

**BOARD OF APPEALS  
REGULAR MEETING MINUTES  
OCTOBER 6, 2010**

**Members Present:** Clayton M. Harrison, Chairman  
Gerald Coutinho, Vice Chairman  
Christopher Graham  
Kimberley A. Fernandes, Clerk  
Donna Lambert, Alternate  
**Absent:** Kendal Tripp  
William Wyatt, Alternate  
**Also Present:** Ralph Souza, Building Inspector

Chairman Harrison called the Zoning Board of Appeals meeting to order at 6:00 PM in the Westport Town Hall, 816 Main Road, Westport, MA.

**Executive Session – 6:02 PM**

**Motion** made by Ms. Fernandes to enter into Executive Session pursuant to Massachusetts General Laws Chapter 30A, Section 21 to discuss History and Strategy for Excel discussion. Seconded by Ms. Lambert. The Board voted 5 in favor, 2 – absent (Tripp and Wyatt).

**Roll Call Vote:** Mr. Coutinho-aye, Mr. Graham-aye, Ms. Lambert-aye, Ms. Fernandes-aye, Mr. Harrison-aye.

Mr. Harrison announced the Board would return to Open Session following the Executive Session.

**Open Session: 7:00 PM**

**Excel Recycling, LLC** – RE: A continuance of a remand Public Hearing pursuant to an order of remand issued by the Bristol Superior Court in litigation known as Price, et al. V. Excel and Harrison, et al, Bristol Superior Court C. A. No. BRCV2009-01602, regarding the application of Excel Recycling, LLC, 37 Charlotte White Road, Westport, MA for an Administrative Finding that the current use of 37 Charlotte White Road is not an alteration/expansion of a non-conforming use; or if an alteration/expansion is found to exist, that the alteration/expansion is not substantially more detrimental than the prior, lawfully pre-existing, nonconforming use, under the Westport Zoning By-Laws Article 4.1.2 and 4.1.3. The property is depicted as Assessor's Map-67, Lot -10. The application and supporting materials are available for inspection at Town Hall in the Zoning Office during regular Town Hall hours.

**Sitting on Petition:** Harrison, Coutinho, Graham, Fernandes and Lambert  
**Attending:** Attorney Ilana Quirk, Kopelman & Paige, representing the Town of Westport.  
Attorney John Markey, representing Excel Recycling  
Attorney Robert Feingold, representing Mr. & Mrs. Price  
**Abutters:** Mr. & Mrs. Price, 323 Main Road  
Carole Mann, 1 Kelsey's Way

There were other abutters present but this was a closed session and no further testimony or information regarding the case was allowed.

**Motion** made by Alternate member Donna Lambert and seconded by member Coutinho to go back into deliberation. 5-0 The Board voted unanimously in favor.

**Motion** made by Member Fernandes and seconded by member Coutinho to accept "Procedural History". 5-0 The Board voted unanimously in favor.

**Motion** made by Member Fernandes and seconded by member Graham to accept "Substantive Findings" thru #14. 5-0 The Board voted unanimously in favor.

**Motion** made by Alternate Donna Lambert and seconded by member Coutinho to agree the hours of operation are being adhered to. Vote 4-1 in favor with Member Fernandes dissenting.

Chairman Harrison mentions the time and the fact we have another hearing scheduled for 7:15 PM. The Board agrees to continue deliberation after the next scheduled meeting with it being 7:20 PM and the next meeting is scheduled for 7:15 PM.

**With it being 7:20 Chairman Harrison calls to order the Zoning Board of Appeals meeting for 42 Cleveland Street at the Westport Town Hall, 816 Main Road, Westport, MA 02790.**

**Manuel Soares, 42 Cleveland Street** – RE: Continued hearing on an application request for a variance to keep and maintain two dump trucks/trailers, four pickup trucks and ten pieces of off-road equipment located at 42 Cleveland Street. Relief is sought from Zoning By-Law Article 4.0-Commercial Use not allowed in R/A District. The property is also known as Assessor's Map 11, Lots 48-60.

Prior to proceeding, the Board confirmed that Ms. Garant had been notified of the hearing and was present at the hearing. Member Coutinho also disclosed that he is a volunteer member of the Board of Directors for the Westport Credit Union and took a vote in the past regarding a foreclosure concerning the Property. He has no current or future responsibility or duty regarding the Property and does not now and has never had any financial interest in the matter. No one voiced any objection to Member Coutinho sitting on the matter and he mentioned that the prior involvement he had was minor and not relevant to the current proceeding and that he can be fair and impartial.

Present and representing the applicant was Dan Aguiar (Senior Project Manager SITEC). Present and representing the abutters, the Paiva's, was Attorney John M. Mitchell. Neighbors Bill and Theresa Plamondon and Mr. and Mrs. Rebello were present and spoke against granting the variance. Mr. Daniel Garant, a direct abutter, spoke in favor of the application, stating that he had no problem with any aspect of the proposed use. The applicant's representative presented the application to the Board. He noted that the Property does not satisfy current dimensional requirements and is undersized and asserted that it cannot be used for a residential use because a conventional septic system and drinking water well cannot be installed at the property. He asserted that this problem is a topographical concern that is causing the applicant a hardship and so variance relief is appropriate. He informed the Board that the proposed use of the Property would only be for passive storage and repairs of commercial equipment and vehicles, not for storage of goods. He stated that there was no septic and there was no plan to add a septic system.

Building Inspector, Ralph Souza asked whether a tight tank could be added and the applicant's representative stated that was a possibility.

Attorney John Mitchell, as counsel for the Paiva's, who are abutters to the Property, spoke in opposition to the project and reviewed the standards for a variance and argued that they have not been satisfied. He also argued that there have been zoning violations in the past at the Property and that there is an existing zoning violation at the Property for which the Town has issued a new cease and desist order has issued; however, Town Counsel opined, citing Dowd v. Board of Appeals of Dover, 5 Mass. App. Ct. 148 (1977) and Fafard v. Reading Conservation Commission, 41 Mass. App. Ct. 565 (1996), that the Board should consider only whether the standards of a variance have been satisfied, without regard to whether a violation exists.

The Board announced that, based the upon advice of Town Counsel, the Board would not consider whether there have been violations of zoning in the past or whether there is a current violation of zoning at the Property and would consider only whether the standards for variance relief have been satisfied.

Ms. Theresa Bouchard of 32 Cleveland Street described the truck traffic on Cleveland Street and how narrow the street system is and stated her concern that the truck traffic is inappropriate and very unsafe for the neighborhood, especially for the small children in the area, including her grandchild. She also stated that she has observed workers at the Property urinating on the ground, in full view of the neighbors, including small children.

Ms. Theresa Plamondon described the current use of the Property as including all of the trucks and equipment that are sought under the applicant and stated that access to the Property occurs at all hours of the day and night, causing constant noise of a type that is not appropriate for a residential neighborhood, including at 2 a.m. and 5 a.m. She stated that the trucks accessing the Property now do so in an unsafe manner, as to speed and turns because they are simply too big and too long. She stated that spray painting of vehicles is undertaken at the Property and that spray booths would be required and are not in place or proposed.

The Applicant's representative stated that only two employees access the Property and that he did not believe that spray painting was or would be occurring. Building Inspector Souza told the Board that has seen 2 to 10 different pieces of equipment at the Property and confirmed that there are no sanitary facilities or water at the Property and that this is not appropriate for a commercial use. He noted that the Property might be eligible under zoning for a single family use under the separate lot protection provision of G.L. c.40A, §6, ¶4; however, he has not confirmed that and any such protection would be subject to the ability of the site to conform to septic and water requirements. The Applicant's representative noted that a tight tank for the commercial use might be possible.

Ms. Pauline Rebello of 6 Cleveland Street noted that she grew up on Cleveland Street and that there are many more houses now than when the existing commercial use begin before zoning was adopted and that an expansion now would be inappropriate due to the increased residential density and the narrowness of the streets that prevent the long trucks from making safe turns. She stated that there are small children in the area and the trucking activity makes it unsafe for them.

Mr. Robert Rebello of 6 Cleveland Street noted that Cleveland Street is too narrow for the long trucks to safely access the Property and stated that the current trucking results in trucks coming

onto his property and that his fence posts have been damaged by trucks hitting them on a number of occasions.

Mr. Garant noted that his father operated long trucks there in the past, bringing them to the Property. Mr. Rebello responded that Mr. Garant operated one of the trucks that hit Mr. Rebello's fence posts on more than one occasion.

Mr. Soares spoke to his application and stated that there are only two employees and that he and his employees use nearby restrooms when needed. He stated that he stays in first gear as he goes down Cleveland Street and he does not drive too fast or unsafely.

A question arose as to the ownership of the Property. Mr. Soares stated he owned the Property and then stated that he was in the process of buying it.

After all parties finished presenting evidence, Donna Lambert, Alternate member **motioned** to close the hearing for discussion, seconded by Member Kimberley Fernandes. The Board voted unanimously to close the public hearing.

The Board discussed the narrowness of the area streets, the increase in residential density, the lack of water and sanitary sewer at the Property and the various standards for granting variance relief.

**VOTE TAKEN: Motion** made by Member Coutinho, Seconded by Member Fernandes. The Board voted 4-1 (with Member Graham dissenting) to deny the variance application because the Board found that the requested relief, to increase the nonconforming commercial use at the undersized parcel at the Property from the storage and maintenance of 4 vehicles to up to 16 vehicles could not be granted without substantial detriment to the public good and without nullifying or substantially derogating from the intent and purpose of the Zoning By-law as the Property is inappropriate for the proposed expansion of the commercial use because the Property is undersized, the street system in the area is too narrow to safely accommodate the trucking activity, the area is densely populated with residential uses, with small children who would be endangered by the truck traffic, and there is no water and sewer at the Property to accommodate the employees.

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**EXCEL RECYCLING** - Resumed hearing at 8:50 PM. Chairman Harrison calls the Excel hearing back to order. Continuing with discussion....

**Motion** made by Member Fernandes and seconded by member Coutinho that the current **Traffic conditions** cause traffic back-ups on Charlotte White Road and the traffic conditions currently caused by Excel's truck traffic creates inconvenience and hazards that are substantially more detrimental than the lawfully pre-existing nonconforming use of the property as Excel's truck traffic on Charlotte white Road is greater than that of the prior nonconforming use. The Board voted 4-1 in favor (with Alternate member, Donna Lambert dissenting).

**Motion** made by Member Fernandes and seconded by member Coutinho that even though Excel has taken measures to assist with lowering the **noise** level these measures are not acceptable and have not been effective in sufficiently reducing and controlling the noise to protect the abutting residences. The Board voted 4-1 in favor (with Alternate member Donna Lambert dissenting).

**Motion** made by Member Fernandes and seconded by member Coutinho to determine that the current **noise levels** generated by Excel are substantially more detrimental than that of the lawfully preexisting nonconforming use of the property. The Board voted 3-2 in favor (with Alternate member Donna Lambert and member Chris Graham dissenting).

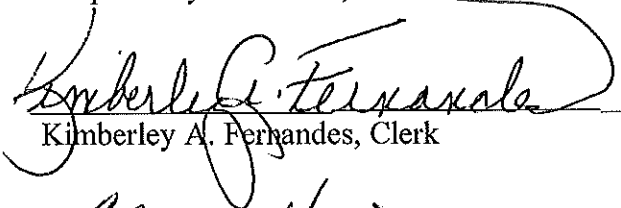
**Motion** made by Member Fernandes and seconded by member Coutinho to determine that Excel's changed use of the property, without conditions imposed is substantially more detrimental to the neighborhood than that of the lawfully preexisting nonconforming use of the property. The Board voted 3-2 in favor (with Alternate member Donna Lambert and member Chris Graham dissenting).

Per the advice of Town Counsel the Board will take the time to review tonight's decision and allow Town Counsel the time to draft a decision for review prior to delivery of the final decision. Next meeting is scheduled for October 27, 2010 at 6:00 PM.

**Motion** to adjourn at 9:55 PM made by Member Fernandes and seconded by Alternate member Donna Lambert. The Board voted unanimously in favor.

#### **Adjournment**

Respectfully Submitted,

  
Kimberley A. Fernandes, Clerk

Approved:

  
Clayton Harrison, Chairman