

**Zoning Board of Appeals
Meeting Minutes**

Minutes of October 26, 2016

Members present: David Kirwan, Chair; David Orth, Jim Buckley, Clerk; Vaughn Hathaway Alternate members present: Mary Moore

Meeting called to order at 7:15PM

Approval of Minutes

July 6, 2016

MOTION: Mr. Buckley moved to approve the minutes of July 6, 2016 with minor corrections as noted

SECONDED: Mr. Hathaway – Discussion: None – VOTE: All in Favor

August 3, 2016

MOTION: Mr. Buckley moved to approve the minutes of August 3, 2016 with minor corrections as noted

SECONDED: Mr. Hathaway – Discussion: None – VOTE: All in Favor

August 10, 2016 – 182 Paxton Street

MOTION: Mr. Buckley moved to approve the minutes of August 10, 2016 for 182 Paxton Street with minor corrections as noted

SECONDED: Mr. Orth – Discussion: None - VOTE: All in Favor

August 10, 2016 – 503-505 Stafford Street

Table until the next Board meeting on November 30, 2016

Public Hearing

Hearing on the petition of Paul Thibeault of 1001 Stafford Street, Rochdale, MA for an Appeal of the Building Inspector's Enforcement Order to Cease & Desist operation of a firewood sales business on the property.

Meeting called to order at 7:30PM

Instructions were given on hearing procedures.

Voting at tonight's hearing: Jim Buckley, David Kirwan, Vaughn Hathaway, David Orth, Mary Moore

Mr. Buckley read into the record, the Notice, Application, Letter from the Building Inspector dated 9/6/2016, a Complaint letter from Margaret Shivik of 999 Stafford Street, Rochdale to the Building Inspector dated 8/26/2016, and Statement of Facts and Points on the Appeal

Submitted into evidence: copy of Application/Zoning Permit for Home Occupation, Business Certificate for a Home occupation at 1001 Stafford Street, aerial photos from Google Earth showing the site and the return receipts from the Certified Mailing.

Correspondence received: Site Consideration from the Building Inspector and documents related to Mass Land Use & Planning Law that were read into the record by Mr. Kirwan.

Mr. Kirwan opened the meeting to the applicant to present their petition.

In Attendance: Mr. Paul Thibeault, Applicant; Mr. Barry Bachrach & Ms. Rhonda Bachrach, Attorneys representing Paul Thibeault

Mr. Bachrach reviewed where the property was located on Stafford Street in Rochdale and where the small Industrial District was, shown in purple and where the R2 District starts, shown in orange.

He explained Mr. Thibeault's property was otherwise landlocked and he was unable to make use of the industrial land, if he was not able to pass through the R2 portion of his property.

Mr. Hathaway said it's not that he couldn't make any use of the land, he couldn't make industrial use of the land.

Mr. Bachrach said he couldn't make industrial use of the land, which is 2/3 to 3/4 industrial. They don't dispute that there is already a house on the property.

Mr. Hathaway just wanted to make clear that it wasn't that he couldn't make use of the property, but can't make industrial use of the property.

Mr. Bachrach agreed. He wanted to point out that Mr. Thibeault stores his wood in the industrial part of the property and makes approximately 70 to 80 delivery trips a year between the months of September to November. He will load the wood on his truck from the industrial portion and drive down the driveway that goes through the residential portion when delivering.

In the Harrison case, it mentioned there was no evidence that industrial uses couldn't be made on that property.

Mr. Hathaway said in the Statement of Facts #10, states; "Where, as here, a district boundary line divides a lot, Section 2.3.04 of the Town Zoning Bylaw allows Mr. Thibeault to conduct a use permitted in the less restrictive zone; here, the Industrial Zone."

He noted the word "here" was not included in Bylaws. The Bylaw states, "Where a district boundary line divides any lot existing at the time such line is adopted, the regulations for the less restricted portion of such lot may extend not more than thirty (30) feet into the more restricted portion." He felt there was a distinct restriction in the Bylaw and what was stated in the application, there were no restrictions in the Bylaw that says he can go no more than 30 feet into the more restrictive zone.

Mr. Bachrach said he read that section a little differently and felt it indicated the less restrictive zone could go 30-feet into the more restrictive zone.

Mr. Hathaway said 30-feet is the enforcement and it's clear that it is not allowed in any of the less restrictive zone.

Mr. Bachrach said his client is doing industrial work within the 30-feet of the more restrictive zone. All the wood is being loaded and stored on the industrial property and not encroaching on the residential property.

Mr. Hathaway asked if the property had been surveyed to confirm that was not the case.

Mr. Bachrach said since he became involved, it has not been surveyed and in discussions with the Building Inspector, was told they should store the wood in back of the shed.

Mr. Hathaway noted the commercial vehicle presumably has to drive over the more restrictive zone, being residential.

Mr. Bachrach said that was if delivering the wood was being something more than just an accessory use of the property. He submitted a letter dated 6/13/2016 from the Building Inspector to Margaret Shivik that indicated it was not a problem to drive the truck down the driveway. His client had been continuously told over the years that a commercial truck could be used and it wasn't an issue driving over the residential portion of the property.

Mr. Kirwan read the Building Inspector's letter to Margaret Shivik, dated 6/13/2016 into the record.

Mr. Bachrach said the point of the letter, is the issue that Mr. Thibeault was told that commercial vehicles were allowed to park in that zone. This was analyzed as doing business in the Industrial Zone and driving the truck out through the residential zone was appropriate.

Mr. Kirwan said from September through November is 70 to 80 trips going out to clients delivering wood. The wood would need to be replenished, so that would make a lot more trips coming into the property during the balance of the year.

Mr. Bachrach said there would be additional trips during the year, but the intent, before the cease & desist was to move further down the property and further away from abutters.

Mr. Kirwan said he drove by the property and noticed a lot of wood stacked near the abutter's property. He asked how close to the abutting property the wood was stacked.

Mr. Thibeault said approximately 20-25 feet on the Industrial portion of the property.

There was some wood stacked near his home for his personal use.

Mr. Kirwan said he noticed a very large truck there and asked what portion of the property that was parked.

Mr. Thibeault said on the Industrial side.

Mr. Hathaway said it didn't look like the wood was strictly on the Industrial side.

Mr. Thibeault said he had the property surveyed, but there were no markers. The wood is stored in a gravel & stone area and has been told for years that was sufficient.

Mr. Kirwan asked the hours of operation.

Mr. Thibeault said he leaves in the morning and is not at the property during the day. He comes back at the end of the day to dump his load. He is at the property more in the fall when delivering orders, but it is not a constant thing. There may be 100-150 trips during the period of a year.

The most noise is when he dumps the first bucket and hitting the steel bed of the truck. He did put some plywood down and rubber to help muffle the sound.

Mr. Hathaway asked if there was an increase in the intensity over the years.

Mr. Thibeault said it's been the same over the past 8-9 years.

Mr. Hathaway asked if the complaints were only made more recently or throughout the time he has been there.

Mr. Thibeault said the complaints have only come from Ms. Shivik, no one else has complained. There were no complaints until a couple of years ago and there has been no change in the way he does business. He has been in the same place, doing the same thing for 10 years and he did not know what changed that would bring on the complaints.

Mr. Kirwan noted the Building Inspector's 6/13/2016 letter didn't indicate there was a problem with driving a commercial vehicle over the residential portion to get to the industrial portion. He questioned that being specifically in violation of the Bylaw.

Mr. Hathaway understood it was in violation of the Bylaw, but the concern was with the abutter's complaint with the noise and smell of the truck.

Mr. Bachrach said the property was split between residential and industrial and they were trying to keep a separation between everything. If his client was given the opportunity and enough time to make a bigger pad area for the wood, it would help address the concerns.

He felt a site visit would help the Board understand where his client would put the pad, which would be on the other side of the hill, much further away from the abutting property, but Mr. Thibeault would need additional time to create that pad.

Mr. Kirwan noted looking at the map submitted, it didn't give an accurate view of where the neighbor's house was located versus the 3 ½ acres that appears to go way back. Without a specific plan showing that or doing a site visit, it is hard to envision how far back this pad was to be moved and whether it would minimize the noise.

Mr. Bachrach felt a site visit would be important for the Board to see where the work is done and how it is done. The wood seen near the abutter's property has been distributed and once the pad was made in back, it would be a good 75-yards further away.

His client has tried to address the noise when dumping a load into the truck and has placed plywood in the bed of the truck, so the wood is being dumped onto plywood instead of metal.

His client also implied that a rubber coating was put on the bottom of the truck bed to help lessen the noise level further.

Mr. Bachrach noted in response to Ms. Shivik's complaint, his client pushed his starting time back on weekends to 10AM.

Mr. Thibeault said the original complaint was the time he started the truck in the morning during the week. He would start his truck between 6-6:30AM to let it warm up, and then leaves for work, just like anyone else.

Mr. Bachrach said they will work on pushing the wood area further back on the property so that the initial noise would not be heard.

Ms. Moore said she got the chance to walk the property and looking at the picture of the property, the Shivik house is just past the 300-foot change, then the property continues up along the backside of the house. She asked where the proposed the work area was to be pushed back. Mr. Bachrach explained it would go to the right of the shed in back.

Ms. Margaret Shivik, 999 Stafford Street & Mr. Michael Shivik, 999 Stafford Street, in attendance.

Mr. Michael Shivik submitted into evidence, two thumb-drives that showed pictures of the work being done at 1001 Stafford Street.

He felt a site visit wasn't really necessary because their evidence will show what started the complaints.

Ms. Margaret Shivik explained Mr. Thibeault starting his truck, every morning at 6:15AM and letting it idle and this is located very close to her bedroom window.

She said Mr. Thibeault's business started out small and he would split the wood on his property. The log splitter was located at the back corner of the property abutting hers'.

At first, she didn't complain, but then started calling the property owner when the noise became too much.

She further explained her land was originally part of 1001 Stafford Street and the original iron pipes, after splitting the lots, were still in place.

The vibration and the loudness with the dumping of the wood, forces her to stay away from that side of her house.

She said she complained to the Building Inspector a few years back and explained the situation. The Building Inspector told her that he knew what she was talking about because he had been down there because he gave him a permit for a wood stove. The wood for the stove was stored beside the house, but then the stacks of wood started becoming mountains of wood.

She felt a crack in her wall was caused from the noise and vibration caused when loading the wood into the truck.

She said the Building Inspector finally told her one day that the best she could do now was to call the Police and have them come up and listen. It takes three dumps to fill the truck bed with wood and when loading the truck, the sound echoes.

She noted this past June, Mr. Thibeault claimed he put down plywood on the truck bed, but the noise has not improved. The smell of the diesel fuel is very bad, she is unable to open her doors or windows due to the smell, and the smell lingers.

Mr. Thibeault starts work at 9:30AM on a Saturday and not 10AM as he claimed and when she looks over at his property, it looks like there is a fire with all the fumes from the diesel fuel in the air.

She grew up on that property in Rochdale with the Mills across the street and there was never problem with the Mills in Rochdale with noise or smell. The work being done at 1001 Stafford Street is a problem.

Ms. Shivik continued. Around 8 years ago, she called the landowner complaining about the noise, the smell and the time work started. At that time, they were able to work something out, but it lasted only two weeks.

Mr. Shivik submitted into evidence, a picture showing the commercial truck used and the mountain of wood being stored on Mr. Thibeault property.

He said the picture shows the truck being parked right at the property line and the piles of wood being stored right at the property line.

The problem is in the summer they can't open windows or run the air conditions because of the trucks & equipment running all day. Mr. Thibeault claims there are only a couple of dumps a day and that's not the case. Mr. Thibeault pushes & moves the wood around on the lot and in order for him to get the correct load of wood into the truck, it's counted one by one.

Mr. Shivik felt that was definitely processing wood on the property.

The property owner has been contacted on multiple occasions to no avail. Mr. Thibeault goes back to doing whatever he wants after a period of time. That is a very important fact the Board should take into account when making this decision tonight.

There are three to four delivery trips done a day. The wood is loaded into a frontend loader, one by one and then emptied into the truck. The wood is counted out by cords, which means Mr. Thibeault is processing on the property.

Mr. Shivik asked to play a section of the video submitted, so the Board can hear how loud the noise level is.

Mr. Hathaway noted the Board was not hearing whether or not this was an allowed use. He felt the Board understood the complaint of this being obnoxious, but they were here to decide whether the decision by the Building Inspector should be overturned.

Mr. Shivik said it was more than obnoxious; it was life intruding and life interrupting. He played the portion of the video for the Board to hear what the sound was like from his back porch. He noted it was image #84631 and recorded in September on a Sunday morning.

Mr. Shivik continued. They filed their first complaint to the Town several years ago, asking that Mr. Thibeault move his wood back behind the line. They tried working with Mr. Thibeault and the homeowner and from the Building Inspector's letter dated 6/30, clearly states that there's been no attempt to comply.

He will give Mr. Thibeault credit on putting plywood in the bottom of the dump truck, but that did not stay in there for long. As for pushing the area further back on the lot, he was concerned with the wetlands that sat in the back there.

He felt the Bylaw was clear that Mr. Thibeault can do whatever he wants within the Industrial Zone, so long as, he meets the rest of the requirements.

Mr. Orth asked if Mr. Shivik was complaining about the noise or the use of the residential property. Mr. Shivik felt it was all tied together.

Mr. Orth said it sounded like they were complaining about the noise in an industrial area.

Mr. Shivik said that would depend because the noise is coming from a truck going out at 6AM.

Mr. Thibeault said the truck leaves in the morning and comes back at night once a day.

Mr. Shivik disagreed and noted the truck making several trips during the day.

Mr. Hathaway said his concern was on using residential property for an industrial use. He travels Stafford Street all the time and would not feel safe walking that road because of the traffic. He felt it was a dangerous area to have a commercial truck entering and existing a residential property.

Mr. Thibeault said the traffic is very light in the early morning. As for the complaint of him leaving at 6AM, he called the Chief of Police asking if there was a Bylaw stating he couldn't leave for work, with his truck, before a certain time in the morning. He was told there wasn't a Bylaw stating when someone could leave for work in the morning.

He felt this was not different from anyone else leaving to go to their job in the morning.

Mr. Kirwan disagreed and felt there was a difference between someone idling a pick-up truck and someone idling a commercial truck.

Ms. Moore asked if there was anything stated in the Bylaw that would not allow Mr. Thibeault to have that truck on the property if he wasn't doing business there. She questioned that if Mr.

Thibeault uses that truck to go to work, was there anything stating he can't drive down that same driveway with that truck to go to work every day.

Mr. Orth said the Bylaw states "the continued and regular parking of one commercial vehicle", but doesn't imply the size of that vehicle, "operated by a resident of the premises is permitted by right in all zoning districts." Section 3.2.08. It continues stating, "Commercial vehicles in this bylaw do not include tractor trailers or construction vehicles (backhoes, bulldozers, dump trucks and the like).

Maybe it could be said that this being a dump truck, could be excluded.

Mr. Kirwan felt that was the point that they can't go parking large trucks, bulldozers and tractor trailers in a residential district.

Mr. Jeff Taylor, Building Inspector said as the Zoning Officer, he did not classify that dump truck as a construction vehicle, because this was not a construction business, it's a wood business.

Mr. Kirwan asked Mr. Taylor what his concern was with this application and whether he had concern with the dump truck going in and out through the residential portion of the property. Mr. Taylor said he didn't have an issue with the truck, but did have a problem with the noise and fumes. He tried remedying the issue by being a mediator, but that didn't work, so now he recommends they go by what the Bylaw states.

In his opinion if the business was moved to the back of the property, which would make it at least a football field away from everyone, not much would be heard.

Mr. Hathaway said the June 13th letter stated a resolution to the issue and there was an opportunity to make a change. Then there was a follow-up letter saying the changes weren't made. If there was an opportunity to make adjustments, why wasn't it done.

Mr. Bachrach said as his client mentioned earlier, he makes his money this time of year and isn't bringing any wood onto the property. His client put the plywood and rubber liner in the truck and is willing to remove the trees and gravel the area to move the wood further back on the lot, but that will take a lot of money.

Mr. Hathaway asked even though this agreement was made back in June, nothing could be done to make it less troublesome due to finances.

Mr. Thibeault said it wasn't like he was doing nothing, he did start cutting the trees down in back.

Mr. Kirwan asked on something like this, if the Board was allowed to impose certain restrictions on that piece of land.

Mr. Hathaway explained the Board was strictly hearing whether or not to uphold the Building Inspector's Decision.

Mr. Orth understood before the cease & desist, some recommendations were made to possibly remedy the situation and that did not happen. Since that did not happen, nothing changed and that was the reason for the cease & desist.

He felt if Mr. Thibeault moved to the recommended locations, then the cease & desist order may be lifted.

Mr. Hathaway noted the Board was not in the position to say if Mr. Thibeault moved to the other location, the cease & desist would be lifted, that is up to the zoning enforcement officer.

Mr. Shivik said it looks like residential access to the industrial zone is not allowed, as a matter of law. Under Mr. Taylor's reasoning, if the truck was painted yellow and labeled construction, they can't park it there, but if it's red and labeled unicorn truck, they can park it there.

Mr. Taylor explained he didn't care what color the truck was, he was talking about the use of the truck. A construction use is different from a use of bringing in firewood in a truck. A construction truck has more to do with earth removal, etc. and not firewood.

Mr. Kirwan reviewed that the Board will be taking a vote, potentially tonight, to either uphold or void the cease & desist. If the Board upholds the order, there is nothing the Board can do nor should do, to change the situation in the future. That would be up to the applicant and Building Inspector. If the applicant took certain actions that were compatible and considerate of the neighbors, that there may be an opportunity that the Building Inspector could potentially lift the cease & desist. Mr. Taylor agreed.

Mr. Bachrach said from what he is hearing, Mr. Thibeault received the cease & desist because he hadn't followed through on moving to the back part of the property. The Board can take a vote to void the order or uphold the order. To uphold it would reserve the right of the Building Inspector to make a determination when to lift the order.

Mr. Kirwan wasn't sure if that would be the case, but it would be up to Mr. Thibeault to work closely with the neighbors and Mr. Taylor's office to come up with some kind of solution that would be amicable to all.

Mr. Hathaway noted the Board was strictly voting on whether to approve the cease & desist order and not to include the other stuff that has happened.

Mr. Shivik said they were amicable to work with Mr. Thibeault, but they have tried so many times and nothing has happened. So now that Mr. Thibeault is up against the wall, he'll do anything to get back to do whatever he wants to do all over again.

Mr. Kirwan asked for any further comments, questions or concerns; hearing none, asked for a motion.

MOTION: Mr. Buckley moved that Zoning Board of Appeals uphold the Building Inspector's Enforcement Order to Cease & Desist operation of a firewood sales business on property located at 1001 Stafford Street, Rochdale, MA

SECONDED: Mr. Hathaway – Discussion: Mr. Orth clarified that the Board was denying the appeal request of Mr. Thibeault.

VOTE: 4 –In Favor / 1 –Opposed (Mary Moore)

MOTION: Mr. Orth moved to close the hearing

SECONDED: Mr. Buckley – Discussion: None – VOTE: All in Favor

Meeting adjourned at 9:45PM

Respectfully submitted:

Barbara Knox

Barbara Knox