

Town of Amherst  
Zoning Board of Adjustment  
Tuesday April 19, 2016

Attendees: R. Panasiti (Alt), K. Shea, D. Kirkwood- chair, J. Ramsay, R, Rowe

D. Kirkwood called the meeting to order at 7:04pm, explained the ZBA process and introduced the board members.

New Business:

**CASE #: PZ7178-030416 – Appeal of Administrative Decision - Rehearing** Kevin J. Grassett (Owner) – Requesting an Appeal of an Administrative Decision made by the Zoning Administrator on August 28, 2015 regarding the expansion of a preexisting non-conforming use. 75 Merrimack Road, PIN #: 004-024-000. Zoned Rural Residential

D. Kirkwood explained the history of this case. In August the decision was made that the use went beyond the definition of a non-conforming use- this business had expanded beyond its use and the applicant would have to go before the ZBA for a variance. The decision was appealed in December and that decision was upheld by the ZBA. Tonight we are rehearing the decision of the appeal.

Silas Little represented Mr. Grassett. Both were present. They are appealing the decision that Mr. Grassett's third party use of storage of equipment and materials was not something that occurred in the past and therefore constitutes a change of use. The applicant has previously given the history of the property and all of the construction uses it has had and companies that have used it. Mr. Little listed some of this information again.

He added that construction costs go up significantly when materials need to be transported long distances to and from the job sites each day. If you can establish a temporary yard near where the work is going on, you are able to deliver that project at a cheaper cost and more satisfactory timetable.

Mr. Little stated there is no basis for Ms. Mailloux to have made the determination that these uses did not occur on this property before and that they can't continue. He stated that her tenure in the town was not of sufficient duration to determine that these activities did not occur at the time the zoning ordinance was adopted. Amherst has accepted these uses on that property over a long time period. These uses are episodic. This activity occurs when the jobs need them- not all the time. Photographic evidence was presented by Mr. Grassett from a flyover in 1987. These were presented to the board. They show a series of boxes that did not belong to the owner, but were stored there. This use began in 1963-before the zoning ordinance. It was sporadic and episodic in nature. There was never an objection from 1963 until 2015.

D. Kirkwood stated that the fact that Ms. Mailloux wasn't here in 1963 to know what went on applies to many people and it isn't a requirement to being a zoning administrator to have been here in the 1960s to know what was going on in town. All the information can be found in the files at the town offices.

K. Shea asked how ownership of the boxes in the photos can be proven. Mr. Grassett stated he knows that they weren't his uncle's storage units, though he can't remember who's they were.

R. Rowe was here in 1971 and knew Oliver Merrill who had several businesses including excavation, plowing, trucking and renting his truck and driver to the town. The only use he came to the town for

49 permission for was to have an earth excavation permit. The issue is you say Oliver Merrill had a full  
50 business of warehousing and wholesaling and parking trucks/doing repairs and that business was not  
51 just an incidental activity.

52  
53 Mr. Little replied no, his permissive use by third parties of his land was incidental, sporadic and on an as-  
54 needed basis. Ms. Mailloux stated it's not warranted as a grandfathered use. We are saying she is  
55 incorrect on that basis. Mr. Merrill would not have needed a permit for any use until the 155E statute  
56 was passed. Prior to that there was no statewide regulation of gravel pits.

57  
58 R. Rowe said if there was incidental use, Oliver Merrill had a full right to expand it to a reasonable  
59 extent. The applicant has to show that the recent uses of the property are a reasonable expansion.

60  
61 Mr. Little said the issue Ms. Mailloux raised is she said we have an illegal use as a third party depot. We  
62 are appealing it because that use has been done on that property and with the full permission of the  
63 town. Somehow the town or the board has decided 53 years later that the use of the property is  
64 improper. The town's acceptance of this use until 2015 establishes the validity of the points he is  
65 making.

66  
67 K. Shea stated scale is the issue. If you're contesting her statement that the expansion should be valid,  
68 then you need to provide evidence of the scale of the operation.

69  
70 Mr. Grassett said 3500 yards of material went out a day when it was an active gravel operation. That's  
71 225 10-wheelers a day. He has not come close to that scale.

72 Mr. Little read from Ms. Mailloux's decision letter of August 28, 2015 and explained this recent activity is  
73 not an expansion. The property has always been used in this manner.

74  
75 D. Kirkwood said the town has grown. What may have been acceptable in years past, may not be  
76 acceptable now because of an increased size of a neighborhood.

77  
78 R. Panasiti asked if the sifting machine was in use there with Oliver Merrill as well as now. Yes.

79  
80 D. Kirkwood opened the floor for public comment.

81  
82 R. Baker 91 Merrimack Rd.

83 He is an abutter that has lived there for 30+ years.

84 Oliver Merrill came before the town to restore the banks for safety after the materials were removed.

85 Until recently there was no reason for a neighbor to have reported the situation. There was some  
86 storage, some vehicles coming and going and some sifting of gravel. The visibility of the storage material  
87 was that you could drive by and not see it. In the last two or three years this has completely changed.

88 The zoning administrator may not have written up all of the issues the ZBA should look at. One issue is  
89 the damage to the road that is used by all of the huge trucks as well as being the primary route for the  
90 school busses. He appreciates the paving work being done in Amherst and also that the hours of Mr.  
91 Grassett's operation are fairly good. The issue is the noise. Sifting is ongoing, there was jackhammering  
92 of rocks for two weeks in December and there is water removal from a small pond. This is an expansion  
93 of use beyond just storage of material and parking of vehicles.

97 B. Green 81 Merrimack Rd

98 She wrote the letter that was submitted in the packet to the board. These are our homes- our  
99 sanctuaries. She is not technically an abutter, but can see his property and the piles and trucks and she  
100 can hear all of the activity. Every time a dump truck empties a load she hears the tailgate slam and it  
101 shakes her windows and wakes up her baby. She called the police first to ask if there are noise  
102 ordinances and found out there aren't so they referred her to the zoning board.  
103 She spoke several times with Ms. Mailloux and has also spoken to Deb and with Scott who have all been  
104 very helpful and well qualified.

105 The issue is the scale. Historical use doesn't always mean the use is ok now. The town is trying to  
106 become a young town again with new families that are coming for the great school system.

107 The words used over and over again were sporadic and episodic. Continental paving has used the  
108 property for a year and a half. She spoke to DPW Director B. Berry and he said the project has a few  
109 years left. So it is unlikely they will be wrapping the project up in a month or so as Mr. Grasset stated  
110 earlier. She is tired of it and is upset that this is an appeal of an appeal and the process is just continuing  
111 on possibly just to get through another construction season before changes are made.

112 She provided photos of the site from Google satellite images that show the property and the scale of the  
113 operation year by year. This is a neighborhood with children playing at each other's homes and the  
114 trucks are barreling down the road. The roads are not made for these trucks to be on them. The road is  
115 collapsing from it. This is no longer a sporadic and episodic operation- it is an everyday operation. It's  
116 not just a few boxes, it's multiple large vehicles, large piles of dirt, rock and tubing for culverts.

117  
118 R. Grasset lived here his whole life. Oliver Merrill was his uncle. The scale of the operation used to  
119 include cemetery fields. The scale of the operation is actually smaller now. There used to be up to 200  
120 trucks a day taking materials out of there. The roads are fine and the trucks slow down and you don't  
121 hear them come in the property.

122 K. Shea asked him about the business in the 1970's. R. Grasset said his uncle sold logs, rented land to  
123 Lorden Lumber for lumber storage, rented out his hen houses and materials were going in and out of  
124 Cemetery fields. When they did the bypass, Continental paving was using it as a staging area.

125  
126 Cliff Ann Wales 16 Pine Acres Rd

127 She has pointed out to B. Berry that the road is falling apart. He saw it and is aware of it.

128  
129 A. Clifford 2 Pine Acres Rd

130 He doesn't want anyone to lose a business or prevent anyone from making a living. The scope of the  
131 business and expansion of it is the issue along with the noise. He is trying to reconcile a cemetery with  
132 grieving families next to a construction operation like this with a sifter and excavator and extremely tall  
133 piles of dirt. He is not in favor of expanding the business.

134  
135 R. Grasset said there are people that move in to town knowing what's nearby when they buy their  
136 house, but don't like what's going on after they move in. They make a complaint and a lot of time and  
137 money is spent defending it. Then there is no recourse to them if they lose.

138  
139 J. Towne 48 Thornton Ferry Rd II

140 He commented that if an operation is episodic and sporadic, how would a potential homebuyer know  
141 that an operation is going on if there isn't constant noise and vehicles?

142  
143 This ended the public comment.

145 S. Little stated that the board has his written statements.

146  
147 **R. Rowe moved and K. Shea seconded to enter into deliberations. Vote unanimous**

148 **R. Rowe moved no regional impact. J. Ramsay seconded. Vote unanimous**

149  
150 D. Kirkwood clarified that the board is voting to answer if the zoning administrator misinterpreted the  
151 zoning ordinance as it's currently written.

152 He opened discussion with the board as to whether the case was made sufficiently that the zoning  
153 administrator made an error in her determination of the ordinance or not.

154  
155 R. Panasiti read from the August 28<sup>th</sup> letter then stated 'change to the neighborhood' is what he has an  
156 issue with. K. Shea agreed with him.

157  
158 R. Rowe also read from the August 28<sup>th</sup> letter and summarized that the extra vehicles not owned by Mr.  
159 Grasset do have a substantial effect on the neighborhood due to the volume of truck traffic and  
160 material storage on that site. The testimony they heard is that it is a substantial expansion, not just a  
161 slight expansion. The activity may have been incidental before, but tonight we heard how the current  
162 activity impacts the neighborhood. He doesn't think the zoning administrator was wrong.

163  
164 J. Ramsay said Mr. Little used the words episodic and sporadic but that wasn't quantified. Sporadic  
165 activity changes. It may mean that the scope of work that is going on now could diminish or it could  
166 expand further.

167  
168 K. Shea mentioned section 3.2 and said when you move into a neighborhood, you can't just decide you  
169 don't like what your neighbors are doing and file a complaint to make it go away. That's why there is this  
170 protection that a preexisting nonconforming use can continue. There are two points the use has to meet  
171 to continue. One is that when it's expanded it's not going to substantially change the nature or purpose  
172 of the use and the applicant has established that. The other is that when it's expanded it's not going to  
173 substantially change the neighborhood. That's the part that is not in accordance with the  
174 nonconforming use. The expansion needs to be quantified. A variance needs to be sought where  
175 parameters can be set for that growth. There's nothing wrong with the use or what he's doing on the  
176 property- it's the scale that's having an impact on the neighborhood and that can't be solved with an  
177 appeal. He doesn't think Colleen was wrong. Statement two under the section is not met.

178  
179 J. Ramsay said he has lived here most of his life and he's not even qualified to determine the expansion  
180 of that use. Episodic use may include expansion and contraction of this operation over time.

181  
182 D. Kirkwood said we have seen an expansion and contraction of this use. Because of the time periods  
183 mentioned, there is a lot of anecdotal information which is hard to substantiate. The speakers believe  
184 their statements are true. The statements need data to prove them. The ZBA has to base their decisions  
185 on factual data submitted.

186 In 1963 there was a zoning ordinance. It was updated in '73, '82, '93 and 2010. When a town expands,  
187 so do the standards. The ordinances protect the existing farmers and businesses from people that might  
188 come in and want to change things in a way that is not what Amherst is about. He knows the gravel  
189 operation was there. The use that is there is probably a contraction of what used to be there before  
190 Cemetery fields were given to the town.

191 The board has to determine if what's being proposed is an expansion of the use that was in existence 40  
192 years ago. The ordinance has been updated as the needs of the town were changed. He has not heard

193 anything tonight to prove that the zoning administrator misinterpreted the ordinance given the  
194 testimony of abutters and Mr. Robert Grasset that there was a large scale operation but then it pulled  
195 back. But for the past 30 plus years if that's the standard, then that's what we're dealing with in terms of  
196 expansion. He has not seen enough information otherwise to overturn the decision. That doesn't mean  
197 the operation comes to a halt. There are other avenues for the applicant such as superior court or  
198 application through zoning variance.

199  
200 K. Shea suggested they come to an established definition to find common ground that allows the  
201 applicant to operate but also allows the neighborhood to be residential.

202  
203 J. Ramsay said the zoning administrator's interpretation was misunderstood. He is not convinced it's an  
204 expansion because of the terms sporadic and episodic. Section 3.2 is a protection to preexisting  
205 nonconforming uses.

206  
207 R. Rowe said in 1963 Amherst had about 1500-2000 people and Oliver Merrill owned much of the land  
208 source. He didn't need to store materials on that site before the zoning ordinance was created because  
209 he had land all over town to use. He still wants Mr. Grasset to have a viable business there, but now the  
210 town has changed and the materials are depleted and the family doesn't own that large amount of land.  
211 The business has expanded too much given the current neighborhood. He could go to court or to the  
212 town fathers to work something out or come for a variance but he would need specific documentation  
213 of what he is going to do on the property for a variance to be granted.

214  
215 R. Panasiti agreed with Bob. He said the town has expanded and changed. There are many more roads  
216 that need work done on them. Mr. Grasset's business has expanded along with the town. There has to  
217 be other ways they can come up with for him to operate.

218  
219 D. Kirkwood conducted the vote. Did the applicant demonstrate there was an error made by the Zoning  
220 Administrator?

221 K. Shea no for the reasons listed

222 J. Ramsay yes he did

223 R. Rowe no

224 R. Panasiti no

225 D. Kirkwood no

226 4 not in favor 1 in favor

227  
228 D. Kirkwood stated that with the application having not received a favorable vote, the appeal is denied.

229  
230 **J. Ramsay moved and K. Shea seconded to come out of deliberations. Vote unanimous**

231  
232 Other Business

233 **Reorganization of Board/Appointment of Alternates**

234  
235 K. Shea said that Jeff Towne ran for a position, but maybe he wants to be a ZBA alternate. He is here  
236 tonight so they can ask him.

237 D. Kirkwood said they have appointed someone to an alternate position, but they still need two more.  
238 The board discussed that both Alec and Wil are going to resign, but Wil will keep his spot until he moves.  
239 J. Town stated he is interested in the position.

240 D. Kirkwood stated they can't appoint anyone until Alec and Wil resign. This topic will be discussed when  
241 the full board is present.

242

243 **Minutes: March 15, 2016**

244 Tabled

245

246 **J. Ramsay moved and R. Rowe seconded to adjourn at 8:37pm. Vote unanimous**

247

248 Respectfully submitted,

249 Jessica Marchant