

**BOARD OF APPEALS  
REGULAR MEETING MINUTES  
SEPTEMBER 16, 2009**

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

**Absent:** Christopher J. Graham

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.

**UNDERWOOD FARMS of WESTPORT, INC.** – RE: Continued Public Hearing on an application for a variance at 1344 Main Road due to a boundary dispute (condition #15) and crawl space height requirements (condition #3) of a decision rendered on April 4, 2007. The property is located at 1344-1346 Main Road, also known as Assessor's Map 56, Lots 10 and 10-7.

Sitting on petition: Harrison, Coutinho, Lambert, Tripp and Fernandes  
Attending: Ralph Souza, Building Inspector/Zoning Enforcement Officer  
Attorney Mark Levin, representing applicant  
Abutters present: William & Nancy McDonald – owners/applicants  
Attorney Daniel Perry, representing Carol J. Lortie-1338 Main Rd.

Attorney Levin stated this property was granted a variance in 2007. The variance had a number of conditions including the crawl space requirement of no more than 4 ft. in height, no interior access and not habitable. Attorney Levin stated he was here tonight to address condition #3 and condition #15. Attorney Levin stated that MGL Chapter 40A, Section 10 is clear that this Board has the right to make statutory changes. Attorney Levin said all units were to have one-bedroom only. The four duplexes and one triplex were designed to decrease the density on the property, which was formerly a motel with 11 individual cottages. Attorney Levin stated the problem started with unit # 4, which is attached to a duplex. When the foundation was placed, the crawl space due to a slope in the land was 94". The Plumbing Inspector stated that at 48" the height from the heating unit to the wooden joists did not comply with building code. Wooden decks were placed in the crawl spaces to make the 48" compliance but due to no heat being in the crawl spaces and the accumulation of dampness, the decks have begun to warp. Attorney Levin stated the initial intention of the Board was to keep this area uninhabitable and it still is with no access to the basement from inside the house. The height of the buildings will not change. The property is not in a wetland area but there is a buffer zone. The engineer's failure to recognize a slope and the topography of the property are causing problems. On May 15, 2009, a letter was received from the Building Inspector stating he was not concerned about the height as long as there was only a 48" x 40" access and it

was locked. The Building Inspector was satisfied that it was uninhabitable. Attorney Levin stated the foundations needed to be deeper in the ground; this will change the foundations due to cement being needed instead of wooden decks. This is a financial hardship using cement but the original intent of not being suitable to live or expand is still there. Regarding condition # 15 – it was originally determined the new units on the north side were closer to the lot line than expected, so there were revisions made to the old plan creating a new plan with placing the buildings in the old footprints. The engineers used a line from the wall of the property to Main Road, which was used mistakenly as a boundary line. It was agreed to no more than 40 ft. from the line, now with the revision, it is 42 ft. from the property line. The actual boundary line is 28.6 ft. from the line, when the bylaw calls for 10-ft. but Attorney Levin stated his client is willing to move the wall and will continue to plant trees as a boundary buffer. The privacy of the abutters will be maintained.

Mr. Steve Gioiosa, SITEC Engineering stated he spoke with the project manager and engineer. Mr. Gioiosa presented an approved plan from the Zoning Board of Appeals and an aerial photo, which was predated before the present project. Mr. Gioiosa said at this time, the entire project is a couple of feet south of where it originally was planned, the existing buildings have been mirrored and the buffer zone is still in place. Attorney Levin stated the buildings are where they said they would be but the crawl spaces will be the financial hardship. Attorney Levin stated his client is willing to agree to something in writing as far as no habitable space in the deeper crawl spaces. The depth of the crawl spaces will not affect the neighbors and as for the boundary, it was a mislabeling of the plan. Mr. Coutinho asked if the owners, engineer or surveyor knew about this because the owner apparently did not know because he has been mowing the grass for 40 years. Mr. Gioiosa stated the problem was found when it went to the "as-built" stage. Mr. Coutinho stated there was an official onsite at this property and it wasn't a mislabeling, it was just someone did not know; but personally, I have no problem with that change. Mr. Coutinho noted that a copy of the building plans that were submitted are stating the word "loft" being used to refer to the attic spaces. The Board was very clear and deliberate to keep the crawl space at 4 ft. Mr. Coutinho stated that a professional engineer drew these plans, and it is hard to believe that the heating system was not thought out; it is not the Zoning Board of Appeals that should have to anticipate these things. Mr. Coutinho then asked what height was being sought. Mr. James Sabre stated about 12" above the heating system is needed making it roughly 5 ft. being needed. Mr. Souza stated the crawl spaces range from 48" to 62" and the plumbing inspector is calling for more mechanical height. The floors were placed to make the crawl spaces conform to the 48" with the installation of the gas heating system below the floor. Mr. Souza stated that 3 units have received occupancy permits. Attorney Levin stated that units 1 & 2 are 48", unit 3 is 73" with a wood sub-floor and these 3 units all have occupancy permits. Unit 4 is 94", unit 9 is 72", unit 10 is 70" and unit 11 is 70" and all these units are on hold for occupancy. Mr. Coutinho presented pictures from the onsite by the Zoning Board and one of the Board's concerns was that a set of stairs could be put into a 96" space and the area could be used. Perhaps the wood sub-floors need to be removed and the area filled with stone or cement. Mr. Harrison asked if some of the floors were concrete. Mr. Sabre stated yes. Mr. Coutinho stated he would like more complete information as to the actual height dimensions, etc. and what the applicant is looking for. Mr. Coutinho stated that the intent

is to not make it easy to use this area as a workshop. Attorney Levin stated 5 units have this problem (#3, 4, 9, 10 and 11). These are the only units we are seeking relief on. The relief being sought will not affect the public good. Mr. Coutinho stated the Board worked very hard to keep this property in style and being built wrong is hard to believe. Mr. Tripp stated that condition # 17 says submittal of condominium documents for the variance and those have not been submitted.

Attorney Perry stated the Board has heard a lot of misinformation tonight. This property was a motel with seven small cottages. This Board has already given relief to the applicant and any additional relief is a deception. Attorney Perry referenced the boundary line and the "as built" plan from 2007. Attorney Perry also stated that although it was not stated in writing on the conditions, the Board strongly suggested that the utilities be placed upstairs. Attorney Levin stated the engineer made the error, not my client and the error was not discovered until the "as-built". Mr. Coutinho stated that during the site visit, the Board members did not see any boundary marks, just brush and briar near the wall. Mr. Coutinho stated there were too many complicated issues coming to light tonight. Mr. Harrison stated he would like to review the documents and material that was presented tonight. Mr. Harrison stated the Board's concern during the onsite was the southerly side, not the northerly side. Mr. Coutinho stated for the record, the onsite was conducted on January 20, 2007.

**Motion** made by Mr. Coutinho to continue this hearing to Wednesday, September 30, 2009 at 8:00 PM at the Westport Town Hall at which time the applicant will present a list of the requested heights and an original set of plans. Second by Ms. Lambert. The Board voted unanimously in favor. This hearing was closed at 8:00 PM

**EXCEL RECYCLING, LLC** – RE: 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 By-laws Articles 4.1.2 and 4.1.3. The property is also known as Assessor's Map-67, Lot-10.

Sitting on petition:	Harrison, Coutinho, Lambert, Tripp, and Fernandes
Attending:	Attorney Ilana Quirk, representing the Zoning Board of Appeals Ralph Souza, Building Inspector/Zoning Enforcement Officer Attorney John Markey, representing applicant Marty and Jonathan Costa, owner/applicant
Abutters present:	Loretta and Ron Price Ed Vieira Carol Mann

Attorney Quirk stated there still is a bit of information that was requested from the meeting last month, which included the submission of an amended application. Attorney Quirk stated she has also spoken with Attorney Markey after receiving the requested materials from Attorney Markey, the applicant and abutters. Attorney Quirk stated that to summarize the whole process so far, the Board will need to know what findings need to be made, is there more information that will be needed after reviewing this new material and when all that is done, a decision should be rendered. Attorney Quirk said

there were two aspects to this application, which were addressed by the Building Inspector and an appeal of the Building Inspectors' determination letter of May 19, 2009.

#1 – Wholesale/Salvage use to Retail element due to a parking plan being submitted.

#2 – Separation of Lots 9 & 10, which were a non-conforming use, now there is a change in use.

#3 – The applicant made application under Article 4.1.2 and the Board will need to make a finding on this.

#4 – Certification – In August 1973 the property became non-conforming, prior to this, its use was as auto salvage with metal salvaging use.

#5 – The question is has there been a change or extension of the non-conforming use.

The property owner says no but the abutters say yes. In 1987, there was an application for a variance, which related to auto salvage and repair. The variance application did not mention metal salvage use but there were affidavits submitted by the applicant, which were made under oath, that there has been metal salvaging since the 1970's.

Attorney Quirk stated if regards to a change, the case standard is clear, a simple increase in volume is not sufficient enough for a Section 6 determination; but if there has been a change with a detrimental impact, then the Board needs to make a determination. There was a lot of auto storage on a lot of the property but now a large amount of metal recycling has taken it's place and having more of an impact on the neighborhood.

Mr. Harrison asked Town Counsel if she was satisfied with the materials that have been submitted, and should the Board asked for any more information and if so, what should it be. Attorney Quirk stated yes, she was satisfied with all the information that has been submitted.

Mr. Coutinho stated the important issue is the separation of the lots. One lot was for auto storage, the other for auto recycling. Mr. Coutinho asked if any buffer value should be considered. Mr. Coutinho stated that by separating the lots, they lose their non-conforming use. Attorney Quirk stated that the Building Inspectors' letter of May 19, 2009 saw a change of wholesale to retail and a separation of lots. The Board can even issue a cease and desist on this property. The abutting neighbors are stating the "auto salvage" was pre-existing but metal salvage was not. An onsite can tell if the usage has changed. Attorney Markey stated it appears the issue is appealing the Building Inspector's decision. Attorney Markey said whether it was a lawful pre-existing non-conforming use, the records show it was there, including a name on the building from the 1980's stating metal recycling, inc.; an affidavit from Mr. Moniz stated he was licensed from 1970 to 2008; an affidavit from Russell Hart stated he did business with Mr. Moniz in the form of recycling; and in an affidavit from Harold Tripp, he stated he sold metal to Thad's since the 1960's. In 1987, Mr. Moniz filed for a variance to process autos and obtained relief. The original handwritten application to the Zoning Board of Appeals states this but Mr. Moniz's handwritten application did not state scrap metal. As for a change, there was an extension and use of the business, which was the only way to stay in business and that consists of buy low and sell high. As for Section 6, a determination of no substantial change is being sought. There have been no changes or alterations.

Attorney Markey presented aerial photos to show the distant from the five-acre property to the abutters, which are about 400 to 500 ft. away. The noise is better today than it was several years ago. Attorney Markey stated his client has spent several thousand dollars to curb the noise and efforts area being made to shield the noise.

Ms. Loretta Price stated she has only been in her home for 3 years after retiring to Westport because the location was very quiet. Ms. Price and her husband built a deck on the back of their home to be able to enjoy their backyard. At this point, Ms. Price stated she does not need an alarm clock to get up because she can't sleep past 7:00 AM due to the noise coming from Excel and the noise is just getting worse.

Mr. Ron Price stated he submitted new information that was taken with the new equipment on Excel's property. The noise measures that are noted in the information he submitted to the Board were taken from his deck. The noise seems to be coming from the crane and the magnet used to load the material. The noise is not getting better.

Mr. Ed Vieira said the new green machine is to stockpile material higher. The claw can't be opened inside the trailer when loading so the material has to be dropped from a certain height. There are now 4 excavators, 2 loaders, 2 box trucks, 2 tractor-trailers and 2 dumpsters on the property. The traffic is nonstop and the noise is ridiculous. Mr. Vieira stated he used to hang around with Mr. Moniz's son, Thad on the property. Mr. Moniz used to drain oil from the vehicles with a pickaxe and would use a rag to pick up any oil on the floor and just discard it in a barrel. There was no special method to dismantle a car. Mr. Vieira stated he was very familiar with the place and as for the three people, who gave statements, they also own small auto body shops in Town.

Mr. Moniz stated he had dumpsters coming to the property to remove material forever.

Mr. Moniz stated he purchase 12 dumpsters while he was in business to keep up with the scrap metal. Mr. Moniz stated there also were tractor-trailers that came and took material away and he also processed steel on his property. Mr. Moniz stated he could not afford a magnet but proceeded to explain how he processed steel. Mr. Moniz said that Mr. Costa did not have any more trailers than he used to have. Mr. Moniz stated he used to alternate between scrapping metals and cars, depending on what was worth more. Mr. Moniz also stated he did not understand the wholesale / retail end of this conversation. Mr. Moniz stated he did it all.

Ms. Carol Mann stated that when Mr. Moniz was doing his business, no one ever heard anything except the crusher, now the noise that is coming from Excel is earth shaking.

Mr. Marty Costa stated that in 2005 he was operating under a lease agreement and he operated that way for the first two years in business with no complaints; now, Mr. Costa stated he is doing less business and there are complaints. Mr. Costa stated he did not understand it.

Mr. Coutinho asked Mr. Costa, from 2005 to present, is there more or less tonnage and is there more or less equipment on site. Mr. Costa stated he was working on a smaller margin being earned. As for tonnage, it has not increased from 2005 to today and the equipment has been upgraded to be more efficient to work on a smaller margin.

Mr. Jonathan Costa stated from 1997 to 2003 a loader has been upgraded and in 2009 an excavator was upgraded.

Attorney Markey stated the first time this issue became public was when his client had a public hearing before the Board of Selectmen for a license transfer.

Mr. Coutinho stated that he was trying to come to a balance between what he has heard from the Attorney, the abutters and the applicant. Mr. Coutinho stated he asked for a list of equipment from 2005 to today. Attorney Markey stated the only difference is the dumpsters, and that is the fact that Mr. Costa now owns his own but he has replaced existing dumpsters from Mr. Moniz.

Ms. Fernandes asked Mr. Moniz that when replacing the old equipment with upgraded equipment, has the old equipment been removed from the property. Mr. Costa stated the old machines are still there and operational if needed. Mr. Costa stated he does not crush cars now, they are baled. Ms. Fernandes stated that all the equipment, old and new, could potentially be used for business. Mr. Costa stated yes.

Mr. Vieira stated to the Board, that he heard other junkyard licenses want the same scrap metal license as Excel if it is granted. Mr. Vieira then questioned how a license could be transferred from Route 177 to Charlotte White Road without a hearing.

Attorney Quirk stated the Building Inspector would have to look at other applications, which are not before us at this time; the Board is only dealing with the application here tonight.

Mr. Price stated that Excel was violating ordinances and bylaws but continuing to operate but he is still continuing to operate. There is standing water and junk piles with amazing height. There is a traffic safety hazard. Mr. Price also asked if the additional property was going to be grandfathered also. In other cases, once land was separated, it lost its' grandfathering.

Attorney Quirk stated that was an important issue and is referred to "Doctrine of Infectious Invalidity", when creating a new lot, each lot must have its' own Section 6. There are enforcements for what Mr. Price mentioned and that enforcement is by other boards.

Mr. Coutinho stated if there are violations of the Town By-laws, a complaint should be made to the proper enforcing agents in the Town.

Mr. Harrison said the Board received a number of letters and notes from people and abutters; and there is quite a bit of material.

Ms. Fernandes stated if an onsite is conducted and the property is viewed, could there a limit on the equipment allowed on the property. If the Board has no jurisdiction over things like this, why do an onsite.

Mr. Harrison asked Attorney Quirk if Board members have the right to observe the property without an onsite.

Attorney Quirk stated that if a Board members goes alone to observe the site, they must record their observations as to whether there is a change or an increase; should the Board go as a group, they must post a meeting.

Mr. Tripp stated that after the last hearing, he parked his truck outside of the business at two different times. There were no great noises and this was at about 10:00 AM.

Ms. Fernandes said that she also parked and observed for a while and there was not much noise. Ms. Fernandes stated she parked on Kelsey's Way and spoke with a neighbor there. The neighbor said there was noise but not anything that bothered her. Ms. Fernandes noted that at 4:00 P.M. all noise and work seemed to cease; also, she did not observe any traffic situations.

Ms. Lambert stated she observed the site at around 7:15 and 9:00 A.M. and the only noise she heard was the beeping of the vehicles backing up.

Mr. Coutinho stated he is a proponent of onsite visits but in this instance, this may not educate us but we may be educated for use in the future. This onsite won't give us the full breath.

Mr. Harrison stated he assumed the noise levels are not always continuous due to this being a multifunction operation. On occasion, in the rest area on Route 88, there are

scrap trucks parked; are they parked there in an attempt to avoid blocking traffic while waiting their turn at Excel.

Mr. Coutinho asked Mr. Costa how that is handled.

Mr. Costa stated that normally everything is scheduled to avoid confusion and accidents. Attorney Quirk stated that a demonstration of the equipment at the onsite is permissible with the neighbors being aware of the demonstration, so they may make their own observations as to whether that is the noise they are experiencing. After the onsite, the Board or Zoning Enforcement Officer can check with the neighbors to see if what they heard or felt was typical.

Mr. Marty Costa stated the noisiest is the magnet, which drops material about 15 ft; as for the grappler, it goes into the container to fill it.

Mr. Vieira asked that the cutting shears be demonstrated as to how noisy it is going through a steel beam.

Mr. Jonathan Costa stated of course it makes noise, Mr. Moniz used to cut beams with a torch.

Mr. Costa stated he extends an invitation to the Board members to demonstrate the equipment and the dropping of the material, etc.

Mr. Harrison asked Mr. Vieira to submit a list of the equipment that he knows of on the property.

Mr. Coutinho also asked Mr. Vieira to try to be available for the day of the onsite at his own property so the Board will have someone to check with as to what they experienced on that day and whether it was typical as to what takes place in regards to noise and shaking.

Mr. Harrison also asked the Zoning Enforcement Officer to be available for the onsite.

**Motion** made by Mr. Coutinho to set an onsite visit to Excel Recycling, 37 Charlotte White Road for Saturday, September 26, 2009 at 9:30 AM. Second by Ms. Lambert. The Board voted unanimously in favor.

**Motion** made by Mr. Coutinho to continue this hearing to Wednesday, October 7, 2009 at 7:00 PM in the Westport Town Hall. Second by Ms. Lambert. The Board voted unanimously in favor.

Mr. Harrison stated that the material would be submitted by Town Counsel one week prior and available to anyone interested. This hearing was closed at 9:35 PM

### **Consider**

1. Approval of meeting minutes was held until next meeting.

### **Correspondence Received**

1. No action was taken regarding a letter from the Selectmen's Office for Special Town Meeting.
2. Mr. Souza stated he issued a "Cease & Desist" at 488 Drift Road, a farm that is being used as a depot for 3 sanitation trucks. Mr. Souza advised the owners they needed to apply to the Board of Appeals. This application should be coming before the Board.
3. Mr. Souza stated he advised the owners of 1380 Drift Road, that they needed to apply for a variance to the Board of Appeals. The owner presented a plan for a proposed garage, showing 23 ft. from the road. Mr. Souza stated that in using the 250-ft.

average rule for setbacks, the best setback was 30 ft. from the road. This application should be coming before the Board.

4. A "Zoning Action Report" was received for informational purposes only. No action was taken.
5. No action was taken regarding an informational packet received from Briggs's Landing.
6. **Motion** made by Mr. Coutinho to set Wednesday, October 28, 2009 at 7:00 PM in the Town Hall to hear two new filings: 1344 Main Road and 1065 Horseneck Road. Second by Ms. Lambert. The Board voted unanimously in favor.

**Motion** made by Ms. Lambert to adjourn the Zoning Board of Appeals meeting at 10:15 PM Second by Ms. Fernandes. The Board voted unanimously in favor.

**Adjournment.**

Respectfully submitted,



Diane Pelland, Principal Clerk  
To the Zoning Board of Appeals

**APPROVED:**



Donna Lambert, Clerk