MEMORANDUM

To: New Bedford Zoning Board of Appeals
From: Assistant City Solicitor Kreg Espinola
Date: September 8, 2016
Re: Anthony R. DeCosta, A-1Asphalt, 1861 Shawmut Avenue, New Bedford

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I. Introduction

On May 18, 2016 the City of New Bedford Commissioner of Buildings issued a cease and desist order to Anthony R. Decosta, owner of A-1 Asphalt Co., Inc. ("A-1"), 1861 Shawmut Avenue, New Bedford (the "Property"). A-1 appealed this decision to the Zoning Board of Appeals.

At a hearing on July 21, 2016, the Board of Appeals requested additional information from the petitioner regarding the use of the property. Petitioner responded with a memorandum dated August 18, 2016. This Memorandum is in response to the claims and statements in that submission.

II. Nonconforming Use of the Property/ Grandfathering

A-1 claims that their use of the property is a "grandfathered" or preexisting nonconforming use. In this case, A-1 has divided the question as to preexisting use into three separate uses of the Property. The first use of the Property claimed by A-1 is the use as a "contractor's yard". The second and third uses are the acceptance of ABC (Asphalt, Brick, and Concrete) debris and the crushing of that debris, respectively. None of the uses claimed by A-1 are properly considered as "grandfathered". All three of the uses claimed by A-1 were unlawful based upon the zoning applicable at the time of their inception and therefore not entitled to any protection.

Under Massachusetts General Laws and New Bedford Ordinances nonconforming uses are allowed after the zoning ordinance or by-law has changed as long as the use remains the same and the use was originally lawful.[1] If an owner wants to change the use of the property they must get a finding from the regulatory authority allowing that change.[2] "For purposes of deciding

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[1] "Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent." M.G.L. c. 40A § 6. *See also* Ordinances, City of New Bedford, c. 9 § 2400.

[2] "Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming use to the neighborhood." *Id.*

whether a use is nonconforming within the meaning of M.G.L. c. 40A § 6, the question is not merely whether the use is lawful but how and when it became lawful."[3]

A. "Contractor's Yard"

A-1 claims their initial lawful use the use of the Property as a "contractor's yard" began in 1963. This is essentially a base of operation for a contractor whose business is conducted off site. The Property is zoned Industrial "B".

A-1 correctly points to the 1963 revision of the Code of the City of New Bedford section 9-253 which states that "[w]ithin any industrial "B" district, as indicated on the building zone map, any use **otherwise lawful** shall be permitted." (Emphasis added) A-1, in their memorandum, points to the "plain wording" of this section and states that the use as a contractor's yard was an allowed use and therefore was conforming.

A-1's argument is belied by what A-1 attempts to do regarding the remainder of the City Code in effect at the time of the change of use of the Property to a contractor's yard. Section 9-266 Enforcement – Permits, provided:

> "[i]t shall be **unlawful to use** or permit the use of any premises or building or part thereof hereafter constructed, altered, or moved, or the yards, courts, or other open spaces of the same which may be or are in any way reduced, **until the superintendent of buildings shall have certified thereto on the building permit or in a use permit that** the premises or building or part thereof so constructed, altered or moved, **the proposed use thereof**, and the open space thereof, conform to the provisions of this chapter."[4] (Emphasis added)

Under the "plain wording" of the City Code, A-1 was required to get a certification from the superintendent of buildings in order for their asphalt business contractor's yard on that premises to be lawful. A-1 attempts to explain away their lack of compliance with the requirements of the Code based upon the "fact" that they would have received the superintendent of buildings certification anyway. A-1 argues that the certification was a mere formality of no consequence.

With all due respect to A-1, they can't have their cake and eat it too. A-1 can't point to the plain language of the applicable code that allows a use "otherwise lawful" and then ignore a section that says if you fail to perform a specific act, your use is "unlawful". Regardless of whether the superintendent of buildings certification could properly be considered as a mere ministerial act[5], the failure of A-1 to comply rendered their use unlawful under the terms of the applicable City Code. The use was therefore not an allowed use in an Industrial "B" district.

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[3] *Mendes v. Board of Appeals of Barnstable*, 28 Mass.App.Ct. 527, 529-30 (1990).

[4] The same language is contained in the 1943 edition of the City Code of New Bedford c. 27 § 60.

[5] The City does not accept this assertion.

B. ABC (Asphalt, Brick, and Concrete) and Crushing

Even assuming, for the sake of this discussion, that A-1's initial use as a contractor's yard was a conforming use, they were required to get a change of use permit at each substantial change of use.

According to A-1, in 1981 they began accepting stone and asphalt, and in the early 1990's they began crushing stone and asphalt, thus significantly expanding their business on the premises and going far afield of a contractor's yard.[6] Both of these instances would have been a change of use that would have required a new determination.

The courts have maintained "tests for determining whether current use of property fits within exemption granted to nonconforming uses, [which are]: (1) whether present use reflects nature and use prevailing when zoning by-law took effect; (2) whether there is a difference in the quality or character, as well as the degree, of the present use; and (3) whether current use is different in kind in its effect on neighborhood."[7] A proposed modification that triggers any of these tests will constitute a change of use.[8]

The expansion of the hours of operation, the machinery used, the air pollution, the increased traffic, and the detrimental effect on the neighborhood all would qualify under this test as a change in use so as to disqualify A-1 from a nonconforming use. The same argument noted above would apply. A-1's failure to obtain a change of use determination and permit rendered their use unlawful under the applicable zoning ordinance.

C. Massachusetts Department of Environmental Protection

The law applicable in 1981, when A-1 claims to have begun accepting ABC debris, required A-1 to receive permission from the Mass DEP to conduct those operations. Furthermore, when they changed their business in the early 1990's to a begin crushing and recycling operation, A-1 was required to obtain a new permit from the Mass DEP. A-1 failed to do so on both occasions.

A-1's failure to obtain the requisite permission and permits to operate the ABC and crushing operations renders the use of the property without those requirements as "unlawful". As an unlawful use, these operations are not allowed uses in an Industrial 'B" district under the ordinance.

In 2014 the petitioner was served a notice of noncompliance by the Massachusetts Department of Environmental Protection (DEP). A-1 was cited because they were operating an Asphalt, Brick and Concrete (ABC) Recycling Operation and did not receive a Recycling, Composting and Conversion (RCC) permit or other approval before operation pursuant to 310 CMR 16.00. A-1 had been out of compliance with this particular permit requirement since it began its crushing operations in the early 1990's. The DEP returned again in July of 2015 and

[6] August 18, 2016 Memorandum from Anthony DeCosta, p. 3.
[7] *Powers v. Building Inspector of Barnstable*, 363 Mass. 648 (1973).
[8] *Id*.

completed another visual inspection of the premises. A-1 was cited for having materials too close to the abutting wetlands and for having materials that were not asphalt.

D. Title 5 EPA Air Quality Permit

The petitioner does not have a title 5 EPA air quality permit. They contend that their business does not create or emit enough airborne pollution to require a permit. As the EPA has not done an inspection of the site it is unreasonable to take A-1's word that they do not require a permit.[9] Without an official determination by the EPA there is no way to know if a permit is in fact required or not.

E. Conclusion

Based on the foregoing A-1 is out of compliance with the Massachusetts and New Bedford zoning laws. A-1 has a long-term systemic disregard for the requirements applicable to their use of the Property. They failed to get the required determination in 1963 when they began their business, and then failed to get both Mass DEP and change of use permits in 1981 and the early 1990's when they changed their use of the land. The five instances of A-1 shirking their duties as a company operating in New Bedford speak volumes to their intentions in abiding by the laws that govern them. A-1's blatant disregard for the process is entirely unfair to fellow citizens and business owners who do abide by the zoning ordinances and is particularly egregious as it relates to the impact of their use on their neighbors.

[9] In fact, given their track record, it would be reckless to take their word regarding necessary permits.