

Great Barrington Zoning Board of Appeals

Minutes of April 26, 2018, Meeting

Vice-Chairman Carolyn Ivory opened the Great Barrington Zoning Board of Appeals meeting and continued the public hearing at 7:30 p.m. at the Great Barrington Senior Center. 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, 2017, 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.

Mr. May said he reviewed the 2003 building permit for a new structure and fence at (then) 1 Roger Road. He said it was designated as an accessory use to a single-family dwelling. A single-family property is entitled to have an accessory shed, garage or barn. If it were meant for commercial use, it should have had inspection reports on the installation of a bathroom, oil/water separator and electric wiring. He said he could not find those signoffs.

There was discussion that the application used the term "barn" and "for truck maintenance." Mr. May said a commercial building in a residential zone would be non-conforming. Ms. Quirk said a legal, pre-existing, non-conforming property under case law would need further special permit relief to expand its use. If it was clearly a commercial use, a six-year statute of limitations has expired for the town to act. There was discussion of whether the building permit was issued in error, or if the building inspector at the time considered it a true accessory use.

Kristen O'Brien said she and her husband, Gary, discussed this with the previous inspector and it is a perfectly legitimate building permit. Ms. Ivory asked if anyone lived on the property in 2003, as a neighbor testified the Brownsons left in 2004 after William Brownson died. Ms. O'Brien said there were tenants in the house until they purchased the property in 2011.

Michael Andelman, 17 Blue Hill Road, said, among other things, the noise ordinance in Great Barrington designates contractor hours as 8 a.m. to 8 p.m.

Ms. O'Brien said when they purchased the property they did their research and examined the 1996 judgment. She said the property owner has the right to use it as a trucking facility. She said the judgment didn't specify a rubbish hauling business was because the Brownsons were considering other business ventures. She said they purchased another property in 2011 and relocated the landscaping business. They began Irish Trucking to continue use of the 11 Roger Road property. She said she and Mr. May, neither with counsel, appeared in court when a zoning violation ticket was dismissed. She said the police no longer routinely come to the property when a complaint is phoned in, so there is no way of knowing what the police log entries mean. She said their lawyer, Mr. Feldman, had presented conditions they were willing to abide by.

Jan Wojcik, 1 Roger Road, told ZBA members it would be instructive for them to spend time at his place and witness the truck traffic, some at 4 in the morning.

Board members discussed a memo from Great Barrington Treasurer/Collector Karen D. Fink that for the years 2002 to 2005 she could find no commercial vehicles registered to any of a dozen businesses at 1 or 11 Roger Road: Roger Trucking, Robert W. Brownson, Ruth Brownson, Roger Brownson, RWB Services, Gary J. O'Brien, GJO LLC, Gary J. O'Brien Property Services, Irish Trucking, Master Garbologist, C&C

Disposal or CDS Development. Ms. Kotleski said excise tax bills are often mailed to taxpayers at locations other than where vehicles are housed.

On a motion by Mr. McAlester, seconded by Mr. Hagberg, the vote was unanimous to close the public hearing.

Ms. Ivory asked Mr. Katz to sit in place of Dr. Ron Majdalany, who recused himself from this hearing.

Displaying the content on a screen via Powerpoint, Ms. Quirk took the board through a lengthy list of findings.

On a motion by Mr. Wise, seconded by Mr. Katz, they, Ms. Ivory, Mr. McAlester and Ms. Kotleski said aye to the first nine findings.

While they saw that the appeal was filed more than 30 days after the date on the cease order, Ms. Quirk said the board had to go by that date and not the date the ZEO actually hand-delivered the order. Nevertheless, after discussion, saying he preferred to continue and resolve the matter, Mr. Wise moved to proceed, Mr. Katz seconded and all members agreed.

There was discussion at several points as to what number of trucks or hours of operation might have been in force and covered by the 1996 judgment. Ms. Quirk inserted the results in her working copy of the findings/decision. Mr. Wise noted that neighbors indicated there were two garbage hauling trucks and one septic tank truck, a fleet apparently enlarged by at least one container hauling vehicle, and perhaps others, precipitating neighborhood complaints in 1995-1996. The 1996 excise sheet submitted by Robert Brownson indicated six heavy trucks.

The board on a motion by Mr. Wise, seconded by Mr. McAlester, voted to find the 2003 building permit was issued for a non-commercial use. The vote was 4-1, Mr. Katz dissenting.

Ms. Quirk urged the board to try to estimate what working hours for the Brownson trash-hauling business might have been in 1996. Mr. Wise finally moved to indicate hours of 7 a.m. to 5 p.m., six days a week. Mr. McAlester seconded, all voted yes. On a motion by Mr. Wise, seconded by Mr. McAlester, the board voted unanimously that the present use is as a commercial truck maintenance facility.

A 10-foot fence is mentioned in the 2011 building permit. Mr. McAlester said this may have been permission to build a fence, but not necessarily a directive. The board said it had inadequate information as to whether a fence was ever built.

On a motion by Mr. Wise, seconded by Ms. Kotleski, the board unanimously said the building permit does not reference commercial uses.

Mr. McAlester moved that the board affirm the cease and desist order determination regarding the parking lot being built without site plan review, Ms. Kotleski seconded, all were in favor.

The board discussed the three sections of the Powers test.

- Does the current general trucking use (i.e., Contractor's Yard or other defined use) that is not owner occupied reflect the nature and purpose of the nonconforming owner occupied use allowed under the 1996 Agreement for Judgment?

The votes were McAlester, Kotleski, Katz, Ivory, Wise — all no.

- Is there a difference in the quality or character of the current use as well as the degree of current use when compared to the use allowed under the 1996 Agreement for Judgment? Listing reasons including hours of operation and noise, the vote was again unanimous yes.

• Is the current use different in kind in its effect on the neighborhood than the use that was allowed under the 1996 Agreement for Judgment? Listing night vs. daytime operation, fumes, lights, etc., the vote was again unanimous yes.

Ms. Quirk said the appellant has the option of appealing to Superior Court or to submitting a special permit application (to the ZBA, since it is a pre-existing, non-conforming use). She suggested enforcement be stayed for a time, as a court would likely take that action anyway. There is a 20-day appeal period. The board decided to give a 45-day stay, longer if a SP is sought and processed. Mr. Wise made the motion, Mr. McAlester seconded, all were in favor.

Ms. Quirk said the board could stop here, but after discussion and at Mr. Katz's urging, they proceeded to issue a modified cease and desist order, that, among other things, indicates no more than six heavy trucks of 33,000 GVW unladen size, and six smaller vehicles, but excluding employee vehicles, be allowed at the property; hours be 6 a.m. to 7 p.m., Monday to Saturday; no lights flashing on vehicles; no "Jake braking."

The board voted to adjourn the meeting to Monday, April 30, 2018, at 3:30 p.m. at Town Hall, if necessary. Mr. McAlester moved to authorize the chair to sign the decision for the board, in the event members upon review of the new copy decides they have no reason to meet. Ms. Kotleski seconded, and all were in favor.

Mr. Wise moved to approve the provisions of the new order, with an invitation to file for a special permit. Ms. Kotleski seconded, the vote was unanimous.

In other business, on a motion by Ms. Kotleski, seconded by Mr. Katz, approval was given to the minutes of the April 3, 2018, meeting/hearing.

The board adjourned at 10:30 p.m.

List of new exhibits:

- Town Counsel 4-26-18 Draft ZBA Decision
- Town Planner 4-26-18 Draft Modified Cease and Desist Order
- Memorandum re Excise Tax Bills, Karen D. Fink, Great Barrington

Treasurer/Collector

- Affidavit of Frances Kollman
- Affidavit of Elizabeth Jones
- Copies Great Barrington Police Department log entries, 3-27-2009 to 4-26-18

Respectfully submitted,



Bernard A. Drew
Recording Secretary