

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES
WEDNESDAY
SEPTEMBER 20, 2023**

RECEIVED

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WESTPORT ZONING
BOARD OF APPEALS

Members Present: Roger Menard, Chair
Constance Gee
Barbara Pontolilo
Raymond Elias
Cynthia Kozakiewicz
George Stelljes

Absent: Gerald Coutinho, Vice-Chair

Chair Menard called the meeting of the Zoning Board of Appeals meeting to order at 6:30 p.m. with the reciting of the Pledge of Allegiance. He stated that the meeting is being conducted with a quorum present.

Also present was Ralph Souza, Building Commissioner/Zoning Enforcement Officer.

Chair's Announcement - Under MGL Chapter 30A, Section 20(f) - Meeting being recorded.

1. Chair Menard stated that the first matter before the Board was the administrative appeal of Mary Raposo, Owner, and David Raposo, Applicant, from a cease and desist order of the Building Commissioner and the Building Commissioner's determination that the screening of soils is a form of manufacturing and not allowed in a Residential/Agricultural District. The subject property is located at 17 Sodom Road and is shown on Assessor's Map 61, Lots 21R and 21AA-O.

At the outset, Chair Menard stated that the members voting on this matter would be Cynthia Kozakiewicz, Barbara Pontolilo, Constance Gee, Ray Elias and himself, Roger Menard. He also noted that a supermajority of four (4) out of five (5) members must vote to either grant or reject the appeal for it to pass.

Chair Menard explained the procedure that would be followed at this hearing, namely: the Applicant would present his evidence; the Board would ask questions and discuss the information submitted; the Board would open up the hearing to the public for comment or questions; the Board would close the hearing; and the Board would then deliberate and render a determination.

Chair Menard read the notice into the record, stating that the administrative appeal was prompted by a letter issued by the Building Commissioner, stating in pertinent part:

"After review of the Westport Zoning by-Laws Article 4.1, I have determined that the property in question is a pre-existing, non-conforming commercial business in a Residential/Agricultural district which has operated since 1985.

. . .

It is my opinion that the screening of soils is a form of manufacturing and is not allowed in a Residential/Agricultural district, and you must Cease and Desist that portion of the activity."

Addressing the Board for the Applicant was Attorney Thomas Killoran, 350 North Main Street, Fall River, MA, who stated that:

1. He represents the Raposos in this matter.
2. There are approximately 23 acres on the property.
3. Since approximately 1985, JR & Sons Construction utilized the property to park their business vehicles and stockpile materials for the business, which is asphaltting and excavating.
4. The business has a stockpile permit since 2009, which was renewed in 2023. Asphalt material that has been dug up from parking lots or streets is then stored on the premises.
5. Once or twice a year, for approximately two (2) weeks, the Applicant hires A.J. Potter, Jr. & Sons (Len Potter) to grind and recycle the asphalt piles that have been accumulated throughout the year.
6. The business is a pre-existing, non-conforming use for the past 35 years or so.
7. There are abutters in the audience who support the business.

Chair Menard said that the Board appreciates comments from the audience; however, whether the abutters are in favor of the business or not is not relevant to the administrative appeal. The Board must determine whether or not the Zoning Enforcement Officer correctly interpreted the Zoning Bylaw.

Attorney Killoran agreed and said that:

1. Len Potter can provide the history of the processing and any other information that the Board needs.

2. The nearest residence is about 200 feet away.

3. The Applicant is seeking approval of the screening/crushing component of the business is part and parcel of the business that is conducted by JR & Sons Construction at the subject property, which has been in existence for many years, since the 1980s, as a pre-existing, non-conforming use.

Attorney Killoran showed the buildings that were shown on an illustration, explaining the area where the business is conducted, as well as the residences and processing area.

Chair Menard asked Mr. Souza why he had not issued a cease and desist order for the entire business, which is located in and prohibited by a residential area.

Mr. Souza said that the business had been conducted for more than 10 years and the statute of limitations had expired. The sole issue is the manufacturing of the asphalt materials.

Attorney Killoran confirmed that, once 10 years have gone by, then the statute of limitations also expires. He also stated that the screening/crushing is termed as recycling by Mr. Raposo, and this process has been a consistent component of the business the entire time that the business has been in existence.

Ms. Pontolillo asked Mr. Souza what the complaints were by neighbors.

Mr. Souza said that he received a complaint from an abutter of noise during the process of screening.

Chair Menard noted that if what the Applicant is doing is perceived as manufacturing, the Zoning Bylaws do not allow that process in a Residential/Agricultural District.

Mr. Elias said he researched the definitions of recycling and manufacturing and they are different. He stated that the term "recycling" is not mentioned anywhere in the Zoning Bylaws. Mr. Elias noted that the materials are being brought in, they are then processed/recycled and then brought out.

Chair Menard said that that process is considered to be manufacturing.

Mr. Elias said that materials are not being "manufactured" on the property.

Ms. Kozakiewicz noted the definition of manufacturing in the Zoning Bylaw is to bring something into being by forming, shaping, combining, or altering materials, and that it seemed that the materials were being altered on the premises. She also stated whether, the Applicant living on the premises, provided the business with an exception. Chair Menard did not believe so.

Attorney Killoran said that the business has been conducting the screening process for 35 years.

Mr. Elias said he reviewed the GIS records on 2009, 2012 and 2022 and the stockpiling and construction activities are shown to be at that location; however, recycling is not noted anywhere in the Zoning Bylaws.

Mr. Souza stated that if the business has been in operation for more than 10 years, it may be considered a prior non-conforming use and, therefore, allowed by the Bylaw.

Chair Menard asked if anyone in the audience would like to make a comment.

Len Potter of A.J. Potter, Jr. and Sons, 604 Main Road, Westport, MA confirmed that he has been crushing asphalt at the location for many years, as far back as 1988 or 1990. The process typically takes about two (2) weeks.

Antone Vieira, 8 Kelly Avenue, Westport, MA disputed whether the screening of soils is considered manufacturing as screening of soils is conducted by farmers.

Joseph Carvalho, 28 Sodom Road, Westport, MA said that he has lived at his address since 1977 and has been going on for more than 10 years; the recycling is done in the rear of the property; typically operates between 8:00 a.m. and 4:00 p.m.; and he has no complaints and supports the business.

David Raposo, Applicant, said that the processing starts around 8:00 a.m. and rarely works on Saturdays.

Ed Thibeault, 41 Sodom Road, Westport, MA said he has lived at his address since 2009 and that Len Potter has been at the business

each year to recycle. He also said that the business does not interrupt his life.

Valerie Martin, 287-289 American Legion Highway, Westport, MA, said that her house is near where the crushing takes place. She is bothered by the noise and the dust that gets into the area where she lives. Although she understands that the Raposos have a permit, she is concerned with silica in the air and the exposure is hazardous. She has sent several e-mails to Mr. Souza since last year and complained not only about the noise but the dust as well. When her mother purchased the property in 1999, cows were in the area where the recycling is currently taking place. She remembers her father making complaints in 2017.

Mr. Potter said that he is aware of the silica dust and any silica derived from the recycling process is handled by water spraying from the water tank on the premises during the processing to meet OSHA standards.

Chair Menard asked whether the Board of Health has been to the location.

Mr. Raposo said no one has from the Board of Health.

Mr. Potter said that OSHA is on the location and observes the process.

Mr. Elias noted that the same process is done at the Potter location on Main Road.

Mr. Potter agreed, but that his location is in a business district.

Valerie Martins said that, even if the machinery keeps dust to a minimum, as she had advised Mr. Souza, the dust derived from the dumping of used asphalt is not kept to a minimum.

Mr. Souza noted that the Raposos have a soil permit from Conservation Commission to dump used asphalt.

Attorney Killoran said that, in the past, the Raposos would buy and sell cows in the rear area of the property, however, there are none there now.

Mr. Raposo said that the area is fenced in.

Mr. Elias recalled that the 2009 GIS showed cows on the property.

Attorney Killoran reiterated that the crushing process has been in operation in excess than 10 years.

Valerie Martins said she did not believe the recycling has been going on for more than 10 years, although the business has been on the property for many years.

Mr. Potter confirmed that the crushing of asphalt has been occurring in excess of 10 years.

Mr. Elias made a motion to close the hearing at 7:03 p.m. Ms. Pontolilo seconded the motion and the Board voted unanimously in favor.

Chair Menard said that the Board will begin with a motion to grant the administrative appeal. If the Board votes to grant the appeal, the determination is that the cease and desist order was incorrectly issued.

Ms. Kozakiewicz noted that the issue is not whether Mr. Souza was correct in issuing the cease and desist order, but that he and the Board required more information.

Mr. Elias noted that the process being conducted by the business is grandfathered to allow its use.

Chair Menard said that any health-related issues should be brought to the attention of the Board of Health.

Ms. Gee said that the Board has heard that the business of recycling has been operating for more than 10 years, which would then be allowed as a pre-existing, non-conforming use. She does not believe, however, that the business of recycling asphalt can be considered agricultural or within the "right to farm" provision.

Ms. Kozakiewicz said that the term "soil" in the cease and desist letter was misinterpreted to mean an agricultural use when, in actuality, it is crushing of used asphalt, which is not an agricultural use.

There being no further discussion, Mr. Elias made a motion to grant the administrative appeal of Mary Raposo, Owner, and David Raposo, Applicant, from a cease and desist order of the Building Commissioner and the Building Commissioner's determination that the screening of soils is a form of manufacturing and not allowed in a Residential/Agricultural District. The subject property is located at 17 Sodom Road and is shown on Assessor's Map 61, Lots 21R and 21AA-0. Ms. Kozakiewicz seconded the motion.

Chair Menard said that an affirmative vote means that the Zoning Enforcement Officer incorrectly interpreted the Zoning Bylaw.

Mr. Elias asked whether the Board could impose conditions as a part of its decision.

Chair Menard said that is not possible to do so on an administrative appeal.

Chair Menard noted that there is more than enough evidence that it has been in operation for more than 10 years, and according to the Zoning Enforcement Officer, if it has been in operation for more than 10 years, it is grandfathered.

The Board voted unanimously to grant the administrative appeal.

Chair Menard said there is a 20-day appeal period from the date of filing of this determination with the Town Clerk.

The hearing concluded at 7:13 p.m.

2. The second matter before the Board is the continued hearing on the petition of Casey Amaral for a variance to continue use of the residential building known as 581-C Drift Road, Westport, MA, which will not be detrimental to the public good, will not impact the integrity or character of the neighborhood, nor negatively impact abutting properties and require no structural changes, and would otherwise cause substantial hardship to the Applicant as mandated by Zoning Bylaw Article 5, Section 5.1. The subject property is located at 581-C Drift Road, Westport, MA and is shown on Assessor's Map 53, Lot 12A.

Chair Menard noted that this matter was continued to tonight to allow members to review the minutes, decisions and videos of the hearings in 2018, which are the subject of this hearing tonight.

Chair Menard started the hearing with providing a brief overview that:

1. The property contains two (2) lots with three (3) structures.

2. In 2018, a variance was requested by the previous owner, Joan Amaral, for side yard relief.

3. At the hearings in 2018, Mrs. Amaral stated that the structure known as 581C Drift Road -- which was being utilized as a rental unit -- would no longer be used as a residence.

4. At the hearings, the Board approved the variance with one of the conditions being that the kitchen be removed from the structure at 581C Drift Road and not be re-utilized as a residence in the future.

5. Thereafter, the Zoning Enforcement Officer attempted to view the structure for compliance, but was not allowed access to the inside of the structure.

6. Mrs. Amaral then sold the property (Lot 1) with the two (2) structures to her son, Casey P. Amaral, the Applicant in this matter.

7. Mr. Amaral has stated that he does not live on the property, nor does he intend to live on the property and he rents out both structures.

8. Mr. Amaral continues to derive income from both structures, which is a violation of the Board's decision of April 2018, as well as the Zoning Bylaws, which prohibit multiple rental/family residences on one (1) lot.

9. In 2018, Mr. Amaral requested that the Board grant him a special permit to convert the structure known as 581C Drift Road into an accessory apartment.

Casey P. Amaral, Applicant, stated that he believes that his mother, in 2018, did not ask that the accessory structure be removed.

Chair Menard and Ms. Kozakiewicz disputed that fact, stating that Sean Leach, Mrs. Amaral's engineer, who was present at the hearings, had suggested the kitchen be removed.

Mr. Elias said that he watched the videos and noted that there was extensive discussion regarding the driveway, splitting the lots, in an effort to help Mrs. Amaral with her problems. Mr. Elias also said that he recalls Mr. Leach stating that the kitchen would be eliminated from the structure. Vice-Chair Coutinho, in the hearing, asked how that would be accomplished. The Zoning Enforcement Officer suggested that the kitchen, bathroom or bedroom could be removed.

Mr. Amaral said he also watched the video and agreed that the condition of removing the kitchen was properly included in the decision.

Ms. Pontolilo recalled that the property was to be sold, which would resolve the issue. The sale did not materialize and, thereby, Mr. Amaral purchasing the property from his mother.

Mr. Amaral said that the property was for sale for two (2) years, but did not sell. He thought that the new owner could move into the main residence and the structure in question would not be an issue.

Mr. Amaral said that Ralph Souza, the Zoning Enforcement Officer, was allowed on the property to do an inspection. He also stated that he admitted to Mr. Souza that, in fact, the structure was being occupied by a renter.

Ms. Gee stated that she was present at the original hearings in 2018 and she watched the videos of the hearings again to refresh her recollection. She noted that Vice-Chair Coutinho had asked if someone was living in the structure. Mr. Leach said "not that I'm aware of," and Attorney John Markey stated that he knew no one was living in the "front one."

Mr. Amaral stated that both Mr. Leach and Attorney Market were incorrect and misspoke in their statements and, in fact, no one was living in the main house, but the structure at 581C Drift Road was being rented out. Mr. Amaral also noted that the person renting the structure is the same tenant since prior to the 2018 hearings.

Chair Menard asked which part of Section 5.1 of the Zoning Bylaws, Table of Use, is the Applicant requesting a variance from. He explained that a variance is granted when there is a hardship related to the land (i.e. topography, soil conditions or shape of such land or structures).

Ms. Kozakiewicz reminded that, in order to continue with the rental of the structure, the Applicant would need a special permit. Therefore, the request for a variance that is before the Board is not proper.

Chair Menard and Ms. Kozakiewicz both disagreed with Mr. Amaral's statement that the use of the structure as a residence is grandfathered in.

Ms. Kozakiewicz said that her research showed that there was a plan dated 1972, filed and recorded at the Registry of Deeds, that denotes the structure at 581C Drift Road as a shed. The plan is signed by the prior owner -- the Applicant's father -- and the Town of Westport. Ms. Kozakiewicz also noted that the issue here

is the structure known to be located at 581C Drift Road and the 2018 decision is what rules here.

Chair Menard said that the Board cannot advise the Applicant as to how to petition for relief. At the last hearing, the Board suggested that the Applicant obtain legal counsel. The attorney attended the last hearing, however, the relief being requested is not proper.

Chair Menard said that this situation is not that clear-cut. Essentially, the Applicant has two (2) single-family residences on one (1) lot.

Mr. Amaral disputed whether the 1972 plan is valid and that prior statements made at the 2018 hearings were untrue, specifically, that his family has a tendency to go "rogue."

Ms. Kozakiewicz showed Mr. Amaral information about prior variances that were requested by the Amarals. Once, in order to obtain a building permit, the plan needed to be designed and recorded, which it was. And, in 1984, a variance was requested to keep the two (2) residences on the property, which is what is being requested at this time as well. The variance in 1984 was denied.

Ms. Kozakiewicz stated that the clarifications that Mr. Amaral is looking for, to revise the statements made in 2018, cannot be made. She noted that there were many inconsistencies throughout the years, including at the 2018 hearings, and perhaps the best avenue to pursue a resolution would be to go to Land Court for clarification. It seems that the Board made decisions on incorrect data provided by the Applicant and her representatives in 2018.

There was brief discussion as to whether a building permit was ever issued at the time the residence that is currently occupied by Mrs. Amaral was constructed. Chair Menard said he does not believe so.

Chair Menard said that the issue here is whether a variance from the 2018 decision is proper.

Chair Menard advised that, once he opens up the discussion to the audience, he will allow new information, not a rehash of the comments made at the prior hearing on August 23rd.

Chair Menard explained that granting a variance is the most difficult of all other relief because of the high standard that an applicant must meet to prove to the Board that granting a variance

is proper. Therefore, granting a variance must be based on specific hardship to the land, not solely a financial hardship, and that there would no other relief that an applicant can obtain.

Ms. Kozakiewicz noted that the Board has no issue with all the structures as they exist on the separate lots. The issue is the condition in the 2018 decision that has not been complied with, several years later. She also noted that, in her opinion, it is suspect whether the grandfather provision is achieved here.

Chair Menard stated that the Board's decision in 2018 negates the grandfather provision because the owner at the time, Joan Amaral, agreed that the structure would not be used as a residence. Further, the decisions follow the property even after change in ownership. If the Board were to grant the variance to allow two residences on a single lot, that lot would forever be allowed to have two residences, regardless of who owns the property.

Chair Menard stated that the members voting on this matter would be Constance Gee, Barbara Pontolilo, Raymond Elias, Cynthia Kozakiewicz and himself, Roger Menard. In order to approve or reject a variance, there must be a supermajority of votes, being four (4) out of five (5).

Mr. Elias asked whether the Applicant can withdraw the petition without prejudice and, then, come back before the Board in the future.

Chair Menard said that withdrawing without prejudice is always an option.

Chair Menard opened up the discussion to the audience.

Antone Vieira, 8 Kelly Avenue, Westport, MA said that he understands what occurred over the years with the information he has learned tonight. He asked whether the Applicant could withdraw his petition to then request a special permit.

Chair Menard said the Board does not make recommendations to an applicant; the request for special permit would trigger a variance; a finding would be the proper relief with a non-conforming use.

Chair Menard stated that the Board's hearings are based primarily on applications for special permits for accessory apartments. He further cited from the Zoning Bylaw the rationale for accessory apartments, one reason being that an older homeowner can remain on the property and allow the accessory apartment to derive rental income.

Mr. Amaral said that he understood the reasons for the accessory apartment, however, for personal reasons, he is not able to move to Westport at this time.

Chair Menard noted that the next step would be for the Board to close the hearing and make a determination.

Mr. Amaral said he would like to withdraw his petition without prejudice and submitted a motion to withdraw his petition without prejudice to the Board.

Ms. Pontolilo made a motion to accept the request to withdraw the application without prejudice. Mr. Elias seconded the motion, which was granted with Roger Menard, Barbara Pontolilo and Ray Elias voting to grant; and Ms. Gee and Ms. Kozakiewicz voting to reject the motion. The motion to withdraw the petition without prejudice was allowed by a majority vote of 3 to 2.

Chair Menard said that he believes that the Applicant needs counsel to be able to prove to the Board that this is a grandfathered use. He also noted that these properties pose many issues that are complicated.

Ms. Kozakiewicz agreed, saying that the withdrawal allows the Applicant to re-file at a later date, requesting relief that may or may not resolve the issues.

Chair Menard reminded the Applicant that any decision made by the Board remains in history with the property.

The hearing concluded at 7:55 p.m.

Administrative Items:

1. Approval of the minutes of the regular meeting of August 23, 2023. Chair Menard made a motion to approve the minutes of the regular meeting of August 23, 2023. Ms. Pontolilo seconded the motion, which was voted unanimously to approve the minutes of the August 23, 2023 regular meeting.

2. Chair Menard said that he was appointed Chair of the committee reviewing short-term rentals with the Planning Board. Mr. Coutinho is also a member of this committee.

3. Chair Menard stated that the Planning Board had requested comment by the Zoning Board on two (2) matters: Subdivision of Marcotte Drive, off of Drift Road, the Board had no comment; and

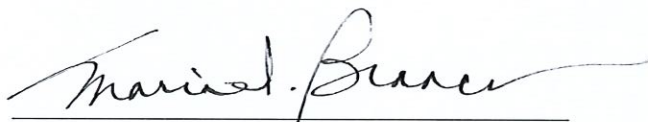
a proposed retail marijuana dispensary at 260 State Road. The Zoning Board asked that the Planning Board keep the Zoning Board advised of a final decision.

The next meeting is scheduled for Wednesday, November 8, 2023.

There being no further matters before the Board, Ms. Pontolilo made a motion to adjourn the meeting at 8:09 p.m. Chair Menard seconded the motion, which was passed unanimously.

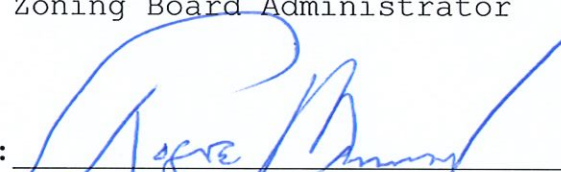
Adjournment.

Respectfully submitted,



Maria I. Branco
Zoning Board Administrator

APPROVED:


Roger Menard, Chair