



## ZONING BOARD OF APPEALS

Town of Chelmsford  
50 Billerica Road  
Chelmsford, MA 01824

### MEETING MINUTES

**February 2, 2023**

*(Approved 4/6/2023)*

**TIME:** 7:00 PM

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

**ROOM:** 204

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

**Others Present:** Evan Belansky, Director of Community Development  
Becky DaSilva-Conde, Community Development Departmental Assistant  
Jonathan Silverstein, 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

*Please note: The public hearings for 10 Wildwood Street and 13 Stearns Street have been rescheduled due to omission of the newspaper legal notices for tonight's meeting. A second mail notification was sent to the abutters with the rescheduled meeting dates. The public hearing for 10 Wildwood Street is rescheduled for Thursday, February 9, 2023. The public hearing for 13 Stearns Street is rescheduled to Thursday, April 6, 2023.*

### **DISCUSSION: Proposed Zoning Bylaw amendments article(s) for April Town Meeting**

Evan Belansky addressed the Board to update the Board on his discussions with the Planning Board (PB) regarding this Board's zoning bylaw amendment requests. The Planning Board's public hearing for the amendments opened on January 25, 2023.

The Planning Board wants to hear specifically from this Board to further understand the “why” and any implications, intended or unintended, there may be as a result of these proposed changes.

80% of our residential lots in the RB District are undersized (under 40,000 sq. ft.). Some historical neighborhoods have lots around 10,000 sq. ft. or less.

One PB member is concerned about implications of allowing too many special permits, particularly for two-family dwellings. However, there is more concern with commercial properties versus residential properties.

On February 8<sup>th</sup>, the PB hearing will be continued. Mr. Belansky asked that this Board discuss the potential implications, single-family vs. two-family lot differences, and have representation at the meeting to answer PB’s questions. If this proposal is to advance to Spring Town Meeting, the hearing must close by February 22<sup>nd</sup>, because the Select Board is scheduled to sign the warrant on February 27<sup>th</sup>. Therefore, the PB needs to make a formal recommendation before then.

This Board is less inclined to issue variances for projects without meeting the legal definition of a zoning hardship because they remain with the land in perpetuity, whereas a special permit is granted for a particular project and does not affect future zoning of the property. It is important to explain this to the PB and at Town Meeting.

The Board agreed to discuss this matter further at the end of the public hearings this evening.

**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.

Chair Reidy read a second letter of opposition from the Luskin family into the record, which he neglected to read into the record at last month’s meeting.

**Public Input:**

Attorney Henry Dane, representing opposing abutter Henry Thatcher, addressed the Board to summarize his opposition and his most recent letter to the Board, dated February 1, 2023.

Attorney Pam Brown, representing applicant Fougere, responded Atty. Dane’s remarks. After several months of due diligence on this property’s history and the local zoning bylaw, it has been discovered that the landscaping/contractors yard terminology did not become a defined use in the Town bylaw until 2012. Town Counsel agrees on this as well.

It has been determined by Town Counsel that the 1955 Variance is no longer relevant to this discussion because it was specifically issued for a floral retail shop onsite, which is no longer valid. There is no retail proposed nor ongoing on the property. If it were a continued use of the property, it became abandoned in 2018 when the Fougères bought the property.

The previous four letters from Building Inspectors over the years, have allowed the use or issued a “denial letter” which did not ban the use but rather stated that a special permit was required to expand the existing nonconforming use. A formal “denial” letter from a building inspector is used as a first-step in the process of having an applicant request a special permit from the Board of Appeals. Furthermore, prior to the recent denial letter, previous letters acknowledged the use as a nonconforming preexisting use; a legal use allowed to continue without a variance or further permitting. Moreover, in 1994, Building Inspector Anthony Zagzoug determined that the property could continue to be used as a nursery, retail sale of nursery products, and operation of a landscaping business so long as the landscaping business does not increase in number and types of trucks and other equipment compared to the previous occupant, Environmental Gardens. At last month’s meeting, the Board reviewed affidavits regarding the intensity of use of the property under Environmental Gardens and Anthony’s Gardens which are in kind to Fougère Landscaping. In 2012, Anthony’s Gardens built a shed without a permit which resulted in an enforcement letter from Building Commissioner Mark Dupell which stated “records don’t show an approval or permit for the increase or alteration of your existing allowed use.” Lastly, in 2018 the Fougères conducted due diligence prior to purchasing the property and obtained a letter from Building Inspector Shaun Shanahan which stated that the use is legal and may continue. Atty. Brown argues that there is no need to deliberate whether or not the current use is legal or not, because it has already been established by prior Building Inspectors/Commissioners.

Town Counsel has submitted a letter to the Board stating the landscaping use was presumed to be part of the nursery use until 2012, as a natural progression of the use. In 2012, the bylaw was amended to include landscaping businesses into the definition of a “contractor yard.” (Prior to 2012, a contractor yard was only defined as “building contractor” for fabrication, etc.).

Based on Town Counsel’s letters dated January 5 and 31, 2023, the Board needs to use the Powers Test to evaluate Fougère’s property to determine if Fougère’s use is different in kind, or intensity, and/or in impact compared to the previous owners/uses of the property.

The Board has the authority to grant a special permit conditioned to the current owner, versus a variance that typically runs with the land. However, the Fougères would prefer not to limit their business to the current owner, Luke Fougère, in case any of their children want to continue the family business when they grow up.

The Board reviewed and discussed the special permit special conditions suggested by Atty. Brown. Member Brown questioned limiting business hours due to the emergency/seasonal nature of the snow plowing aspect of the business, which should be exempt.

Per Town Counsel, Attorney Paul Haverty’s, letter dated January 31, 2023:

“Because a landscaping contractor’s yard was not part of the definition of a contractor’s yard at the time the previous owner introduced the landscaping contractor’s use of the Property, the Board may make the finding that the landscaping contractor aspect of the use of the Property introduced in 1984 was part of the broader category of garden center/nursery use and thus did not constitute a change in the pre-existing nonconforming use.

As noted previously, the Board must review this matter consistent with the test set forth in Powers v. Building Inspector of Barnstable, 363 Mass. 648, 653 (1973), to determine whether a nonconforming use will be substantially extended requires a three-part determination consisting of 1) “whether the present use reflects the nature and use prevailing when the a 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 the current use is different in kind in its effect on the neighborhood.” If the Board determines that the use does reflect the nature and use prevailing when the zoning bylaw took effect, and that there is no difference in character or degree of the use, and that its effect is not different in kind of the neighborhood, then the Board should issue a decision determining that the use is protected as pre-existing nonconforming use. If the Board determines that that the use does not reflect the nature and use prevailing when the zoning bylaw changed, or if it determines that there is a difference in kind in the quality or character as well as the degree of the use, or if the Board finds that the use is different in effect on the neighborhood, then the Board should refer to the determination to be made pursuant to Section 195-8(B) of the Bylaws, which states that the Board may allow a change or substantial extension of a pre-existing nonconforming use if it determines that such use will not be substantially more detrimental to the neighborhood.”

Town Counsel, Attorney Jonathan Silverstein, was present and advised the Board to use the Powers Test to make a determination. If the Board finds that the Fougere’s use does not pass the three criteria, then the Board can take action to address the current use. If the Board finds that it does pass the test, then the Board can treat this application submittal as an appeal to the current Building Inspector’s determination letter. Without a special permit, the Board may choose to add special conditions if the Board finds it is suitable.

Atty. Silverstein clarified that the previous Building Inspector’s letters are legally binding to the property owner in which the determination was issued to. That person can only appeal the determination letter within 30 days. You cannot have a future property owners appeal that determination. However, the current Board can use prior letters of determination by the Town to sort out whether the Applicant’s burden of proving his current use is pre-existing nonconforming has been met.

Public Comment:

Nancy Araway of 65 Littleton Road and Planning Board member – Believes the issue at hand is regarding the difference between a nonconforming use (illegal) versus pre-existing nonconforming use (legal). The nursery was pre-existing nonconforming allowable use, but the current use has transitioned to hardscaping which is a nonconforming industrial use. She believes this Board needs to

consider whether they want to provide a “use waiver” for an industrial use in a residential district, and whether the Board would consider this use appropriate if it were a new business applying for a new use. Furthermore, she stated that hardscaping could by definition be part of the “warehouse use” that was also only allowable in an industrial zone.

Chair Reidy clarified that it has already been determined that it was an existing use prior to the bylaw amendment in 2012 that defined landscaping and contractor’s yard as an industrial use. Therefore, it is a pre-existing nonconforming use. In 2012, the Town felt there was a zoning void in the bylaw regarding landscaping/hardscaping use and voted to amend the bylaw.

Ms. Araway’s point is that if they were no longer growing plants onsite as a nursery or for landscaping purposes in 2012, the use had already transitioned to a hardscaping business which meets the warehouse/ open storage definition. This means they altered their use without proper permitting and authorization.

Mr. Fougere stated to the Board that he uses the remaining greenhouse on the property to grow plants for his landscaping business. His business is not solely hardscaping. He continues to provide landscaping services in addition to hardscaping services.

Larry Thatcher of 77 Linwood Street – He does not believe this should be a consideration of a pre-existing nonconforming use because Bennett’s Nursery was allowable under an agricultural exemption of a farm less than 5 acres. That simply is not the case today. Today’s use is a contractor’s yard, which is an industrial use. He hopes that the Board finds that the Applicant fails the Powers Test.

Atty. Dane argued that everything subsequent to 1977 became nonconforming (illegal use) and did all the business transitions thereafter.

Town Counsel clarified that the law acknowledges that uses transform over time, such as a gas station transitioning to selling food and coffee. The Board needs to decide at what point in time does the use no longer warrant a change in times, such as a nursery transitioning to landscaping, but rather an actual expansion of the use (change in use).

Ms. Araway clarified that the nursery was an acceptable agricultural use and would remain an acceptable use today as agricultural allowable within residential districts. It would be a nonexempt agricultural use because the property is not 2+ acres in size. Exempt-agriculture would be over 5+ acres and is covered under MA Chapter 40A. But the nursery use is really not what is question today. Today we are comparing a nursery (commercial agriculture) to a landscaping business (industrial business). Mahoney’s and Weston Nurseries, are commercial agriculture businesses. They are not in the landscaping business. She is not aware of when this property stopped being a nursery business and become primarily a landscaping business with the greenhouse(s) being an accessory use, but feels that this is the true question that needs answering.

Member Casserly pointed out to the Board that the exhibits/photos from Environmental Gardens (1984- ) clearly shows that they were operating as a contractors yard, tree yard, landscaping and and hardscape business. He worked for a landscape company in Town around that time and recalls that Environmental Gardens grew plants, sold plants in the front yard, sold mulch, stored materials on site, etc, and Anthony’s Gardens did as well.

Attorney Philip Eliopoulos, also representing the Fougere, pointed out that that both Weston Nurseries and Mahoney’s also provide hardscaping services. They are also operating under a pre-existing nonconforming use. Atty. Eliopoulos agrees with Town Counsel’s opinion that the Powers Test should be based on the year 2012; the year the term landscaping was added to contractors yard in the bylaw. Furthermore, Fougere did his due diligence prior to purchasing the property to ensure that the use was allowable and was authorized to continue byright. The Building Inspector in 2018 gave him written confirmation prior to Fougere purchasing this property.

Ms. Araway stated that by today’s standards, Fougere’s business is an outdoor contractor yard. She questioned by whom would a special permit be issued by if this Board finds that a contractors yard special permit is required? She pointed out that such special permit is only allowed within an industrial zone and granted by the Planning Board under site plan review. Atty. Silverstein clarified that if the Board finds the use is an extension of the pre-existing nonconforming use by expansion or alteration of the use, then a special permit could be issued by the Board of Appeals under the bylaw provision that the property is grandfathered in. An additional special permit by the Planning Board would not be necessary. However, the Board of Appeals could stipulate/condition their special permit to include a site plan review, layout, size, etc.

**Motion** by Mr. Mendez to CLOSE the Public Hearing for 150-152 Dalton Road.  
Seconded by Ms. Brown. Casserly. **Motion carries, unanimously, 5-0.**

Chair Reidy announced the five voting members for the motion(s) tonight: himself, Charlie Wojtas, Steven Mendez, Nancy Morency, and Erin Drew. Jamie Brown is not eligible to vote due to missing the past two meetings. Although she watched the videos for both meetings, only one Mullin Affidavit is allowed per hearing. She may participate in the discussion and decision but cannot vote.

The Board deliberated on the three criteria of the Powers Test, as follows:

Powers Test Part 1: “Does the proposed use reflect the nature and purpose of the nonconforming use prevailing when the zoning took effect?” Yes – All 5 members agreed that the current nature and use of the property by Fougere is consistent with the use prior to 2012.

Powers Test Part 2: “Is there a difference in the quality or character and/or degree of the proposed use when compared to the protected nonconforming use?” No – Since 2012 and based on the previous two owners’ use of the property (quantity and types of vehicles and equipment used, and the number of employees, hours of operation, deliveries to the site, etc.), the majority of the members agreed (except Ms. Brown who did not agree) that there is no substantial difference by Fougere compared to Environmental Gardens and Anthony’s Gardens.

Power Test Part 3: “Would the proposed use be different in kind in its effect upon the neighborhood than the protected nonconforming use?” No – All members agreed that the current use is not different in kind since 2012; the current use is a “lawful pre-existing nonconforming use which has not been unlawfully altered.”

Based on the outcome of the Powers Test, the Board decided that the current use is an allowable use and may continue. Therefore, a special permit does not need to be granted to allow Fougere to continue his current use on this property. The Board may treat this case as an appeal and overturn the Building Commissioner’s letter contingent upon there is no future expansion of use and the current conditions remain in effect.

The Board review and deliberated the six special conditions drafted by Atty. Brown. Although the Board does not need to condition the use, they agreed to keep #1 “no more than eight (8) non-resident employees”, and #4 “visual buffer to abutting residential properties shall be maintained by fencing or evergreen vegetation.” The Board did not want to condition work hours due to the Town already having a noise ordinance, and not to restrict hours due to the nature of snow removal varying during storms.

**Motion** by Mr. Diggs to REOPEN the Public Hearing for 150-152 Dalton Road.  
Seconded by Mr. Wojtas. **Motion carries, 3-2.** Mendez and Morency opposed.

The public hearing was reopened to ask applicant Fougere if he would be willing to put fencing further into his lot as opposed to the property line, to increase the open space visually for his neighbors, as suggested by Member Diggs.

Mr. Thatcher spoke in opposition to the Board’s finding to allow the current use to continue. He also stated that no amount of fencing or vegetation will obstruct the view from the rear neighbors’ site lines.

Mr. Fougere stated he is willing to put any additional fencing or vegetation the Board deems necessary. Although Mr. Diggs thought a fence might be more problematic than the existing vegetation in the back left side of the lot, Mr. Fougere did state that fencing does help capture noise. Mr. Fougere prefers to put fencing along the property line to delineate his property. However, the area of potential fencing in question was not along an opposing neighbor’s property, rather it was that of a neighbor in support of Fougere’s use. Therefore, the Board decided not to create a condition to add additional fencing, but rather maintain what is currently in place.

Ms. Araway suggested that since the Board is moving forward with allowing the continued use, she asked that the Board have the applicant incorporate containment and capture systems for potential hazardous materials including motor oil, salt, fertilizers, and other materials deemed hazardous. The reason why an outdoor contractors yard is limited to industrial zones, is due to the environmentally hazardous materials used in their business operations. The Planning Board would include conditions for pavement, spill and containment protocols, drainage systems, salt storage, etc. in their special

permits to account for these hazards. Furthermore, salt storage requires state approved containment systems. She strongly encouraged the Board to further condition these factors to be built to code and satisfaction of the Building Inspector. The Board questioned whether Weston Nurseries and Mahoney's have spill containment and drainage systems in place for their vehicles and materials. Member Brown suggested that the Applicant should reapply for the garage special permit with the Planning Board and these factors would be addressed via that special permit.

**Motion** by Mr. Mendez to CLOSE the Public Hearing.

Seconded by Ms. Drew. **Motion carries, unanimously, 5-0.**

Member Drew expressed concern that the business will be able to operate without site review and approval by the Planning Board. The other voting members expressed it is not this Board's purview to impose environmental parameters on the use.

Member Brown emphasized that because the current use passed the Powers Test the applicant has a byright use. Therefore, the Board should not impose additional restrictions on them.

**Motion** by Mr. Mendez, based on the Powers Test, to overturn the Building Inspector's denial to 150-152 Dalton Road (memorandum dated August 11, 2022) and to ALLOW the continuation of the current mixed-use property and current commercial nursery/landscape contractor business to operate as it currently exists contingent upon the two (2) special conditions remaining in effect as listed and as discussed, presented and deliberated, and based upon the above facts, findings, and documents submitted. The two conditions are as follows:

1. No more than eight (8) non-resident employees shall come to the site; and
2. The owner shall maintain, and replace as necessary, the existing fencing and/or evergreen vegetated buffer between neighboring properties.

Motion seconded by Mr. Wojtas. **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 TO WITHDRAW APPLICATION \*\*\***

**Motion** by Mr. Mendez to ACCEPT withdrawal of 16 Freeman Road without prejudice.

Seconded by Ms. Brown. **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 MARCH 2<sup>nd</sup> \*\*\***

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

**DISCUSSION (continued from earlier this evening):**

**Proposed Zoning Bylaw amendments article(s) for April Town Meeting**

The Board members agreed to increase percentage lot coverage maximum allowed to 40% for single-family homes, and 30% for two-family dwellings for pre-existing nonconforming residential lots.

Chair Reidy will attend the Planning Board on February 8, 2023.

**OTHER DISCUSSION:**

Ms. Brown expressed concern with large public hearing submittals packets being submitted to the Board within 48-hours of the hearing. She is interested in setting Board procedures or guidance to allow for adequate review time. The other members all expressed they all had adequate time for today's hearing. However, Ms. Brown stated that with work schedules it is not always possible to do. Chair Reidy stated that the members can always request a hearing continuation if they need more time to review the materials.

**NEXT MEETINGS:** February 9, 2023 and March 2, 2023

**ADJOURN**

Motion by Ms. Morency to adjourn the meeting at approximately 10:27 p.m.  
Motion carries, unanimous, 5-0.

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