

Great Barrington Zoning Board of Appeals

Minutes of Feb. 27, 2018, Meeting

Vice-Chairman Carolyn Ivory opened the Great Barrington Zoning Board of Appeals meeting and continued public hearing at 7:30 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.

Attorney Paul Feldman (with Great Barrington Attorney Kathleen McCormick representing the appellant), having read a draft decision written by Attorney Quirk, said he would challenge some findings of fact. He provided a new affidavit by Robert Brownson, grandson of Leamon Roger, who assumed Hugh Taggart's ca1929 trucking business and expanded it into a trash hauling business after his return from World War II, in 1945. Mr. Feldman described 2003 excise records that listed 18 vehicles at the Roger Road property and 2002 Berkshire Insurance Group records that did the same. He said 1996, the year of the court judgment, was the same year Mr. Brownson and Roger Brownson purchased the business.

Mr. Feldman stressed that in 1996 the business would have had six garbage trucks, two rolloff trucks, three pickups and a septic tank truck, plus trailers. The number of rolloff trucks grew by 2003 by two. Brownson, the attorney said, said Roger Trucking also did snow removal, providing containers for the Town of Great Barrington, for example, to fill with snow from Main Street for transportation elsewhere. He said Mr. Brownson has no business affiliation with Mr. O'Brien. Mr. Brownson said there is no trash operation at the property today. Mr. Feldman said the suggested finding of fact that there were only four trucks at 1 Roger Road in 1996 was incorrect, again listing the dozen vehicles described above.

Mr. Feldman the Roger Trucking business grew from the Taggart truck business that started before the town adopted its first zoning bylaw in 1932. He said the use activity today is no more intense than in 1996.

The attorney said statistical evidence including videos presented at the previous meeting could be looked at in a different way. He said Michael Andelman asserted 32 percent of the traffic was between 5 p.m. and 8 a.m. But if one shifts the boundaries to 9 p.m. and 5 a.m., the figure is only 6 percent. He agreed some nighttime truck traffic is disruptive to residents, but insisted the use is lawfully non-conforming and pre-existing. He said some of Leamon Roger's sludge truck traffic was at night, hauling material to out-of-town processing facilities. He said Mr. O'Brien had a right to bring gravel to the property, but should have secured a Site Plan Review before building a now-removed parking lot.

Town Counsel Quirk suggested the Zoning Board of Appeals take all affidavits and other evidence from the 2011 hearing and incorporate into these proceedings. After discussion, Mr. McAlester moved to take this action, Mr. Katz seconded and all were in favor.

Attorney Donald Dubendorf, representing Mr. May and the town, provided minutes of the 2011 hearing and other document for the record. He said the 2011 decision not to overturn the Zoning Enforcement Officer's cease and desist order meant snow

plowing business should stop. He said information from 2002 and 2003 does not apply. He reiterated points made at the previous meeting and said clearly the business use of the property today has changed from 1996. Regarding a perceived gap in enforcement, he said that even though there has been seven years since 20a1, the latest cease order is perfectly legal.

Michael Andelman, 18 Blue Hill road, said the reason he presented his data at the previous meeting the way he did was, after conversation with state and town department of public works officials, he determined most work was done between 8 a.m. and 5 p.m. He noted that his videos showed two large O'Brien trucks meeting on Roger Road and one having to back onto a neighbor's property so the other could pass. He said he knew nothing of the operation when he moved here in 2017 and would look into seller disclosure, which could be an issue for real estate agents handling properties near Roger Road. He said some neighbors are not speaking out.

Roger Belanger, 43 Fairview Terrace, said most neighbors moved there when Leamon Roger had a less intense trash hauling business. What is objected to is the larger, louder trucks.

Paul Jones, 19 Blue Hill Road, submitted a thumb drive which he said held 79 videos of trucks running through a stop sign.

In answer to a question from Mr. Wise, Town Planner Chris Rembold said the town changed the business address of 1 Roger Road (seen in earlier documents) to 11 Roger Road in about 2003 or 2004.

In answer to another question from Mr. Wise, Mr. May said the latest cease order was dated Nov. 22, 2017, and hand delivered at his office on Dec. 1, 2017.

In answer to a third question from Mr. Wise as to which date the board should look to for a benchmark on numbers of vehicles, activities, etc., Ms. Quirk said the board should look at the facts including what's in the 2011 file. But in the end, the 1996 Agreement for Judgment is the operative document. And also look at 2011.

Mr. Feldman said the issue is Leamon Roger's creating a recycling transfer station at the property and the town challenging it.

Mr. Feldman said the landscaping business challenged in 2011 had 15 vehicles, pickups and trailers and lawn mowers. Today, the business is only hauling. Any O'Brien vehicles there are leased.

Claudia Shapiro, 70 Egremont Plain Road, challenged the legitimacy of the 1996 document as it was not properly recorded. Mr. Feldman said it was, and cited a file number. Ms. Quirk said the order is in effect and the 2011 cease order was not appealed and is also in effect.

Mr. Katz suggested conditions might be placed on the ZBA decision, including slowing down drivers leaving the property. He outlined other possible conditions involving speed limits, a full-time manager on-site, unlimited building inspector access, a ban on using large truck engine brakes until vehicles reach Route 7 and removal of a race car. He suggested a \$300 fine per violation, to be taken from a revolving escrow fund.

Mr. Feldman responded that Mr. O'Brien could not be at the property himself every day. The building inspector may have access. A speed limit may depend on the number. The stock car is personally owned by O'Brien. Braking procedures are already the case. But a process would be necessary regarding an escrow fund; Mr. O'Brien would need to be able to respond to complaints.

Mr. Hagberg observed that if one starts with a single Taggard truck in 1929, the business has already exceeded Mr. Feldman's suggested 30 times cutoff for expansion.

During a meeting break, legal counsels conferred in the hall. Mr. Feldman then told the board a variety of conditions might handle the issues, relieving an all-or-nothing resolution. He asked for another continuance for legal counsels to confer with the appellant and the building inspector and return to the ZBA with a proposed solution. The ZBA would then discuss the proposal in public.

Mr. Belanger said there were no 16-wheelers traveling Roger Road in 1996.

Mr. Jones said Mr. O'Brien repaired all his vehicles at the Roger Road garage. (Mr. O'Brien said this was not so.)

Brett Anderson, 5 Roger Road, said setting hours might not help those who worked third shift.

Ms. Quirk said noise, vibrations, fumes and all other issues would be reviewed and brought back to the ZBA.

Mr. Andelman expressed frustration at there being no immediate deliberation and decision. He said he was forced to find a lawyer.

Ms. Shapiro cited chapter and verse regarding a \$300 fine and said there was a six-year limit on the 1996 decision.

After further discussion, Mr. Katz moved to adjourn to April 24, 2018, at 7:30 p.m. at Town Hall and have counsel negotiate and return with a possible resolution. Ms. Kotleski seconded and the vote was unanimous. Mr. Feldman submitted a handwritten note agreeing to extend the time for making a decision until April 30, 2018.

In other business, the board on a motion by Mr. Katz, seconded by Mr. Hagberg, unanimously approved the minutes for the Feb. 20, 2018, meeting.

The meeting adjourned at 9:20 p.m.

List of exhibits:

- Town Counsel 02-27-18 Draft ZBA Decision
- 1932-1948 Zoning By-Laws of the Town of Great Barrington
- June 23, 2011 Second Notice of Zoning Bylaw Enforcement, 11 Roger Road
- Dec. 8, 2011, Record of Proceedings, Gary O'Brien Property Services LLC
- Building Permit Application, Ruth Brownson, April 11, 2003
- Aerial slide photos of 11 Roger Road from 1995 to 2014
- Board of Appeals Decision, Dec. 134, 2011, Appeal of GJO LLC and Gary O'Brien Property Services
- Great Barrington Zoning Board of Appeals minutes, Oct. 13, 2011
- Great Barrington Zoning Board of Appeals minutes, Sept. 8, 2011
- Affidavit of Robert Brownson, Feb. 27, 2018 along with excise and insurance documents for 2002, 2003
- Thumb drive, photos of O'Brien vehicles, from Paul Jones
- Appellant's application includes a copy of the Town of Great Barrington et al v. Leamon Roger Agreement for Judgment, Superior Court Civil Action No .950324

Respectfully submitted,



Bernard A. Drew, Recording Secretary