorney Quirk summed up the hearing so far: The board heard both sides give reasonable accounts of case law, but pointed out they were site-specific. Details are important, she said. She said the ZBA has the 2011 decision to uphold, even though only two of the five voting members at the time actually supported it. The board should hear what's different between 2011 and now. How has the use changed? That's why the board needs to hear from neighbors.

- Roger Belanger, Fairview Terrace, said he's lived there since 1980. He said Leamon Roger had two big garbage and two pickups and until 2010 there was no plowing, no landscaping. In the 1940s and the 1960s there was no Irish trucking until O'Brien. There were never 12 around with Mr. Roger, he said.

- Paul Jones, Blue Hill Road since 1960, submitted printouts of police reports he's made between December 2012 and Feb. 12, 2018, regarding truck traffic on Roger Road. I put in 52 police calls late at night. Some try hard to keep the trucks quiet, but a lot don't care at all. They wake us up at 4 a.m. when the leave. They shake the house. The motion-detector lights come on.

- Michael Andelman, Blue Hill Road, submitted a graph, pie charts, a printout and video footage of 2,475 instances of vehicle activity on Roger Road between Dec. 24, 2017, and Feb. 17, 2018. That's 58 days, he said. They go all through the night, he said, many of them four-axle trucks. Thirty-two percent operate between 5 p.m. and 8 a.m. His house was built in 1965. He previously lived on Commonwealth Avenue, he said, where the noise wasn't as loud. He said diesel exhaust is excessive. He said the business has substantially expanded, with sometimes 100 trips a day. He said the old Roger house is abandoned, empty for eight years. He said the traffic is year-round. Regarding recent activity, he said he had correlating weather reports.

- Jan Wojcik, Roger Road, said flow grew from a few trucks triple-axle dump trucks and the road is a total mess. He also set up a camera and has some 700 images taken in a month. He said the value of his property is diminished. He said there are three new houses in the neighborhood, built since 2011.

- John Petell, Blue Hill Road since 1998, said he has motion-sensitive lights near the corner of Roger Road and is often wakened by large "toll road" dump trucks. Many are as early as 4 a.m. The town should have an hours agreement with Mr. O'Brien, he said. Plow trucks are out, fair weather or foul, he said.

Ruby Chang, Roger Road, said trucks roar by 10 feet from her house. She said the town has a responsibility to protect its residents. She is in a new house. The town allowed it to be built and sold with no concern for the trucks. The diesels spew fumes, she said, and many residents have lung problems. She said she realizes Mr. O'Brien is a big employer and she's gratified he hires people to work for him. But what can a neighborhood do?

The hearing came to a lull. Attorney Quirk said the board could continue the hearing and has a 100-day window. Mr. Wise suggested continuing a week, to Feb. 27 at 7:30 p.m. at Town Hall. Ms. Kotleski made this a motion, Mr. Wise seconded, all voted in favor.

In **other business**, the board on a motion by Mr. Wise, seconded by Mr. Hagberg, moved to approve the minutes of the board's last meeting, July 27, 2017. All were in favor.

Members agreed to an April 3, 2018, hearing date at Town Hall at 7:30 p.m. for the Marc Fasteau appeal of a fuel storage tank installed at Great Barrington Airport.

On a motion by Mr. Katz, seconded by Mr. Hagberg, all in favor, the meeting adjourned at 10 p.m.

List of exhibits:

- Kathleen McCormick, McCormick, Murtagh & Marcus: Jan. 29, 2018, letter addressed to the Town Clerk and the Zoning Enforcement Officer, cc to the ZBA, asking to withdraw the appeal.
- Board of Selectmen: Feb. 14, 2018, letter urging support of building inspector's cease order.
- Planning Board: Feb. 9, 2018, letter urging support of building inspector's cease order.
- Conservation Commission: Feb. 20, 2018, letter noting stream on Roger Road property.
- Thomas E. Jensen, Frances Kollman, Judith Kales: Feb. 19, 2018, memorandum stating grievances.
- Ruby Chang: Feb. 20, 2018, email, trucks shake house.
- Michael D. Andelman: at hearing, graph, pie chart, chronology of video evidence of truck traffic, weather email, video.
- Zoning Enforcement Officer May via attorney Dubeldorf at hearing: Color photograph of six plow trucks parked at O'Brien property dated Nov. 27, 2017.
- Attorney Dubeldorf at hearing: Irish Trucking LLC, certificate of organization, 2013 and 2015; RWB Services LLC dba Roger Trucking, Solid Waste Hauler's Annual Permit, 2017, 2016, 2015, 2014, 2013, 2012; Roger Trucking webpage; undated; RWB Services certificate of organization, 2009; Roger Trucking, articles of organization, 1994. Also hearing memorandum.
- Attorney Paul Feldman at hearing: Affidavits of June Williamson and Robert Brownson, 2011; and four photographs.
- Paul Jones at hearing, stack of printouts of Great Barrington Police Department log entries, 2012 to 2018, of his complaints re Roger Road traffic
- Michael D. Andelman at hearing, graph, pie charts, weather report and stack of 2475 listings of traffic on Roger Road, Dec. 24, 2017, to Feb. 17, 2018. Video is at https://www.dropbox.com/sh/31mf1mnvr7bebzc/AABOKyQDP1yhrLph_5uZnVpla?dl=0

Respectfully submitted,

Bernard A. Drew, Recording Secretary