

**BOARD OF APPEALS  
REGULAR MEETING MINUTES  
AUGUST 19, 2009**

**Members Present:** Clayton M. Harrison, Chairman  
Gerald Coutinho, Vice Chairman  
Donna Lambert, Clerk  
Kendal Tripp  
Kimberley A. Fernandes, Alternate

**Absent:** Christopher J. Graham  
William F. Wyatt, Alternate

Chairman Harrison called the Zoning Board of Appeals meeting to order at 7:00 PM in the Westport Town Hall, 816 Main Road, Westport, MA 02790.

**EXCEL RECYCLING, LLC** – Continued Public Hearing on an application for an Administrative Finding that the current use of the premises is not an alteration / expansion of a non-conforming use; or if an alteration is found, that the change is not substantially more detrimental under the Westport Zoning Bylaw Articles 4.1.2 and 4.1.3. The property is located at 37 Charlotte White Road, also known as Assessor's Map 67, Lot-10.

**Sitting on petition:** Harrison-Coutinho-Lambert-Tripp-Fernandes

**Attending:** Marty Costa, owner of Excel Recycling  
Attorney John Markey, representing applicant  
Attorney Ilana Quirk, Kopelman & Paige, representing the Town  
Ralph Souza, Zoning Enforcement Officer, Building Inspector

**Abutters present:** Paul & Carole Mann – 21 Kelsey's Way  
Ronald & Loretta Price – 323 Main Road  
Ed Vieira – 7 Kelsey's Way

Chairman Harrison called the continued public hearing to order at 7:00 PM. with the reading of the public hearing notice to all present. Mr. Harrison stated the meeting would begin tonight with review and discussion of the presentation of material, which was requested at the last meeting.

Attorney Quirk stated that she and Attorney Markey have gone back and forth with communications. Attorney Quirk stated the applicant had asked for an Administrative Finding but feels the applicant must quantify the expansion and show that the expansion is not more detrimental to the area.

Ralph Souza, Building Inspector/Zoning Enforcement Officer stated that a submitted parking plan indicated a change of use; also, there has been a conveyance of land for Lot 10. This is a severing of the lots with a change of use.

Attorney Quirk asked Attorney Markey if any other relief was being sought because an Administrative Finding was advertised.

Attorney Markey stated that on Excel's behalf, he received correspondence from the Zoning Enforcement Officer as to a change of use and requested that Excel come before the Zoning Board of Appeals. Attorney Markey stated that his client has followed the

request of the Zoning Enforcement Officer and his first question is for relief because there is no change of use.

Attorney Quirk noted there was no appeal of the Building Inspector filed, only an Administrative Finding; Attorney Quirk then asked Attorney Markey, is this the position of your client.

Attorney Markey stated that if the Board would allow both, an Appeal of the Building Inspector and an Administrative Finding, then they would change the request.

Mr. Coutinho stated yes, if in effect, as long as it is legally allowed but Mr. Coutinho stated he felt that the Legal Notice covered it all.

Mr. Harrison stated that the discussion was on the merits of the application and the Board must be able to defend their actions.

Mr. Coutinho stated it was not unusual for the Board to do a Finding. Mr. Coutinho then asked if an Administrative Finding makes a difference.

Attorney Quirk stated no, there is a copy of an Administrative Finding from 1987 in this packet tonight.

Mr. Harrison stated this matter did not fall under a Special Permit.

Attorney Quirk stated the procedure matters; a Finding is done as an appeal to the Building Inspector. An Appeal must be specific in detail; while a Finding is not. At the last meeting, the applicant was to come back with information that was requested and the Building Inspector has a number of items on his list.

Attorney Markey stated his client is willing to amend the submitted application and submit a letter for date extension. Attorney Markey stated there were two issues and those are a change of use and if there is a change of use, whether it is more detrimental.

Mr. Coutinho stated he had no problem with the way it was advertised.

**Motion** made by Mr. Coutinho to approve the applicant's request to remove "Special Permit" from the submitted application, subject to a written request being submitted by the applicant. Second by Ms. Lambert. The Board voted unanimously in favor.

Attorney Markey stated he will have an amended application submitted to the Board by the end of the week, which will show removal of the "Special Permit".

**Motion** made by Ms. Lambert to allow the applicant time to amend application with clarity and for submission of a letter allowing for an extension of time for a decision to be rendered. Second by Ms. Fernandes. The Board voted unanimously in favor.

Attorney Quirk then reviewed the requested information. Attorney Quirk noted that Attorney Markey provided a series of deeds showing the transfer to Gina's Realty Corp. from 1974 until 2008 and the two parcels held in common ownership. Attorney Quirk noted that once the second lot was purchased by Gina's Realty Corp., the two lots merged and then were carved up. The Zoning Board of Appeals must now determine the use; and look at the wholesale as opposed to retail use. There are DEP records and licenses, which show a gap from 1973 to 1988.

Attorney Markey stated he requested records from the Board of Health and the DEP but has not received them yet.

Mr. Coutinho stated there is a Zoning Enforcement Officer's letter dated May 19, 2009 and materials from the July 1<sup>st</sup> meeting with many open issues at hand; is this Board restricted to just 4 corners of the letter such as wholesale/retail.

Attorney Quirk stated yes, the appeal is restricted to the Building Inspector's letter due to changes shown on a site plan.

Mr. Harrison noted for the abutters that the letter being referred to is dated May 19, 2009 from the Building Department to Excel Recycling. Mr. Harrison then read the letter aloud. Mr. Harrison asked Attorney Quirk that if the Zoning Board of Appeals uses the Building Inspector's letter and reasoning, and with the Board requesting a substantial amount of information, what additional information should still be requested.

Attorney Quirk stated that the applicant has the burden to prove to the Zoning Board of Appeals that this is a lawful, nonconforming, pre-existing use; that there has been a change to the bylaw as to when it became nonconforming and proof of the status of the lot next door; and change of wholesale to retail for salvaging.

At this time, Attorney Markey was asked by Mr. Harrison to review the submitted information. Attorney Markey stated that Lot #10 is the only lot seeking protection.

Attorney Markey stated that Lot #9 was never a part of the business or licensed; Lot #10, which is a 5-acre parcel, is the original parcel, where processing has always been done; Lot #10 is the only licensed parcel. In 1974, Mr. Moniz purchased Lot #9 and used it for storage only. Attorney Markey then continued reviewing the submitted information, which included what technology was being used by Excel after investing several thousands of dollars and a parking plan being drawn by SITEC Engineers.

Mr. Coutinho stated that an aerial view of the property was submitted and the parking spaces in both areas are clearly shown. Mr. Coutinho stated that in 1987, Mr. Moniz came to the Zoning Board of Appeals with an application to construct a building; did the 1987 submitted plan show any of these parking spaces.

Attorney Markey stated he did not know; only that Lot #10 was used for used car and metal recycling.

Mr. Coutinho also noted that photos showed the then and now photos of on-site equipment.

Attorney Markey stated there is no other heavy equipment on-site other than the loader.

Mr. Jonathan Costa, Excel Recycling, stated there was a demonstration piece of equipment on-site, which was a portable piece of equipment to segregate aluminum from steel; but the equipment is gone, the company did not purchase it.

Mr. Marty Costa, Excel Recycling, stated that he was offered to try the machine out but it was determined that the equipment did not fit into their system.

Mr. Ron Price, 323 Main Road stated to the Board that he was submitting an addendum to his letter of July 1, 2009. Mr. Price then read the addendum. Mr. Price finished by stating that Thad's was auto recycling; Excel is a metal recycling business, tractor trailers are being used to haul metal instead of flat bed trucks, a general scrap metal business is different from metal recycling and Excel has almost nothing by way of auto recycling. In April 2005, there were no junk vehicles on the property and during 2002 and 2003 according to the Annual Town Reports, no junk licenses had been issued to Mr. Moniz. Mr. Ed Vieira, 7 Kelsey's Way stated there were at least 3,000 cars on the property when Mr. Moniz owned it and he conducted his business with a crusher; Mr. Moniz never did metal recycling. There were no magnets or shears to conduct business. Mr. Vieira questioned why Excel is not doing business as Thad's did; also, there are dumpsters located on the property with the wording, Excel Recycling on them; is this another expansion of the business.

Ms. Carole Mann, Kelsey's Way stated that when she bought her property, Thad's was in operation and she had no problem with that business; but now that Excel owns the place, the noise is unbearable and the shaking has to stop.

Mr. Moniz stated that when he was in business, he could not afford a magnet like Excel uses, so he used a crusher instead. Also, Mr. Moniz stated he used to pick up extra metal from the Town Hall. Mr. Moniz stated his licenses were always active and during the winter months, he and his wife would vacation in Florida. Mr. Moniz stated he had been on that property for 40 years and he never had any problems.

Attorney Quirk stated there is a request for a continuance by the applicant seeking an extension until November 27<sup>th</sup> and with an additional 14 days to file a decision with the Town Clerk, will put the applicant beyond the deadline date. Attorney Quirk explained that if there is no extension allowed, there is a constructive grant, which means a favorable grant for the applicant due to inaction by the Board.

**Motion** made by Ms. Lambert to allow an additional 100-day extension as a result of amending the application and to allow the applicant to submit additional paperwork. Second by Mr. Coutinho. The Board voted unanimously in favor.

Attorney Quirk then reviewed for Attorney Markey the additional requested information:

1. DEP Records showing no use of red paint.
2. Licenses from 1973 through 1988.
3. Zoning Board of Appeals certification.
4. Lot #9 uses affidavit.
5. Scope of uses overtime of both lots.
6. Wholesale / Retail use.
7. Submission of a revised application.

Mr. Harrison stated to Attorney Markey, that with the addition of the new requested information, the Board and Attorney Quirk would need a review period before the next hearing. Attorney Markey stated he understood and would get the materials submitted in a timely manner.

**Motion** made by Mr. Coutinho to continue this hearing to Wednesday, September 16, 2009 at 7:30 P.M. at Westport Town Hall with all materials being submitted by September 2, 2009. Second by Ms. Lambert. The Board voted unanimously in favor.

The hearing was closed at 8:50 P.M.

#### **Correspondence Received**


1. A letter was received from Julia Ferguson and Nat Bryant regarding Excel Recycling. Mr. Harrison stated these letters would be addressed at the next hearing for Excel.
2. Emails received regarding Brigg's Landing.  
No action was taken.
3. A letter was received from Mass Housing regarding Brigg's Landing.  
No action was taken. This was informational only.
4. A copy of a letter was received from Pauline B. Dooley requesting return of her application fee.


No action was taken. Attorney Quirk did note to the Board, that Ms. Dooley had the opportunity to seek legal counsel before filing her application; and the Board needs to look at the fact that a legal notice was advertised and abutters notified, along with secretarial work being done in the process of this application; all those items need to be addressed in regards to funding.

**Motion** made by Ms. Lambert to adjourn the Zoning Board of Appeals meeting at 9:37 P.M. Second by Mr. Coutinho. The Board voted unanimously in favor.

**Adjournment.**

Respectfully submitted,

  
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Diane Pelland, Principal Clerk  
to the Zoning Board of Appeals

**APPROVED:**   
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Donna Lambert, Clerk