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## City of New Bedford

### Department of Planning, Housing & Community Development

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## STAFF COMMENTS

### ZONING BOARD OF APPEALS MEETING

July 20, 2016

**Case # 4236: Administrative Appeal**  
1861 Shawmut Avenue  
Map: 124, Lot: 27

**Owner:** The Anthony R. DeCosta Revocable Trust  
1861 Shawmut Avenue  
New Bedford, MA 02747

**Applicants:** Anthony R. DeCosta, Trustee  
The Anthony R. DeCosta Revocable Trust  
1861 Shawmut Avenue  
New Bedford, MA 02747



**Overview of Request:** The petitioner has submitted an application for an **Administrative Appeal** relative to the subject property located within an **Industrial B** zoning district. The petitioners propose to overturn a cease and desist order issued by the Commissioner of Buildings and Inspectional Services dated May 18<sup>th</sup>, 2016.

The ZBA is empowered 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. A concurring vote of four members of this board is necessary to reverse any order or decision of any administrative official.

**Standard of Review.** In an effort to provide the best possible information and guidance to the board, the Acting City Planner requested guidance from the Solicitor's Office about the standards for review of Administrative Appeals cases concerning cease and desist orders. A memorandum dated July 19<sup>th</sup>, 2016 has been provided by Assistant City Solicitor Kreg Espinola, and is attached for your reference.

In summarizing the memorandum, staff notes that "the standard of review for an administrative appeal for a cease and desist order is governed by M.G.L. c. 40A §15." In order for the decision of the building inspector to be overturned there must be a concurring vote of four out of five members for a five-member board. *Id.* In enforcement cases the building inspector "has the burden of proving that the plaintiff's use of its premises violates the by-law<sup>1</sup>."

<sup>1</sup> *Brotherhood of Alpha Upsilon, Inc. v. Zoning Bd. Of Appeals of Bridgewater, 15 Mass. App. Ct. 991, 992 (1983).*

Where the building inspector has decided to revoke a permit or seek enforcement of the regulations, the board should hear that side first.

“There must be set forth in the record substantial facts which rightly can move an impartial mind acting judicially, to the definite conclusion reached... Minute recitals may not be necessary, but there must be a definite statement of rational causes and motives, founded upon adequate findings. 311 Mass. 52, 54-55 (1942).”

Planning staff notes the recommendation of the Assistant City Solicitor who advises that it is important that the Board “consult the cease and desist order and related attachments for the by-laws that the enforcement officer stated were violated.”

Of particular note: some of the guidance provided is a bit more nuanced than the MEMORANDUM suggests. For example, if the petitioner claims a statute of limitation applies to the case then the burden of proof would shift to the petitioner. However, generally, the zoning enforcement officer bears the burden of proving that the use or structure violates local zoning regulations.

The Assistant City Solicitor has been invited to attend this hearing if he is available.

**Precipitating Reason for the Appeal.** The petitioner seeks an administrative appeal of the cease and desist order dated May 18<sup>th</sup>, 2016 which cited the owner for the following:

- Failure to obtain a building permit for any structures associated with, or the operation of, A-1 Asphalt Co., Inc.
- Failure to obtain the required permit for a contractor’s yard, specifically including, but not limited to, section 105.3 subsection 3 of Massachusetts State Building Code which states in part that an applicant must “indicate the use and occupancy for which the proposed work is intended”...
- Activities not permitted under the definition of a contractor’s yard:
  - Activities being, “the rock and concrete crushing operations and the crushing and recycling of other materials”
  - Definition of a “contractor’s yard” as defined in the code of ordinances: “land used for the storage of commercial construction equipment, materials, and supplies and for the parking of registered commercial vehicles.”

Further, the cease and desist order states “The operation of A-1 Asphalt is in violation of the ordinances and has resulted in substantial quality of life issues to the neighbors located in the proximity to A1’s operation, including but not limited to the following:

- Equipment on the A-1 site are crushing and recycling materials making noise and vibrating the ground and homes in this area.
- Dust and dirt are constantly settling on neighbor’s properties, vehicles, and inside their homes making it impossible to open the windows or enjoy their yards and making it dangerous for children to play.”

The cease and desist order goes on to note that “These are a few of the quality of life issues that have resulted from your violation of the City of New Bedford Ordinances.”

Page two of the cease and desist order provided as an attachment for this case file includes the complete list of code section violations.

**Existing Conditions:** The property is a 9.6 acre lot located northwest of the New Bedford Regional Airport. It has 316.8’ of frontage on Shawmut Avenue and is 2,278’± in depth. Both residential and industrial uses are present. A single family house (29’x23’) is located in the northwest corner of the site with a grass yard area and dog pen. East of the house is a paved driveway which leads to an entrance gate and fence. South of the gate is a garage, shed, general building, crusher/grader, and stockpiles of excavated materials brought to the site. A second unpaved driveway provides access to another gate at the northeast corner of the property. The house is used as a residence. The area in the rear, as described by the petitioner, is used as a contractor’s yard.

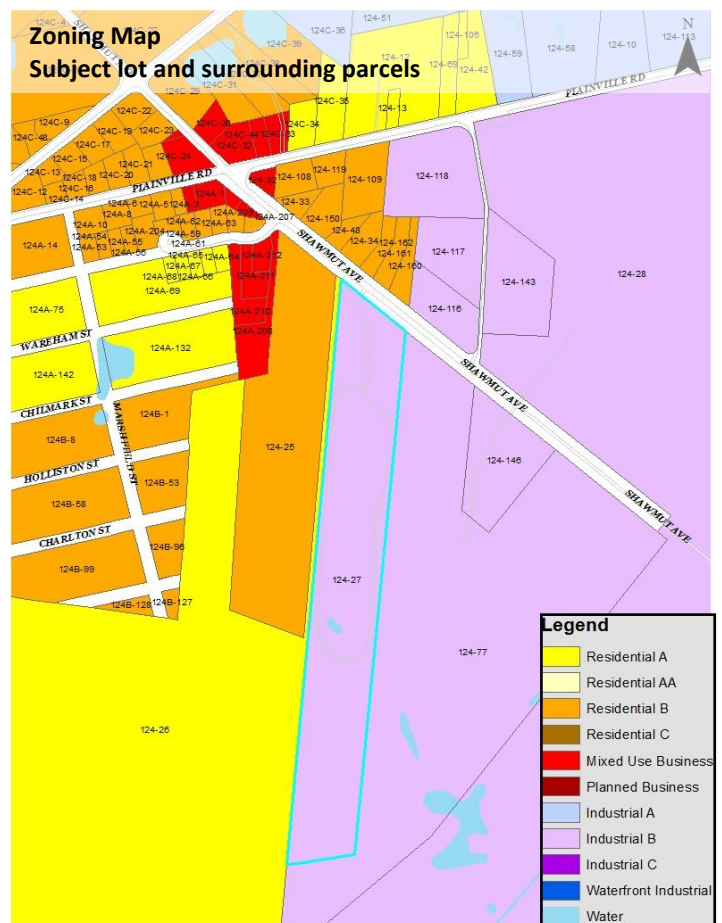
The petitioner’s business, A-1 Asphalt, is an asphalt paving business that builds new and replaces existing paved surfaces. The work involves excavating materials which are brought to the yard to be stockpiled. The petitioner explains the stockpile materials are screened to segregate soils, stone, and broken asphalt. Large stones and asphalt are crushed. The “material is then reused either as fill, base, or aggregate depending on the needs of that or other jobs. A-1’s vehicles and equipment are kept in the yard.” The petitioner states, the company “does not store hot asphalt in the yard”.

Industrial B [IB], Residential B [RB], and Mixed Use Business [MUB] zoning district boundaries transect the surrounding neighborhood. The mixed use business zone is along Plainville Road with the boundary near the intersection of Shawmut Avenue and Falmouth Street. The residential B district runs approximately 670’± from the Falmouth Street intersection on the easterly side of Shawmut Avenue, and 290’± on the western side of Shawmut Avenue to the appeal property. The industrial zoning district includes the appeal property and properties southwest including Bridgewater State flight school and the airport property. Therefore, the property which is the subject of this appeal has residential properties abutting to the northwest and directly across the street, conservation land abutting the southwest rear corner of the property, and land owned by the airport abutting to the rear and southeast.

**Proposal:** The petitioner appeals the cease and desist order based on the following points made in the appeal statement:

- A-1 Asphalt is a contractor and uses the property primarily as a contractor’s yard, a permitted use in the Industrial B zoned district.
- The company was started by the petitioner’s father and has been located at this property since 1963, and there has been no change of the principal use of the property since that time.
- The petitioner indicates the initial permit for a garage on the property issued in 1932 and the establishment of A-1 Asphalt’s use as a contractor’s yard at the site in 1963 predates the State Building Code, which went into effect in 1975.
- The petitioner indicates permits related to A-1 Asphalt’s use of the property were issued in 1973, 1999, and 2000, with no apparent complaint about the use of the property.
- The petitioner notes the definition of a contractor’s yard in the zoning ordinance changed in 2002; therefore the petitioner contends, the use is an existing non-conforming use, as A-1 Asphalt has been engaged in the crushing of stone and concrete in its yard since the 1990’s.

**Plans/Other Approvals:** The plans submitted with the application depict proposed changes to the property currently under the review of the City’s Conservation Commission. In comparing plans previously submitted to the Conservation Commission in 2000 to the current plans last revision and dated April 26<sup>th</sup>, 2016, Planning Staff note the plans did *not* include the crusher/grader as shown on the plans submitted with this administrative appeal application. That said, as a crusher/grader is considered transportable machinery and not a permanent structure it may have been left off.





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## 1861 Shawmut Avenue Map: 124, Lot: 27

NOTE: Property line is approximate; for discussion purposes, only.

Google earth

41°40'36.00" N 70°58'02.46" W elev 87 ft eye alt 2542 ft

MEMORANDUM

**To:** Jennifer Clarke, AICP  
**From:** Kreg Espinola  
**Date:** July 19, 2016  
**Re:** 1861 Shawmut Avenue

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The standard of review for an administrative appeal for a cease and desist order is governed by M.G.L. ch. 40A § 15. In order for the decision of the building inspector to be overturned there must be either: a concurring vote of all the members of a three-member board or a concurring vote of four out of five members for a five-member board. *Id.* In an enforcement case the building inspector “has the burden of proving that the plaintiff’s use of its premises violates the by-law.” *Brotherhood of Alpha Upsilon, Inc. v. Zoning Bd. Of Appeals of Bridgewater*, 15 Mass. App. Ct. 991, 992 (1983). Where the building inspector has decided to revoke a permit or seek enforcement of the regulations, the board should hear that side first. The decision reached by the board must be put into a writing that includes the vote of each member, detailed record of the proceedings, and the reasons for the decision. M.G.L. ch. 40A § 15. The written decision must conform with the standard set forth in *Brackett v. Board of Appeals of the Building Department of Boston*:

There must be set forth in the record substantial facts which rightly can move an impartial mind acting judicially, to the definite conclusion reached. . . Minute recitals may not be necessary, but there must be a definite statement of rational causes and motives, founded upon adequate findings. 311 Mass. 52, 54-55 (1942).

Furthermore, the board must provide notice of the decision pursuant to M.G.L. ch. 40A § 15. Notice must be sent to: the petitioner, applicant, or appellant, parties interested as defined in § 11 of the statute, and every person present at the meeting who requested the notice be sent to them. *Id.*

Jennifer, please consult the cease and desist order and related attachments for the by-laws that the enforcement officer stated were violated.