



ZONING BOARD OF APPEALS

Town of Chelmsford
50 Billerica Road
Chelmsford, MA 01824

MEETING MINUTES

January 5, 2023

(approved February 9, 2023)

TIME: 7:00 PM

LOCATION: Town Offices, 50 Billerica Road, Chelmsford, MA

ROOM: 204

Members Present: Brian Reidy, Chair
Charles Wojtas, Vice Chair
Steven Mendez
Nancy Morency
Erin Drew, Associate Member
Peter Casserly, Associate Member
Glenn Diggs, Associate Member

Members Not Present: Jamie Outland-Brown

Others Present: Jose Negron, Building Commissioner and Zoning Enforcement Officer
Becky DaSilva-Conde, Community Development Departmental Assistant
Paul Haverty, Town Counsel

Chair Reidy called the meeting to order at approximately 7:00 p.m.

PUBLIC INPUT: None

ADMINISTRATIVE REVIEW: None

NEW PUBLIC HEARING(S): None

CONTINUED PUBLIC HEARING(S):

1) **150-152 Dalton Road – Luke Fougere d/b/a Fougere Landscaping, Inc. and 150-152 Dalton Road, LLC**

The applicant requests an amendment to a 1955 variance, or in the alternative a special permit to modify an existing non-conforming use, for continuation of the current mixed-use as a residential dwelling and landscaping company. This property consists of approximately 1.66 acres located in the Residential B district – Parcel ID: Map 51, Block 131, Lot 82.

Town Counsel, Attorney Paul Haverty, gave a summary of a letter he submitted to the Board earlier this afternoon which states:

“...after reviewing the additional information submitted on behalf of the owner of the Property, it appears my initial determination was in error. The variance issued for the Property was limited to the retail sale of materials grown at the nursery located on the Property, however, the nursery use itself constituted a separate pre-existing nonconforming use. As indicated in the letter submitted by attorney Brown, a nursery use was allowed in the underlying zoning district in 1955. Although we have not been provided the specific date upon the greenhouse/nursery use became nonconforming, we know that was not allowed as of 1977. We also have evidence that the pre-existing nonconforming greenhouse/nursery use converted into a landscaping contractor’s yard as early as 1984, and has been maintained as such ever since. Accordingly, the Board’s analysis should focus on whether or not the current use as a landscaping contractor’s yard constitutes a substantial change from the original pre-existing nonconforming use.

Pursuant to Section 195-8(1) of the Chelmsford Zoning Bylaws, the Board may “award a special permit to change a nonconforming use in accordance with this section only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood.” The Bylaw goes on to state that the Board may consider “(1) [a] [c]hange or substantial extension of the use”; or “[a] [c]hange from the nonconforming use to another, less detrimental nonconforming use.”

...As I see it, the Board should first review the current use under the Powers test to determine whether or not there has been a change or substantial extension in the nonconforming use... If the Board determines that there has been no change or extension of the original pre-existing nonconforming use, then a decision should be issued making such a determination. However, if the Board determines that a change or substantial extension has occurred, then the Board should review the impacts of such change to determine whether or not such change or extension is substantially more detrimental to the neighborhood than the original pre-existing nonconforming use. It would be appropriate for the Board to consider that the landscaping contractor’s yard use has been in place for nearly forty (40) years.”

Member Mendez asked Town Counsel what is the “existing use” today? Town Counsel stated the preexisting nonconforming use is the greenhouses/nursery which has morphed into what is going on today, a use that has been going on since the 1980s, the landscaping/contractor’s yard. The Board needs to determine whether this current use is the same as, or a substantial extension of, the pre-existing nonconforming use, and whether or not it has been detrimental to the neighborhood since the 1980s.

Attorney Pam Brown, applicant Luke Fougere, and Attorney Phil Eliopoulos were present again this evening.

Atty. Brown distributed a new packet of information to the Board. She summarized her packet, which details the use of the “Powers 3-part Test” for making determinations, lists potential findings, lists a draft motion with sample conditions to consider when deliberating a special permit for this property, as well as new exhibits to evaluate and consider. The exhibits include letters from the previous two owners/families detailing the various landscaping activities/uses that took place on this property, and the quantity and types of vehicles used.

Atty. Brown acknowledges that the property use has morphed as nurseries began offering landscaping services over the decades, and landscaping companies further morphed with the residential needs for hardscape design/installations in addition to the planting, tree removal, and mowing services.

The Powers 3-part Test is based on a case law that governs the continuation or change of “pre-existing nonconforming uses.” It is used as a protection for property owners of vested rights/grandfathered uses to maintain their nonconforming use.

Atty. Brown asked the “the Board make such findings as it deems appropriate and grant the Special Permit in accordance with Section 195-8.(B)(1) to allow a change in the nonconforming use.”

Atty. Henry Dane, representing abutter Henry Thatcher of 77 Linwood Street, summarized the memorandum of opposition he submitted to the Board dated December 28, 2022 including color photos taken by drone over the property on December 3, 2022. He argues that if the pre-existing nonconforming use was that of greenhouses. However, he points out that the drone photos demonstrate that there are no longer greenhouses on the property, therefore the Board cannot grant a special permit to expand a such use. He argues that the property has been in violation of the zoning bylaw, and that the Board should not condone the current use because the so-called “nonconforming” use has been illegal use for decades. The use over the past 38 years has been very different than what was permitted in the 1950s. He also believes that the “nonconforming” use has indeed been detrimental to the residential neighborhood.

Henry Thatcher of 77 Linwood Street spoke in further opposition, stating that it is clear that Mr. Fougere is operating a “contractors yard” which is illegal in a residential district. The use is a clear violation of the Chelmsford Zoning Bylaws. He does not want to put Mr. Fougere out of business. He simply wants his business moved to an appropriate zoning district. He asks that the Board not legitimize this illegal contractors yard and prohibited residential zoning use.

Mr. Fougere pointed out that Atty. Dane misspoke. There remains one greenhouse on the property, which he recently renovated. It is attached to the former retail shop. Mr. Fougere also pointed out the dumpster currently on the property that he is filling with buried debris that he inherited on the property from previous owners.

Randi Davidson of 82 Linwood Street – Read her letter of opposition to the Board. Her main complaint was an increase in noise by the machinery on early weekdays and Saturday mornings. She has not complained in the past regarding Fougere or Bertolaccini because she thought it was a completely permitted use by the Town. Her additional concern is that allowing this use to proceed may lead to additional use expansion in the future with other potential larger landscaping businesses. Her pointed out that the neighbors most impacted by the noise and activity are the ones abutting the rear portion of the property, such as herself and others who have expressed opposition.

Paul Fenders of 158 Dalton Road – Mr. Fenders has lived here since 2007. He stated that there is no comparison in the activity and noise of level of Fougere versus the previous owner. He stated not only can you see and hear the increased activities, but you can also feel the low-frequencies vibrations of the equipment and activity.

Mr. Fougere asked permission for his supporters to speak.

Catherine Ulanga of 148 Dalton Road – Is not at all in opposition to Mr. Fougere’s business operations. He has been a great neighbor and she knows that he intends to further beautify his property. She does not have concerns with noise. She supports business use and family livelihood.

Amy St. Hilaire of 146 Dalton Road – She and her husband Greg has submitted a letter of support to the Board. Her family/parents bought the house in 1984 and she had lived there her entire life. Therefore, she has been in the neighborhood and abutted the property through the previous two owners. The noise and activity levels are not of concern to her and her family. She stated that there is an occasional truck delivery, and the equipment noise level is no more disturbing than a leaf blower.

Charles Ulanga of 148 Dalton Road -- He stated there is not much noise disturbance, and he is a direct abutter. He supports the Fougere’s family business.

Atty. Brown pointed out that it is true that contractors yards are not allowed in a residential zone in Town. However, a change in nonconforming use is allowable so long as the use is allowed elsewhere in Town by the bylaws. Contractors yards are allowed in other districts. Therefore, the Board does have the authority to allow this type of use in the residential district under a special permit. Furthermore, she believes Fougere Landscaping is more than a “contractors yard,” and she called attention to the fact that Mr. Fougere does continue to maintain a greenhouse on the property.

Motion by Mr. Mendez to CLOSE the Public Hearing for 150-152 Dalton Road.
Seconded by Ms. Morency. **Motion carries, 4-1. Mr. Wojtas voted in opposition.**

Chair Reidy stated that the Board should carry out the Powers Test to make a determination. Town Counsel advised the Board to use the nonconforming greenhouse/nursery use as the baseline use to decide if the use has changed substantially.

Member Wojtas compared the use of the current and past two business to determine whether the current use is more detrimental to the neighbors. Without having used a noise-meter since 1977 to present, for comparison, Mr. Wojtas used the number of employees and vehicles for comparison instead. Looking at those numbers, he believes that the current business is less detrimental than the previous business use/activity. Atty. Haverly pointed out that these numbers do not speak to the nursery/greenhouse use, therefore this may not be a proper comparison.

Motion by Mr. Wojtas REOPEN the Public Hearing for 150-152 Dalton Road, for clarification purposes. Seconded by Mr. Mendez. **Motion carries, unanimously, 5-0.**

Atty. Brown wanted to clarify that Environmental Gardens did, in fact, continue to operate the greenhouses from 1984-1994 (see Exhibit C - item 5, and Exhibit D - second paragraph).

Atty. Eliopoulos pointed out that there is no point trying to sort out what intensity existed because the prior building inspectors have already issued letters authorizing by right nonconforming use. As far as he is concerned, the authorized retail use was far more intensive with customers coming and going throughout the day, unlike the current use. He does not believe it is fair for his client to have to prove what occurred in the past, because we have letters from the Building Inspectors who historically knew what was occurring on site during those years. The Board should rely on those letters when making a determination.

Board Discussion:

Member Drew spoke via telephone to state she does not have any questions, and to point out that there is a delay with the livestreamed video.

Chair Reidy does believe that the business use has morphed with the times based due to what services are in demand. Member Wojtas agreed. Member Mendez does not believe that the morphing is relevant. Chair Reidy pointed out that for many years, the property was a wood lot (splitting and selling wood to customers).

Town Counsel asked at what point was “contractors shop/yard” added to the zoning use schedule in the Bylaws? In 1984, it was Building Inspector opinion that the “landscaping use” expansion of the business would require a special permit. At that time, the owner was introducing elements of landscaping business while maintaining the nursery/greenhouse use. The question remains, when was the introduction of the landscaping aspect addressed in the local bylaw? He believes this needs to be researched in order to address this case appropriately. Atty. Haverty suspects it was more recent than 1984.

Member Casserly pointed out that there is a letter from 2018 by Commissioner Shaun Shanahan, which again states it was a “continued use” of commercial business/property. Member Diggs agreed and emphasized that although the letters do not detail how the use has morphed, the Commissioners’ letters do determine the morphing was understood and was allowed as a “continued use” over the past 38 years.

Atty. Brown distributed a portion the proposed 1977 bylaw. Atty. Haverty noted that the proposed changed did specify that a contractors yard was not an allowable use in the residential district. Chair Reidy read the current definition of “contractors shop/yard indoor” and “contractors shop/yard outdoor” into the record. Atty. Haverty pointed out these definitions were amended in April 30, 2012 Annual Town Meeting. Therefore, these were not in effect in years prior. The Board wants to know what the definitions and allowable/prohibited uses were in 1977. Once they have that, they can tie it back to whether there has been a “substantial expansion of use,” or whether there has been a natural expansion of use, or a change in use.

Chair Reidy asked Mr. Negron to find a copy of the 1977 Zoning Bylaw.

Atty. Haverty asked the applicant’s attorney to formally withdraw the request to modify the variance.

Motion by Ms. Morency to CONTINUE the Public Hearing for 150-152 Dalton Road to February 2, 2023. Seconded by Mr. Casserly. **Motion carries, unanimously, 5-0.**

- 2) **16 Freeman Road – Jeff Hansel** – Variance, under Section 195-8 Non-Conformity and/or Section 195-9 Conformity, to construct an attached single car garage that will not meet the side setback and any other relief that may be deemed necessary. Parcel is in the Residential B district, Map 113, Block 427, Lot 1.

***** REQUEST FOR CONTINUATION WITHOUT DISCUSSION TO FEBRUARY 2nd *****

Motion by Ms. Morency to CONTINUE the Public Hearing for 16 Freeman Road to February 2, 2023. Seconded by Mr. Wojtas. **Motion carries, unanimous, 5-0.**

- 3) **11 Rainbow Avenue – Sarah and Gary Brown** are requesting a special permit under Section 195-6.1, for a Limited Accessory Apartment (LAA), and a variance(s) for the side setback requirement, the maximum building lot coverage and floor area ratio, any other relief deemed necessary. This property is located in the RB district – Parcel ID: Map 39, Block 163, Lot 15 and is approximately 10,720 square feet (0.25 acres) in size.

***** REQUEST FOR CONTINUATION WITHOUT DISCUSSION TO FEBRUARY 2nd *****

Motion by Ms. Morency to CONTINUE the public hearing for 11 Rainbow Avenue to February 2, 2023. Seconded by Mr. Wojtas. **Motion carries, unanimous, 5-0.**

DISCUSSION / NEW BUSINESS:

Discussion regarding zoning bylaw amendments for Annual Town Meeting with regard to percentage lot coverage and floor area ratio threshold, as previously discussed last month.

- Ms. DaSilva updated the Board that Evan Belansky, Community Development Director, is requesting the Board’s input on final proposed amendments to share and discuss with the Planning Board at a public hearing on January 25, 2023.
- Some of the previous suggestions included changing the overall thresholds on the maximum allowable percentages, changing the thresholds only for pre-existing nonconforming lots of a particular smaller lot size, or change the wording to allow general relief to all residential lots for these two thresholds by special permit.
- The purpose of amending the zoning law is to address the recent increase in pre-existing nonconforming smaller residential lot owners who propose to build small additions, but exceed the percentage lot and/or FAR thresholds, thereby requesting variances yet they do not meet the legal definition of a hardship to obtain a variance.
- The Board discussed all these options and decided to propose relief by special permit, across the board versus setting new thresholds, in order to review/permit all exceedances on a case-by-case basis.
- Chair Reidy and Mr. Wojtas agreed to attend the Planning Board’s public hearing on January 25th.

MEETING MINUTES TO APPROVE: December 1, 2022

Motion by Mr. Wojtas to APPROVE minute meetings for December 1, 2022. Seconded by Ms. Morency. **Motion carries, unanimous, 5-0.**

NEXT MEETINGS: February 2, 2023 and March 2, 2023

ADJOURN

Motion by Mr. Mendez to adjourn the meeting at approximately 9:08 p.m.

Motion carries, unanimous, 5-0.

These meeting minutes are respectfully submitted by Becky DaSilva-Conde, Departmental Assistant, Community Development Office.