



City of New Bedford
ZONING BOARD OF APPEALS

CITY CLERKS OFFICE
 NEW BEDFORD, MA

2016 DEC 20 A 9:21

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 Massachusetts 02740
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CITY CLERK

JONATHAN F. MITCHELL
 MAYOR

NOTICE OF DECISION

Case Number: #4236				
Request Type: Administrative Appeal				
Address: 1861 Shawmut Avenue				
Zoning: Industrial B Zoned District				
Recorded Owner: Anthony R. DeCosta				
Owner's Address: 1861 Shawmut Avenue New Bedford, MA 02747				
Applicant: Thomas P. Crotty, Esq.				
Applicant's Address: 5 Dover Street Suite 102 New Bedford, MA 02740				
Application Submittal Date	Public Hearing Date			
May 31 st , 2016	July 21st, September 1st, September 22nd, October 27th, November 17th, and December 6th, 2016			
Decision Date				
December 6 th , 2016				
Assessor's Plot Number	Lot Number(s)	Book Number	Page Number	Certificate Number
124	27	5664	303	

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 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.

Action: Denied, for the reasons set forth in the attached decision. (See Attachment)

A copy of this Decision was filed with the City Clerk of the City of New Bedford on December 20th, 2016. Any person aggrieved by this decision has twenty (20) days to appeal the decision in accordance with the procedures set forth in Section 17 of Chapter 40A of the General Laws of Massachusetts.

Dec. 20, 2016
 Date

Allen D. Decker
 Clerk, Zoning Board of Appeals

1.) APPLICATION SUMMARY

The petitioners propose to overturn a cease and desist order which requires 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 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.

2.) MATERIALS REVIEWED BY THE BOARD

Plans Considered to be Part of the Application

- Plan of Site Improvements, drawn by Charon Associates, Inc. , last revision date April 26th, 2016, date stamped received by City Clerk's Office May 32nd, 2016 including:
 - Drawing no. L-1
 - Drawing no. L-2
- Plan of Site Improvements, drawn by Charon Associates, Inc., last revision

Other Documents & Supporting Material

- Completed Petition for a Special Permit, stamped received by City Clerk's Office May 32nd, 2016
- Letter to ZBA from the Commissioner of Buildings & Inspectional Services, Danny D. Romanowicz, dated June 30th, 2016.
- Staff Comments to ZBA from Department of Planning, Housing and Community Development, dated July 20th, 2016.
- Letters from abutters Gregory Siriois, Jacqueline & James Kummer, Andrea & Thomas Welch, received by the Zoning Board July 21st, 2016
- Exhibit Submitted by Petitioner, received by Zoning Board July 21st, 2016
- Sections of City Code Concerning Industrial B districts and enforcement thereof, received by Zoning Board July 21st, 2016
- 1963 New Bedford Code Sections, submitted by Commissioner of Building & Inspectional Services Romanowicz, received by Zoning Board July 21st, 2016
- Correspondence from the Office of the City Solicitor, dated August 26th, 2016, received by Zoning Board September 1st, 2016
- Letter from Conservation Agent dated August 29th, 2016, date stamped received by Zoning Board September 1st, 2016
- Letter of Interest from Patrick Sheridan of 1194 Old Plainville Road dated August 21st, 2016, received by Zoning Board September 1st, 2016
- Memorandum from Petitioners Attorney, Thomas Crotty, Esq. submitted August 19th, 2016, received by Zoning Board September 1st, 2016
- Aerial Images Dated April 5, 1994; April 14, 2007; and December 1, 2011; submitted by Patrick Sheridan to Planning Department September 2, 2016
- Memorandum from Assistant City Solicitor Kreg Espinola dated September 8th, 2016
- Anthony DeCosta's Rebuttal to the September 8th, 2016 Memorandum, submitted September 14th, 2016

- Copy of a Noise and Vibration Monitoring Summary by Geosonics, Inc., submitted September 14th, 2016
- Request for continuance from the Petitioners Attorney, dated October 24th, 2016
- Documentation submitted December 6th, 2016 by the petitioner in the support of his overturning the existing cease and desist order on the property
- Case of Oakham Sand and Gravel Corporation v. the Town of Oakham, submitted by John Walsh, received by Zoning Board December 6th, 2016.

3.) DISCUSSION

On the evening of the July 21st, 2016 meeting, board members: Debra Trahan, Allen Decker, Robert Schilling, Sherry McTigue, and Leo Schick were present for the public hearing. City of New Bedford staff: Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services), Kreg Espinola (Assistant City Solicitor), and Jennifer Gonet (Assistant Project Manager, Planning Division) were present during proceedings for the subject case review.

Mr. Decker made a motion, seconded by Mr. Schick to receive and place on file the communication from the Commissioner of Buildings & Inspectional Services, Danny D. Romanowicz, dated June 30th, 2016; communication from the Department of Planning, Housing & Community Development, dated July 20th, 2016; the appeal packet as submitted; the plan as submitted; and, that the owners of the lots as indicated are the ones deemed by the Board to be affected; and that the action of the Clerk in giving notice of the hearing as stated be and is hereby ratified. With all in favor, the motion carried.

Chair Trahan then declared the hearing open.

Mr. Decker made a motion, seconded by Mr. Schick, to receive materials submitted by the applicant at the meeting. With all in favor, the motion carried.

Representative of the petitioner, Attorney Thomas Crotty (current business address of 5 Dover Street Suite 102 New Bedford, MA 02740; previously of 388 County Street New Bedford, MA 02740), stated that A-1 Asphalt had been in business for more than fifty years, started in 1964 by Charles DeCosta, Sr. He noted neighbor complaints about trucks coming back and forth from the property, noise, and dust, are issues not before the board as they are not issues related to zoning or any claim that the nature of the business is a violation of zoning. He stated that in May a cease and desist order was issued to A-1 Asphalt by Mr. Romanowicz, which is the subject to be addressed this evening.

He stated that Commissioner Romanowicz complained that in the past the building department was not notified by the DeCosta family that they were going to run a business and that the nature of the business was going to be an asphalt business, a contractor's yard, which unfortunately gets into some "dry legal issues related to the nature of the zoning laws and ordinances and grandfathering issues."

He noted the applicant's engineer was present to explain the A-1 Asphalt's plans to address neighbor concerns, though those issues are not before the board.

Attorney Crotty stated that in 1932, the previous owner received a certificate of occupancy and a building permit to erect a five-stall garage, which is still being used by A-1. He stated A-1 Asphalt has in the past contracted to do work for the city and the old telephone company. Attorney Crotty referenced permits issued for A-1 in 1973, 1999, and 2000, included in the materials he submitted to the board. Attorney Crotty stated these are relevant because the allegation of the Building Commissioner is that A-1 failed to obtain a building permit for any structures associated with A-1 Asphalt. He noted the existing certificate of occupancy. He noted the only other structure is a hundred year old farmhouse that Mr. DeCosta lives in. Attorney Crotty stated that building permits were obtained. He stated the argument is raised that the business itself needed permits. He stated that any use permit would be grandfathered in. Additionally, the present use as a contractor's yard is still a legal permitted use. Presently, a permit must be obtained for the use. He stated in the 60's you weren't required to tell anybody anything.

Attorney Crotty stated that with regard to the claim that A-1 failed to obtain a permit for a contractor's yard, is a state building code which went into effect ten years after the business started, and as such is also grandfathered in. He stated the zoning ordinance in the 90's allowed crushing stone in a contractor's yard because any lawful use was permitted and so thus, it too is grandfathered in. He stated the Building Commissioner's allegation relate to things that are all grandfathered in.

In response to Chairperson Trahan's invitation to speak or be recorded in favor were the following: Mr. Carmelo Nicolosi of Charon Associates (323 Neck Road Rochester, MA) the engineer who worked on the engineering on the site; and Mr. Anthony DeCosta (1861 Shawmut Avenue New Bedford, MA). There was no response to Chairperson Trahan's further invitation to speak in favor.

In response to Mr. Schilling, Attorney Crotty stated there are seven current employees. Attorney Crotty added there was a volume increase at one point due to A-1's work for the airport. Mr. DeCosta stated that in 2005 there were approximately ten employees.

Chairperson Trahan invited City Assistant Solicitor Kreg Espinola (133 William Street New Bedford, MA) to address the board.

Attorney Espinola stated he disagrees with Attorney Crotty's contention with relation to grandfathering and the zoning ordinances in 1963. He stated that in 1963 there was an ordinance in place that required a permit from the building inspector which A-1 never received. Attorney Espinola stated the initial permit, from the Town of Dartmouth, called for a one story cement block building, the key being that the purpose of a garage five car capacity says nothing about operating an asphalt company or a rock crushing operation. Attorney Espinola advised the board that failing to get a building permit has no statute of limitations. Such permits alert the city as to what is happening in the neighborhoods. A corporation can come in subsequently, even after failing to obtain the initial certificate of occupancy. Attorney Crotty's Exhibit D says wired gas pumps, Charles DeCosta. It says nothing about A-1. So, even in 1973 they are not alerting the building department to what's going on out there. While agreeing with Attorney Crotty that this is a "dry legal issue," the fact remains that one needs to alert the building department by getting a correct building permit. Having failed to do so, they should not be allowed to operate.

Mr. Schilling stated that the cease and desist should have gone out fifty years ago. Attorney Espinola stated that if you don't know what's happening at a place, one would not send a cease and desist.

Chairperson Trahan inquired as to how the matter came before the board. Attorney Espinola stated a number of neighbors had submitted documents for the board's attention.

Commissioner Romanowicz stated in response to Attorney Crotty's representation that the City of New Bedford has always had a building code, and he read from a 1964 copy. Commissioner Romanowicz noted that A-1 was operating without a license from DEP [the Department of Environmental Protection] and eventually had to go to the Conservation Commission, which required Commissioner Romanowicz to submit a letter. This started the research on finding a building permit for the business, which could not be found, and the applicant has not submitted.

Attorney Espinola in response to other issues raised relative to the cease and desist letter, stated that a contractor's yard is allowed in an Industrial B Zone, however rock crushing is not allowed in a contractor's yard. Attorney Espinola submitted the 1963 zoning regulations and directed the board to the enforcement section relative to permits.

Mr. Decker made a motion, seconded Mr. Schick, to accept sections of the city code concerning Industrial B districts and enforcement thereof. Motion passed unopposed.

In response to Chairperson Trahan's invitation to speak in opposition, Ward 1 City Councilor James Oliveira (39 Briarwood Drive New Bedford, MA) stated he had followed the issue for some time and notes a greatly diminished quality of life for the neighbors. He stated the use of the property has changed over time. He stated that while creating new opportunities, a business still has a high degree of social responsibility to the existing area neighbors. He stated there should be a strong consideration on this aspect of the business and he encouraged the business find another place for such operation, so that taxpaying neighbors may once again open their windows in the summer and let their children play outside. He stated he is opposed to the use in place.

Also speaking in opposition was Mr. Gregory Sirois (1930 Shawmut Avenue New Bedford) who stated he is a lifelong city resident and city employee who bought his home in 2002. He stated he visited the neighborhood and was aware he was buying a home near an airport and near A-1 Asphalt. He explained the truck traffic at that time of his purchase. He stated that a few years ago the truck traffic changed dramatically. He noted the many 20 ton dump trucks and tractor trailer trucks coming down the street at over 100 per day. He stated they cannot open windows or go outside and enjoy their property, the business operating from 7:00 am to well after 5:00 pm, as well as Saturdays and some Sundays. He added that houses vibrate from the rock crushing to the point where things fall off the walls. Mr. Sirois told the board the activity has dramatically reduced since that project three years ago but if he's allowed to continue with this activity then there is no doubt that's going to activate again. He stated that this business is not appropriate for a neighborhood. Mr. Sirois further stated the Conservation Commission application was submitted as an aggregate recycling company not A-1

Asphalt. He also encouraged Commissioner Romanowicz to research how many permits were pulled for work in the city to pave driveways.

Ms. Emanuela Mello (113 Falmouth Street New Bedford, MA) explained she lives across from these problems.

Mr. Thomas Welch (1878 Shawmut Avenue New Bedford) stated they were “under siege with A-1 running giant slabs of concrete through his machines and trucks barreling through at high speeds.” He stated it is dirty, dusty and noisy. He felt it was an illegal use that started a few years ago and is a horror. He stated they need help.

Mr. Andrew Savaria (1534 Old Plainville Road New Bedford New Bedford) stated recent roadwork on Shawmut Ave re-routed traffic to Old Plainville Road, and for that three week period he got a taste of the trucks barreling down the road well over the speed limit, creating a scary situation with his small children playing in the yard. He stated he was in opposition.

Ms. Andrea Welch (1878 Shawmut Avenue New Bedford, MA) stated she is in opposition. She also told the board there was a monitor put on a pull to count the traffic, which happened two days before the cease and desist order. She suggested the board research the amount of traffic from the monitor. She also complained about the rock crushing, the rattling, and dust it creates, as well as her concern for her grandchildren. She stated trucks came by every thirty seconds.

In rebuttal, Attorney Crotty stated it was anticipated the neighbors would complain about the operation, but that is not what the board is to base its decision upon. He stated the Conservation Commission proposal would add a new entrance/exit which will clean off trucks as they enter the street to alleviate the dust. He stated they will build a berm to alleviate the noise issue. Attorney Crotty again noted the only issue before the board is the legal issue about grandfathering rights under the zoning ordinance.

Mr. Carmelo Nicolosi, site engineer, noted a 75 foot long paved section providing storm water runoff along with a 50' section of trap stone. In response to a question from Mr. Schick, Mr. Nicolosi could not provide an answer indicating what was causing the dust.

Mr. DeCosta stated the dust is coming mostly from the trucks, which will be washed off before entering the street. He stated neighboring houses have windows open day and night.

In response to questions from Mr. Schilling, Mr. DeCosta stated the rock crushing has been in existence since 1990 and that the volume of rock crushing varies depending on the contracts.

Attorney Crotty stated that Charon Associates engineers went out and created an existing conditions plan, which shows the stone in the same location now as it was in 2000 and in the 1990's as well.

Ms. McTigue inquired as to whether a permit had been pulled for that work. Mr. Crotty stated there was no permit required, per the grandfathering issue.

Mr. Nicolosi stated a permit was pulled by the Conservation Commission in 2000, regarding work in the buffer zone due to wetlands and an enforcement order.

Ms. McTigue read the section on Industrial B from the 2002 ordinance.

Mr. Crotty stated that in the 1990's the ordinance stated that under Industrial B one could do anything that was not otherwise unlawful.

Attorney Espinola stated the 1963 ordinance stated they needed to get a permit to operate the business and there is no statute of limitations on that issue.

Ms. Trahan inquired of the board if they were in favor of having the applicant get more clarification and have the applicant re-appear.

Attorney Crotty stated the use permit issue, the crux of the Building Commissioner's complaint, is such that fifty years ago or twenty-six years ago no use permit was obtained. The purpose of that is to make sure that the use planned is in compliance. He stated the issue is whether in 1963-1964, when this was a contractor's yard for a blacktop company, was a legal use. He stated the question is whether in 1960's there was anything that he was doing that was illegal at the time. He stated the Building Department does not allege that this was not a legal use back in the 1960's. Instead they are saying you didn't get the piece of paper--that's all. He stated back in the 1990's rock crushing was a legal use of the property. Attorney Crotty stated that he had never seen a use permit, as opposed to a building permit. He suggested that absent a complaint or allegation that at the time those were not allowed uses, the most the board should do is have A-1 apply for their permits now under the ordinance as it existed.

Attorney Espinola stated that would be an incorrect application of the law. He clarified by reading for the board Section 9, §266 Enforcement. He stated Mr. DeCosta is trying to do an end run around and say he is above that ordinance. Attorney Espinola stated it is not merely a piece of paper, but is the very reason for ordinances, so that neighbors don't have to come in and deal with this. Attorney Espinola encouraged the board to also look at the subsequent permits, which do not say A-1 Asphalt. He stated the law in place should be applied and any deference should be granted to the neighbors. Attorney Espinola stated that Building Inspector Romanowicz has a meritorious argument in addition to a procedural argument.

Chairperson Trahan invited one representative for the opposition to speak. Mr. Sirois referenced a Conservation Commission issue that was never rectified. He stated the representation about trapping the dust from the trucks doesn't do a thing for trucks coming in. He stated they don't use tarps or close the doors on the back of the trucks.

Chairperson Trahan inquired as to the time frame that this problem started and whether it was three years ago. Mr. Sirois stated there was no problem in the neighborhood before that, no dust, no vibrations.

Mr. Schilling stated that three years ago something dramatically changed.

Chairperson Trahan confirmed by a show of hands by those in opposition that the change occurred some three years ago.

Mr. Schilling moved to have the board come back. He stated he was not prepared to vote, seeing merit on both sides and a factual question about when the rock crushing operation actually started.

Mr. Decker said he would second the motion, but requested discussion on the motion. He stated he wanted to know what additional information was specifically being sought.

Commissioner Romanowicz addressed Attorney Crotty's representation noting that had Mr. DeCosta Sr. gone to get a building permit in 1963 it would have been an allowed use. He read the 1963 ordinance and the Industrial B use from Section 9, 253, uses and then read Industrial A uses (which would be stone crushing) were allowed providing that nothing injurious, nauseous or offensive to the neighborhood for reason of odor, fumes, dust, smoke, vibration, et cetera, shall be permitted. He felt those things had all been stated by those in opposition this day.

Mr. Decker made a motion, seconded by Ms. McTigue, to include sections handed in from the 1963 building code for the City of New Bedford. Motion passed unopposed.

Mr. Schilling requested information that in 1964 the cease and desist could have issued. He stated he understood that A-1 did work for the city. Attorney Espinola clarified that he had heard no testimony that A-1 was doing work for the city in 1964. Mr. Schilling stated that his understanding was that A-1 was legally out of compliance when hired by the city to do the airport project, subcontracted or otherwise. Mr. Schilling stated that his impression is that some three years ago something changed that dramatically spiked the problems, and he wants to know what spiked.

Mr. Sirois stated the airport project was subcontracted to A-1. He also mentioned a recent Faunce Corner Road reservoir project.

Mr. Decker felt the question stated by Mr. Schilling is at the crux of the questions that need to be answered.

Mr. Schilling also requested that a memo and response be filed before the hearing by both counsel.

Ms. McTigue inquired as to obtaining the Conservation Commission items, and any EPA Title 5 air quality permits.

Mr. Decker amended the motion to include the items requested by Mr. Schilling and Ms. McTigue. Chairperson Trahan confirmed with Ms. Gonet the contents of the motion before the board. Ms. Gonet clarified with board that Mr. Schilling had moved to continue, seconded by Mr. Decker, subsequently amended with wanting an answer to the questions of what happened three years ago, is

there an EPA title 5 air quality permit, and any Conservation Commission submissions be provided to the board. On roll call vote, the motion passed unopposed.

Attorney Crotty requested any form for a use permit. Commissioner Romanowicz explained that a change of use would be a building permit.

Chair Trahan announced the case is continued to the next meeting on August 25th, 2016 at 6pm and be the first item on the agenda.

Ms. Gonet asked Chair Trahan if the petitioner would be willing to sign an extension of time limits.

Chairperson Trahan instructed those present who wished to be notified of the next meeting on this matter to provide their name and address to Ms. Gonet.

Ms. McTigue informed Chair Trahan she was unable to attend the August 25th meeting. The board briefly discussed the meeting date. Mr. Decker informed the board he was unavailable as well. Chair Trahan informed everyone present that the same members must hear the continued case. So, if the date will have to change Ms. Gonet will take names and addresses of everyone present for this case in order to inform them of the meeting date.

At the end of the meeting the board decided and announced the case will be heard on September 1st, 2016. Chair Trahan requested Ms. Gonet notify everyone again of the meeting date.

On the evening of the September 1st, 2016 meeting, board members: Debra Trahan, Allen Decker, Robert Schilling, Sherry McTigue, and Leo Schick were present for the public hearing. City of New Bedford staff: Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services), and Jennifer Gonet (Assistant Project Manager, Planning Division) were present.

With respect to Case #4236, a motion was made by Mr. Decker and seconded by Mr. Schick that the following additional correspondence be received and placed on file: correspondence dated August 26th, 2016 from the Office of the City Solicitor; communication from the City of New Bedford Conservation Commission dated August 29th, 2016, a letter of interest from Patrick Sheridan of 1194 Old Plainville Road dated August 21, 2016; a memorandum from Petitioner's attorney, Thomas Crotty, Esq. submitted August 19th, 2016. With all in favor the motion passed unopposed.

Mr. Decker noted that the August 26th, 2016 correspondence from the Office of the City Solicitor was a request to continue this matter to a date set by the board. He stated that it is his understanding that the petitioner, through his attorney, is in agreement with the continuance. Mr. Decker noted there are presently no timeframe issues associated with the case Mr. Schilling made a motion, seconded by Mr. Decker to continue the matter. With all in favor the motion passed unopposed.

After a scheduling discussion amongst board members, a motion was made by Mr. Decker and seconded by Ms. McTigue to continue the matter to the regularly scheduled September board meeting

of September 22nd, 2016, the petitioner to appear at 7:30 pm. With all in favor the motion passed unopposed.

On the evening of the September 22nd, 2016, board members: Leo Schick and Robert Schilling were present. City of New Bedford staff: Jennifer Gonet (Assistant Project Manager, Planning Division) was present.

Acting Chairperson Schick explained the board was unable to open any public hearings this evening due to a lack of quorum for tonight's meeting. He apologized for any inconvenience this may cause. Further, he informed those present that in regards to Case # 4236- 1861 Shawmut Avenue, the case will be heard on October 27th, 2016.

On the evening of the October 27th, 2016 meeting, board members: Leo Schick, Sherry McTigue, John Walsh and Robert Schilling were present. City of New Bedford staff: Jennifer Gonet (Assistant Project Manager, Planning Division) was present.

Acting Chairperson Schick raised the issue of the continuance of Case #4236. A motion was made Mr. Walsh and seconded by Ms. McTigue to continue Case #4236 to November 17, 2016 when a firm date can be set for hearing. With all in favor the motion passed unopposed.

On the evening of the November 17th, 2016 meeting, board members: Leo Schick, Sherry McTigue, John Walsh, and Allen Decker were present. City of New Bedford staff: Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services), and Jennifer Gonet (Assistant Project Manager, Planning Division) were present.

Mr. Decker announced that in regards to case #4236 concerning property located at 1861 Shawmut Avenue the parties were in agreement to continue the case to December 6th, 2016. The meeting would be held on December 6th, 2016 at 6pm in the Library 3rd floor meeting room for a special meeting just on this single case.

On the evening of the December 6th, 2016 meeting, board members: Allen Decker, Robert Schilling, Sherry McTigue, John Walsh and Leo Schick were present for the public hearing. City of New Bedford staff: Danny D. Romanowicz (Commissioner of Buildings & Inspectional Services), Kreg Espinola (Assistant City Solicitor), and Jennifer Gonet (Assistant Project Manager, Planning Division) were present during proceedings for the subject case review.

Mr. Decker made a motion, seconded by Ms. McTigue to reopen case #4236 concerning property at 1861 Shawmut Avenue assessors map 124 lot 27 in an Industrial B zoned district. With all in favor the motion carried.

Mr. Decker made a motion, seconded by Ms. McTigue, to receive and place on file aerial images dated April 5, 1994; April 14, 2007; and December 1, 2011 submitted by Patrick Sheridan to Planning Department September 2, 2016; a memorandum from Assistant City Solicitor Kreg Espinola dated September 8th, 2016; materials submitted by the petitioner's attorney on September 14th, 2016

including: Anthony DeCosta's rebuttal to the September 8th, 2016 memorandum, which was submitted September 14th, 2016; copy of a noise and vibration monitoring summary by Geosonics, Inc., submitted September 14th, 2016; Request for continuance from the Petitioners Attorney, dated October 24th, 2016; and documentation submitted December 6th, 2016 by the petitioner in the support of his overturning the existing cease and desist order on the property. With all in favor the motion carried.

Mr. 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.

Mr. 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.

Mr. 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.

Mr. 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.

Ms. 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.

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

Mr. 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.

Mr. 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. Mr. 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. Mr. 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.

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

Attorney Espinola stated that Number 2 of the cease and desist 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.

Ms. 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 desist 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.

Mr. 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 over turned.

Mr. 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

Mr. 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.

Board members discussed if the permit issued in 1932 was for a contractor's yard or not. Attorney Espinola clarified that in 1932 there was a permit for a garage only. Ms. McTigue stated electric permits had been pulled but not building permits.

After further board discussion on motion content for the administrative appeal, Mr. Decker welcomed an offer from Mr. 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, Sections 5200, 5220 and 5223, 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.

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

Mr. Walsh amended the motion to include, in addition to the ordinance sections cited, Sections 5100, 5110, 5120 and 5130.

Acting Chairperson Schick clarified that a vote in the affirmative will overturn the cease and desist order.

There was a roll call vote.

4.) FINDINGS

Having reviewed this petition in light of the City of New Bedford Code of Ordinances, Chapter 9, Sections 5100, 5110, 5120, 5130, 5200, 5220 and 5223, and under the provisions of MGL Chapter 40A, Sections 7, 8 and 15 the board found 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.

5.) DECISION

Based on a review of the application documents, testimony given at the public hearing and the findings described above, the Zoning Board of Appeals hereby **DENIES** the requested administrative appeal.

A motion was made by Mr. Walsh, 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 5100, 5110, 5120, 5130, 5200, 5220 and 5223 relative to property located at 1861 Shawmut Avenue, Assessors Map 124, Lot 27 in an Industrial B zoned district.

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- 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.

On a motion by J. Walsh, seconded by A. Decker to grant the requested Administrative Appeal, the vote failed 1-4 with member A. Decker voting in the affirmative, members R. Schilling, S. McTigue, J. Walsh, and L. Schick, voting in the negative. (Tally 1-4)

Filed with the City Clerk on:



Allen Decker, Clerk of the Zoning Board of Appeals



Date

