



BOARD OF APPEALS

Hearing #20-08

DECISION ON AN APPEAL TO OVERTURN A DETERMINATION OF THE ZONING ENFORCEMENT OFFICER WITH RESPECT TO 960-962 MAIN STREET

A public hearing of the Acton Board of Appeals was held virtually on Tuesday, July 7, 2020, at 7:30 PM on the petition to overturn a decision of the Zoning Enforcement Officer (ZEO). The property is located in the R-10/8 zoning district at 960-962 Main Street (Map/Parcel B5-17-1)

The hearing was conducted virtually via video and telephone conferencing. Virtually present at the hearing were Ken Kozik, Chairman, Adam Hoffman, Member, R. Scott Robb, Member, and Roland Bartl, Acton Town Planner and Zoning Enforcement Office. In addition, Matt Mostoller, Environmental Manager for the Acton Water District was present. Also present were Attorney Jillian B. Bargar representing the Town of Acton, Attorney Dimitrios Ioannidis representing the Petitioner, i.e., RMBDN LLC and Elizabeth Parsons, and Attorney William Dailey representing the property owner, i.e., Albert Kennedy.

Applicable Bylaws:

10.1 Board of Appeals – The Town of Acton Board of Appeals is hereby designated as the Board of Appeals required by "The Zoning Act" of the Commonwealth of Massachusetts Chapter 40A of The General Laws. The Board of Appeals shall act on all matters over which it has jurisdiction and in the manner prescribed by the following provisions:

10.1.1 To hear and decide appeals from any decisions of the Zoning Enforcement Officer.

Mr. Kozik opened the virtual hearing, explained how the Board procedurally operates and asked the petitioner to begin.

The Petitioner, RMBDN, LLC (Elizabeth A. Parsons, Manager) owns two adjacent parcels to the property in issue, also with the address 960-962 (or 960) Main Street (behind), tax parcels B5-17

& B5-17-2. Mr. Ioannidis stated that the property in issue was originally zoned light manufacturing/agricultural until it was changed to residential (R-10/8) in 1990. At the time, the property was being used to conduct a pig farm with its associated functions by the Kennedy family. When the zoning changed in 1990, the pig farm became a pre-existing non-conforming use. Mr. Ioannidis indicated that according to public records, and other evidence, the Kennedy family ceased its pig farm business in 1998. When the Kennedys ceased the pig farm operations on the property, Mr. Ioannidis alleged that the Kennedy family abandoned its non-conforming pre-existing use. More specifically, Mr. Ioannidis alleged that the Kennedy family abandoned its non-conforming pre-existing use in September of 2017, if not earlier. As such, the Petitioner requested that the Zoning Enforcement Officer issue an immediate cease and desist letter; this request was denied as described below.

Mr. Ioannidis presented additional facts that appear to indicate a landscaping supply company has been operating on the property since 1998 and continues to operate such business as of the date of this hearing. Mr. Ioannidis argued that not only is this use a non-agricultural use, and thus not allowed in a residential district, but vehicles supporting such business have led to increased and intolerable noise, dust, odor and traffic. In the alternative, Mr. Ioannidis argued that the present use is an expansion of a non-conforming use and thus not permitted.

Lastly, Mr. Ioannidis argued that the Zoning Enforcement Officer failed to perform a satisfactory investigation into the facts and circumstances of the matter before denying to issue a cease and desist letter. More specifically, Mr. Ioannidis alleges that the Zoning Enforcement Officer failed to conduct a basic investigation into determining the alleged pre-existing non-conforming use of the Kennedy property, rather relying on hearsay misrepresentations by Kennedy.

Mr. Dailey, representing one of the Kennedy family members that owns the property that is subject of this hearing, stated that before the 1990 zoning change, in addition to a pig farm, the Kennedy family used the property for a number of outdoor uses necessary to make the property profitable. These uses include snow plowing, storage and sale of outdoor materials, composting, renting of equipment, contracting, hauling, and the like. Mr. Dailey stated that the non-conforming pre-existing uses continue to this time and have never been abandoned. More specifically, Mr. Dailey submitted several affidavits alleging that the agricultural and various outdoor, composting, and landscape supply uses have continued on the property and continue on the date of this hearing. Mr. Daily also cited the 2016 construction of a garage at the property pursuant to a building permit, the purchase of new expensive equipment in 2012 and 2019, and the ongoing snow removal work for the Town of Lexington as evidence of the ongoing operations at the property. In addition, Mr. Dailey stated that each time he has personally visited the property in issue there were agricultural activities being performed. Mr. Dailey also alleged that noise, dust, odor was emanating from the Petitioner's property and not the Kennedy property. Lastly, Mr. Dailey argued that the present appeal was really about the Petitioner wanting their two adjacent land parcels to be developed into a new housing project without issues related to a tangential business that might reduce their profit or marketability.

Mr. Bartl, Acton's Zoning Enforcement Officer (ZEO), presented the following facts. Upon receiving the initial complaint requesting a cease and desist, the ZEO reviewed the complaint and his historical perspective of the property in question. Mr. Bartl stated that he has institutional

knowledge of the site and the site's operations that he has gained over the years, which he recognized as continued agricultural uses and outdoor uses involving the storage and processing of various materials. To Mr. Bartl's recollection, the property was used in outdoor storage/processing of materials and debris before 1990, the date of the zoning change. At the time of the zoning change, Mr. Bartl stated that the property had been conducting a pig farm business. In Mr. Bartl's opinion, the outdoor uses involving the storage and processing of various materials have continued and are continuing.

In the summer of 2019, Mr. Bartl visited the subject property to discuss Mr. Kennedy's proposed activities on the property with respect to the Dirt Doctors, in connection with MassDEP's site visit relating to the crushed pavement being delivered to the property, which was found to not be a hazardous material. The soils and crushed pavement were also tested at this time, and it was determined that there was no issue to the percolation/groundwater. At the time of the 2019 site visit, Mr. Bartl advised Mr. Kennedy that the proposed operation of the Dirt Doctors would be a legal continuation of their pre-existing non-conforming use.

In response to the initial complaint, Mr. Bartl restated his understanding that the current use of the property is a continuation of the pre-existing non-conforming use, and determined that the current use on the property was not a dramatic and substantial increase in the intensity of the non-conforming use to make it impermissible.

Matt Mostoller, Environmental Manager for the Acton Water District, differed from the ZEO's opinion. More specifically, Mr. Mostoller stated that the District's position is that a cease and desist order should be issued to the owner of the property as it is conducting activities and operations in violation of Acton's Zoning Bylaws and the Groundwater Protection Bylaws.

More specifically, it is the District's position that the property owner is conducting a non-permissible commercial composting operation, that the ZEO failed to consult with the District, and that any pre-existing use was abandoned.

With no further input, Mr. Hoffman made a motion to close the public hearing. Mr. Robb seconded the motion. The Board unanimously voted to close the hearing.

The Board of Appeals, after considering the materials submitted with the Petition, together with the information developed at the hearing, finds that:

1. The Petitioner seeks to overturn a decision of the Zoning Enforcement Officer (ZEO) pertaining to a cease and desist order. The property is located in the R-10/8 zoning district at 960-962 Main Street (Map/Parcel B5-17-1).
2. In 1990, zoning changed for the property from light manufacturing/agricultural to residential (R-10/8).
3. Subsequent to the 1990 change of zoning for the property, a pig farm and other outdoor supply and associated operations were established and conducted.
4. At some point in time the pig farm business was wound down but the other agricultural and outdoor supply uses consistently continued.
5. The Acton Zoning Enforcement Officer (ZEO) had discussions with the property

owner regarding addition of soil screening, brush and composting services. The ZEO determined that these are permitted uses.

6. The Board was unable to determine whether the alleged noise, dust, odor and traffic originated from the owner's property or from the Petitioner's adjacent property.

Therefore, the Board of Appeals, after reviewing the available materials and based upon the above findings, voted unanimously to **DENY** the **REQUEST TO OVERTURN THE DECISION OF THE ZONING ENFORCEMENT OFFICER.**

Any person aggrieved by this decision may appeal pursuant to Massachusetts General Laws, Chapter 40A, Section 17 within 20 days after this decision is filed with the Acton Town Clerk.

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Kenneth F. Kozik, Chairman Adam Hoffman

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