



Zoning Board of Appeals

December 06, 2016 – 6:04 PM - **Minutes**

New Bedford City Hall, Charles Ashley Meeting Room-1st Floor
133 William Street

PRESENT: Leo Schick (*Acting Chairperson*)

Allen Decker (*Clerk*)

Sherry McTigue

John Walsh

Robert Schilling

ABSENT: Debra Trahan

STAFF: Attorney Kreg Espinola, *Assistant City Solicitor*

Jennifer Gonet, *Assistant Project Manager*

1. CALL TO ORDER

Acting Chairperson Schick called the meeting of the City of New Bedford Zoning Board to order at 6:04 p.m.

2. OLD BUSINESS

ITEM 1: Case #4236 –Continued public hearing on the petition of Anthony R. DeCosta (1861 Shawmut Avenue New Bedford, MA) and Thomas P. Crotty, Esq. (388 County Street New Bedford, MA) for an Administrative Appeal under provisions of chapter 9 comprehensive zoning section 5200 (Zoning Board of Appeals), 5220 (Powers), and 5223 (to hear and decide appeals taken by any person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative

Zoning Board of Appeals

10/27/16

Page 1 of 12

officer under the provisions of M.G.L.A. c. 40A, §§ 7, 8, and 15); relative to property located at 1861 Shawmut Avenue, assessor's map 124 lot 27 in an Industrial-B [IB] zoned district. The petitioners propose to overturn a cease and desist order.

A motion was made (AD) and seconded (SM) to reopen the above-referenced case.

Motion passed unopposed.

A motion was made (AD) and seconded (SM) to note documents previously received by the board, to include aerial images dated April 5, 1994, April 14, 2007, and December 1, 2011 submitted by Patrick Sheridan to the Planning Department on September 2, 2016; a memorandum from Assistant City Solicitor Kreg Espinola dated 9/8/16; material submitted by the petitioner's attorney Thomas Crotty on 9/14/16, including Anthony DeCosta's rebuttal to the 9/8/16 memorandum submitted 9/14/16; a copy of a noise and vibration monitoring summary by Geo Sonics Inc. submitted 9/14/16; a request for continuance from the petitioner's attorney dated 10/24/16; documentation submitted 12/6/16 by the petitioner in support of the overturning of the existing cease and desist order on the property.

Motion passed unopposed.

Board Member Decker stated that his memory of the status of this matter is that after the September meeting, the board was awaiting documentation from both sides regarding specific questions, among questions from Mr. Schilling, and that those have been submitted. He stated the board has not yet been able to have discussion on those, and he believes that is the purpose of this evening's proceedings. He invited both sides to present to the board.

Board Member Walsh stated his understanding is that the primary issue is grandfathering and he welcomed presentation from Attorneys Crotty and Espinola.

Attorney Thomas Crotty stated he had provided a package this evening for the board, including portions of the Geo Sonic study regarding sound measurements at the property. He stated Mr. DeCosta had spoken to area neighbors who had voiced complaints. He stated Mr. DeCosta had a petition signed by some twenty neighbors expressing support. Attorney Crotty stated that notice was given to all abutters to Mr. DeCosta's property by the Conservation Commission on a related project, and that of the 5 residential abutters, 4 signed the petition in support. Attorney Crotty added that the resident who did not sign, Tom Welch, is an assistant building inspector.

Attorney Crotty referenced a letter from Charon Associates provided to the board describing the Conservation Commission project is essentially designed to address some neighbor complaints in a good faith effort by Mr. DeCosta. He stated the project is stalled due to the city not cooperating in allowing work on the wetlands belonging to the Airport Commission.

Attorney Crotty stated the legal issues are and are not about grandfathering. He stated that in 1963 the Shawmut Avenue property, a farm for many years, was purchased by Mr. DeCosta's father, at which time he started A-1 Asphalt. Attorney Crotty stated that the zoning ordinance at the time provided that any lawful use was allowed in that zone. He stated that the use started out as a contractor's yard. Attorney Crotty stated a contractor's yard is still an allowed use. He stated that as such, to some extent that is not a grandfathering issue. He represented that grandfathering is trying to use property for an unallowed use.

Attorney Crotty stated that in the 1980's Mr. DeCosta's father began bringing in demolition debris, and in the 1990's began crushing the same. He stated that that is a grandfathering issue, because it was an allowed use in the 1980's and 1990's, and in 2003 the ordinance was amended to prohibit crushing stone.

Attorney Crotty stated that essentially what it comes down to is whether those uses, which were allowed uses at the time, are somehow not allowed uses due to the Building Department's contention of failure to obtain a use permit.

Attorney Crotty stated that the Building Department is not addressing the specific neighbor complaints of dust, noise and vibrations. He stated the specific cease and desist order addresses the fact that A-1 Asphalt in 1963 did not obtain the use permit the Building Department says it should have gotten. He stated that regardless of noise, dust or vibrations, the Building Department is seeking to put Mr. DeCosta out of business because he did not get the so-called use permit.

Attorney Crotty referenced his September memo addressing the language relied on by the Building Department, also found at the end of the documents submitted this evening, wherein he quoted the provisions of the 1963 ordinance, which is what this case is all about.

Attorney Crotty read into the record the 1963 ordinance. He then stated that when Mr. DeCosta's father began A-1 Asphalt, at what was originally a farm, the property contained a garage building that was permitted in the 1930's. He stated that no other building was constructed or altered. He stated that in 1963, when Mr. DeCosta's father began operation, he did so out of that same building. He stated the land was not changed, reduced in size or altered.

Attorney Crotty stated that the ordinance makes clear that if you build, change or move a building, or if you reduce the size of the lot, then before resuming use you must come to the Building Department and get certification that the changed property conforms to the ordinance. He stated the ordinance does not speak to a property not changed or altered, as in this case where there was a prior allowed use and a different allowed use was started. Mr. Crotty stated the language from the Building Department indicates Mr. DeCosta was supposed to have gotten a use permit even though they made no changes to the property. Attorney Crotty disagrees with that position.

Attorney Crotty stated that at the last hearing, the Building Commissioner indicated that if there was a provision requiring a use permit, he would have some discretion to deny the use permit if he was not satisfied, regardless of whether it was an allowed use. Attorney Crotty stated that is not the law, according to SCIT v. Planning Board of Braintree. Attorney Crotty stated the ordinance is a general ordinance covering all property, and assuming that each time you began using a property you had to go to the Building Department to get a permit for that use, and assuming that the Building Commissioner said I have discretion and I can say no, the SCIT v. Planning Board of Braintree case says no, you cannot do that; that there are zones and allowed uses in those zones which are allowed, and there is no discretion absent a special permit requirement.

Attorney Crotty stated that regarding the absence of a permit, even if there was a requirement for a use permit every time you changed the use of a property from one allowed use to another, the permit would have to be granted. He stated there is no evidence that when Mr. DeCosta's father started A-1 Asphalt in 1963 what he was doing was not in conformance with the ordinance. There's no evidence the Building Inspector could have denied him the right to that permit. He stated that on the evidence before the board, the permit would have been mandatory. He stated where the permit is mandatory and would have been granted anyway, the use is not illegal, according to Derby v. Chelsea, as cited in his memo. He stated that if it is a ministerial act to give him the permit, then the use itself is not illegal. Attorney Crotty again stated that even today, the use of the property as a contractor's yard is not illegal and there is no evidence it is not in conformance with the ordinance.

Attorney Crotty stated the only issue beyond that is the stone crushing, which the very same issues apply to, in addition to grandfathering, because though made illegal in 2003, it was not before then.

Attorney Crotty suggested that the Building Department is going for the brass ring, rather than addressing the real issue of the neighbor complaints and what can be done to help them. Mr. Crotty stated their engineer submitted a project to the ConCom [Conservation Commission] to address those neighbor complaints and the Building Department is saying 'let's just shut down the business because of this use permit they didn't get back in 1963.' Attorney Crotty stated that is unfair to Mr. DeCosta and the neighbors that support him, as well as to a city with such high unemployment.

Attorney Crotty stated the board should reverse the cease and desist order and tell the Building Department to go back to the drawing board and address the neighbor issues that have been raised, rather than try to put this company out of business. Attorney Crotty welcomed questions.

Board Member Schilling stated his understanding is that in 1963 it was an Asphalt Company. And leaving aside the question of whether there had to be a permit some 53 years ago, some documents indicate that in the past few years it has become an aggregate recycling plant.

Attorney Crotty stated that the company began doing that in the 1990's and has not changed in terms of the nature of what they do. He stated they had a stone crushing machine and a sorting machine back in the 1990's. He stated that at various times, depending on the businesses providing these materials, sometimes there would be more of that and other times less. He stated that a few years back there were ten people employed, some doing blacktop, some doing the stone aggregate crushing. He stated that presently there are seven, indicating the volume of that business has gone down.

Board Member Schilling inquired whether Attorney Crotty was referring to the volume of the asphalt or the crushing. Attorney Crotty stated he believed it was the crushing. After consulting with Mr. DeCosta, Attorney Crotty stated both. Attorney Crotty stated he believed most of the stone crushing volume was from when they did the airport runways.

Board Member McTigue inquired as to whether A-1 had received an RCC [Recycling, Composting, Conversion] permit. Attorney Crotty stated that he believed Rick Charon, the engineer, was working on it.

There being no further questions for Attorney Crotty, Attorney Kreg Espinola, Assistant City Solicitor, addressed the board. He stated that while he appreciates Attorney Crotty's concerns about employing people in the City of New Bedford, which the city takes very seriously, he had just witnessed a distortion of the facts and the law in the matter, which the board has to consider.

Attorney Espinola stated it was not that Mr. DeCosta decided that he was going to be a good neighbor and contact ConCom and build a berm for the neighbors to protect them from the noise and the dust. He stated Attorney Crotty omitted the fact that A-1 received a letter from the Department of Environmental Protection (DEP) in 2014 indicating that in fact he was in violation, not having received the necessary aggregate recycling permit in order to operate the type of business he was operating.

Attorney Espinola stated he had spoken with Colleen Ferguson from the DEP who said that the requirement goes back to 1991. He stated that A-1 is playing a game of catch me if you can. Attorney Espinola stated that relying on his memorandum, A-1 was supposed to get a building permit in 1963, and Mr. DeCosta failed to do so. He stated that in 1981 A-1 stated they started taking in truckloads of stuff. They were supposed to get a permit from DEP and failed to do so. Attorney Espinola stated that in 2001 A-1 stated it started crushing rock, and again, failed to get the permit from the DEP. Attorney Espinola asked the board to consider the letter from DEP to A-1 explicitly stating that he is required to get the aggregate recycling permit from the DEP before he can operate. Attorney Espinola stated that Mr. DeCosta has been operating, by his own measure, 15-20 years illegally, and now wants to come before the board and say the reason he's building a berm is for the neighbors. The fact is that DEP is forcing him to comply with their regulations and he has failed to do so up until this point in time.

Attorney Espinola cited the case of Oakham Sand & Gravel Corporation v. the Town of Oakham. He stated that Page 3 of Attorney Crotty's August memorandum states this is a prior non-conforming use. Attorney Espinola stated that even assuming the non-conforming use is legal, which Attorney Espinola asserts it is not, in order to maintain the prior non-conforming use he cannot expand the operation, and that any significant extension or expansion of the use results in the use then becoming illegal. Attorney Espinola stated the reason for this is to put the neighborhoods on notice of what will be happening in their neighborhood, and that is what the permit application does. He stated that is not what A-1 has done. He stated that A-1 at every step has failed to apply for or receive any permit that they were required to obtain to operate that business. Every step.

In rebuttal, Attorney Crotty stated that what is before the ConCom is a wetlands case and notice of intent, where they not only address wetlands issues, but also add the complaint of the dust issue. He stated Mr. DeCosta is proposing mud traps so the trucks can be cleaned off as they exit the property, as well as a berm to address the sound and noise complaints from neighbors. He stated this seeks to reduce the noise even further than what is indicated in the acoustic survey. Attorney Crotty stated those do not have to be put into a ConCom wetlands application. He stated Mr. DeCosta also sought to address the neighbor concerns. Attorney Crotty stated that Mr. DeCosta was not forced by DEP to apply for those things; rather, Mr. DeCosta added them voluntarily.

Attorney Crotty stated that with regard to DEP or ConCom, those are not zoning issues and are not before this board; that they are not the jurisdiction of this board. He stated it is also not the basis of the cease and desist order, which only raises the issue of the failure to obtain a use permit in 1963. He stated the DEP and ConCom issues should not form the board's basis in denying Mr. DeCosta's appeal here, as they are totally irrelevant to this case.

Attorney Crotty stated that the prior non-conforming use issue, again, is not the basis of the cease and desist order. He stated that if the issue was the expansion of the non-conforming use, the cease and desist order should address that, and it did not. He stated that the Building Department is focusing solely on a piece of paper that Mr. DeCosta or his father was supposed to have gotten sometime in the past. Attorney Crotty stated he relies on his previous arguments that the ordinance does not require it.

In rebuttal, Attorney Espinola stated that in 1981, when the operation changed, A-1 would have had to receive a determination from the Department of Environmental Protection (DEP) in order to proceed with their business. Even forgetting 1963, which Attorney Espinola stated he feels is important in that A-1 was required to get a building permit and failed to do so, in 1981 A-1 was required to get a determination of whether that site was feasible for that type of activity, and Mr. DeCosta failed to get that determination. Attorney Espinola stated that in 1991, Mr. DeCosta should have gone to DEP for a determination of whether or not that site was feasible for the operation, and again failed to do so. And in 2001, he failed to do so. Attorney Espinola stated that Attorney Crotty's memorandum relies on a statute that ultimately indicates that this ministerial act of getting a permit back in 1963 would have had to have been stamped off by the Building Commissioner. Attorney Espinola stated that Attorney Crotty omits the provision of that statute that states "otherwise lawful". Attorney Espinola stated that would mean that if you were in violation of the DEP regulation, indicating you cannot operate such business, then you are not otherwise lawful. You are twice lawless.

Attorney Espinola stated that again and again A-1 has gone rogue and failed to get any permit required by either a city or state agency. He stated there is no targeted enforcement action or conspiracy against A-1. Attorney Espinola reminded the board that they had heard from the neighbors concerning what this has caused in their neighborhood. He stated his memory is that when brushing their teeth the cup in front of them was shaking. He stated that A-1's continued expansion over 30 years and their failure to follow the rules everyone else must follow is the reason this has come up.

Board Member Walsh moved that the hearing be closed. There being no further board questions, Acting Chairperson Schick declared the hearing closed.

Board Member Schilling stated he was somewhat troubled that there was a 53 year old violation just coming to the forefront. He stated he was also troubled by the amount of expansion since 1981 that may be legitimate grounds for a cease and desist order. He stated if the cease and desist order was unartfully drawn and referred only to the 1963 matter, it still seems there would be grounds for a cease and desist order based on the expansion of business and the change from merely an asphalt company to a business that crushed stone 5-6 days a week.

Acting Chairperson Schick agreed. He stated it seems there was a disregard for getting the proper approvals and certificates.

Board Member Walsh stated he agreed this was a dry legal issue, which is not complicated. He stated the law must be followed without consideration of equity. He stated he had watched the original hearing and read the materials, and the issue was the neighbors were complaining about the expansion in the use of the property. He stated the neighbors seemed to be complaining about the stone crushing and demolition, and the problems that was causing. Attorney Crotty indicates that that was a pre-existing non-conforming use. Board Member Walsh stated that in his research, he had come across the same case as Attorney Espinola. He stated that the Oakham case states that once there is a substantial change or extension of the non-conforming use, the resulting use must comply with the current zoning by-laws to avoid becoming an illegal use. Board Member Walsh believed the simple question before the board was that based upon neighbors' complaints and the expansion, has the activity at that site made the pre-existing non-conforming use into an illegal use. He stated that based upon the testimony he had viewed from the prior meeting, he is inclined to believe the expansion has made a pre-existing non-conforming use now an illegal use.

Board Member Schilling stated in that case, the cease and deist order should have said 1981, rather than 1963. Board Member Walsh disagreed that the wording was a concern.

Attorney Espinola stated that Number 2 of the cease and deist order does specify the rock and concrete crushing operations.

Mr. Decker made a motion, seconded by Ms. McTigue to accept as part of the case file the case of Oakham Sand and Gravel Corporation v. the Town of Oakham. Motion passed unopposed.

Board Member McTigue inquired if the property had received a cease and desist, can it revert back to the legal use of a contractor's yard.

Attorney Espinola stated that Mr. DeCosta could apply for a permit, which he has not yet done.

Attorney Crotty stated that the Building Commissioner attorney should not be advising the Zoning Board on legal matters. He stated that did not constitute a fair hearing.

Acting Chair Schick reopened the hearing and the board allowed Attorney Crotty to speak briefly.

Attorney Crotty stated that the issue of whether A-1 even needed a use permit is before the board to decide; not for you to be instructed that he needs a use permit.

Attorney Crotty stated the Building Department raises the issue of non-conformity, which Attorney Crotty claims the cease and deist order does not actually address. He added that the contractor's yard is even currently an allowed use, and regardless of the board's decision it is an allowed use and Mr. DeCosta has the right to do it. He stated the issue of grandfathering is also not addressed in the cease and desist order, and he believes on appeal a judge will say that the issue was not even raised. Attorney Crotty again suggested going back to the drawing board and rewrite a cease and desist order that raises these issues.

Board Member Decker explained that in order to make the motion the board needed to state facts that they have found in the case in order for the cease and desist order to be overturned.

Board Member Decker read into the record the items on the cease and desist order, namely:

- Failure to obtain a building permit for any structure associated with the operation of A-1 Asphalt Company
- Failure to obtain the required permit for a contractor's yard
- That the rock and concrete crushing operations and the crushing and recycling of other materials are not permitted activities in a contractor's yard

Board Member Walsh expressed that what weighs heavily on his vote is the rock crushing operation. He said that in his understanding there was a permit prior to 1963 for a contractor's yard. He believes it is undisputed that the rock crushing operation was a pre-existing non-conforming use. He stated the other fact he considers important, is the abutters, who, to his memory, stated at the last hearing that there had been a substantial increase in the rock crushing operation. He felt the board needed to come to a consensus on what facts they find.

Board members discussed how to make the motion for the case.

Attorney Espinola clarified that in 1932 there was a permit for a garage only.

Board members discussed if the permit issued in 1932 was for a contractor's yard or not. Board Member McTigue stated electric permits had been pulled but not building permits.

After further board discussion on motion content for the administrative appeal, Board Member Decker welcomed an offer from Board Member Walsh to present a motion.

A motion was then made by Mr. Walsh and seconded by Mr. Decker that with regard to Case #4236 to approve the administrative appeal as follows: that the cease and desist order issued by the Commissioner of Inspectional Services be overturned and that the appeal of the petitioner be granted per the administrative appeal process under provisions of Chapter 9, Sections 5200, 5220 and 5223

relative to property located at 1861 Shawmut Avenue, Assessors Map 124, Lot 27 in an Industrial B zoned district.

Having reviewed this petition in light of the City of New Bedford Code of Ordinances, Chapter 9, above cited sections, and under the provisions of MGL Chapter 40A, Sections 7, 8 and 15 the board finds the following facts:

- That A-1 Asphalt began using the property at issue as a contractor's yard in 1963;
- That A-1 Asphalt began operating a stone crushing operation at the property in the 1990's;
- That as a result of an ordinance that took effect in 2003, the stone crushing operation became a pre-existing non-conforming use;
- That since that time, there has been a substantial increase in the stone crushing operation at that property.

Ms. McTigue inquired if the references to the code need be based on the cease and desist order, as she believed she had heard different code section numbers in the motion than those listed in the order.

Board Member Walsh stated that his individual decision would be based on the third prong of the cease and desist order.

Board Member Walsh amended the motion to include, in addition to the ordinance sections cited, Sections 5100, 5110, 5120 and 5130. Chairperson Schick clarified that a vote in the affirmative will overturn the cease and desist order.

Roll-call vote as follows:

Board Member Schilling - No

Board Member Walsh - No

Acting Chairperson Schick – No

Board Member McTigue – No

Clerk Decker– Yes

Motion failed 1-4

3. ADJOURNMENT:

There being no further business to come before the board, the meeting was adjourned at 7:05 p.m..

Next meeting – December 15, 2016