



TOWN OF NORTHBOROUGH Zoning Board of Appeals

Town Hall Offices • 63 Main Street • Northborough, MA 01532 • 508-393-5019 • 508-393-6996 Fax

Approved January 24, 2012

Zoning Board of Appeals Meeting Minutes August 23, 2011

Members in attendance: Richard Rand, Chairman; Mark Rutan, Clerk; Craig Gugger; Chan Byun; Richard Kane

Others in attendance: Kathy Joubert, Town Planner; Kay Doyle, Town Counsel; Bill Farnsworth, Building Inspector; Elaine Rowe, Board Secretary; Kevin Carroll; Howie Stone; Sandra Chaurette; Jodie Martinson; Lee Zawacki; Mary Ellen Webster; Ken MacLean; Don Hamman; James Millar; Millard Berryman; Theresa Capobianco; Deirdre O'Connor; Kevin McCormick; Diana Woodruff; Eileen Ward; Donna Morris; David Backus; Attorney Mark Lanza; Emerson Chandler; Peter Adams; Penny Black; Heather Baer; Scott Wellman; Jonathan Bush; Nancy Anderson; Brian Harris; Neil Swinton; Russell Swinton; Nancy Lepore; Tracey Cammarano; James Black; John Forcucci; James Shore; and Christopher Senie

Chairman Rand called the meeting to order at 7:19PM.

Public Hearing to consider the petition of 429 Whitney Street Realty Trust and S.A. Farm, LLC, for an Appeal of the Cease and Desist Order issued by the Building Inspector on July 15, 2011, ordering the Petitioner to stop the use of an unlicensed compost or solid waste facility, and prohibiting any further importation of food and paper waste onto the property located at 429 Whitney Street

Town Counsel Kay Doyle explained that the Town Planner had contacted Mr. Anza, and he indicated that neither he nor his attorney will be attending this evening's meeting. Ms. Joubert stated that the petitioner did not request a continuance of tonight's hearing, he simply indicated that he will not be attending.

Scott Wellman, 67 Coolidge Circle, voiced his opinion that the board should not reverse the Cease and Desist Order. He stated his desire for the town to start investigating the situation more aggressively and suggested that the town make an effort to get onto the property to assess whether Mr. Anza is complying with the Cease and Desist Order. Mr. Wellman voiced his opinion that the town should try to determine how much material is coming into the site, either through phone calls to the haulers or with the use of cameras. Mr. Wellman noted that the odors emanating from Mr. Anza's property are so horrendous that the neighbors are unable to use and enjoy the property that they own. He commented that his bedroom window faces the opposite side of 429 Whitney Street, and he has had to keep his windows closed because of the stench. He suggested that utilizing best practices for a composting operation would not result in this type of odor, and questioned the legality of the activity taking place on the parcel. He reiterated his desire for the board to enforce the Cease and Desist Order and asked that the maximum allowable fine be imposed on Mr. Anza.

Chairman Rand asked Mr. Wellman how he is sure that the odors are coming from Mr. Anza's property. Mr. Wellman stated that there were never any issues with odors until garbage trucks starting coming to

that property. He commented that it appears to be the epicenter of the odor, and that the odor is much worse up on the aqueduct.

Sandra Chaurette, 66 Coolidge Circle, noted the close proximity of her property to the aqueduct and Mr. Anza's property, and commented that the horrendous odor has been present for far too long and has prevented her from being able to open her windows or use her screened porch. She discussed the severity of the odor, which prompted her to call the Town Engineer about a week ago. After a lengthy conversation with Fred Litchfield, he had asked the Board of Health Agent to make a visit. Ms. Chaurette noted that she has lived in town for over 40 years, and has spent 30 of those years in her home on Coolidge Circle. She emphasized that it is totally inappropriate for Mr. Anza to be doing what he is doing on this parcel, and stated that she is outraged and insulted that the town has allowed him to continue this activity.

Robert Frank, 420 Whitney Street, voiced his frustration, and noted that the taxpayers and residents will have to live with the impacts of Mr. Anza's activities long after he is gone.

Heather Baer, 6 Coolidge Circle, explained that she had just moved to the Pine Knoll neighborhood in late October and, had she known about this situation, she would never have done so. She stated that she is unable to enjoy her property and noted that she is not nearly as close to Mr. Anza's property as some of the other abutters. She commented that the horrendous stench not only makes it impossible to spend any time outdoors, it also makes you physically ill.

Millard Berryman, 24 Morse Circle, noted that he has been a resident for over 40 years and requested that the board take some action to prevent the activity from continuing. He stated that the odor was so bad on August 12th that he called the Police Department to complain. At their suggestion, he spoke with the Board of Health Agent who visited the neighborhood and was shocked at the severe stench emanating from Mr. Anza's property.

David Backus, 58 Coolidge Circle, stated that Mr. Anza's violation of the Cease & Desist Order has been ongoing. He explained that he has personally observed these violations, has sent numerous emails to town staff, and that trucks have been entering and exiting the site on a daily basis.

Penny Black, 4 Stone Drive, stated that she had observed a garbage truck entering the property on August 17th, so she took a photograph of the truck and contacted the DEP. She reiterated that Mr. Anza has clearly continued to violate the Cease & Desist Order and emphasized that the town must take some action. Ms. Joubert asked about the photograph. Ms. Black stated that she had sent the license plate number of the garbage truck to both DEP and the Town Administrator.

Diana Woodruff, 46 Coolidge Circle, presented the board with a packet of emails that she has sent over the last few months complaining about the odor, flies, and truck traffic to and from the parcel. She also stated that the odor in the neighborhood this morning was gag-inducing. In addition to the odor, there is also a noise issue associated with the activity on the property. Mr. Farnsworth commented that there are numerous emails coming in constantly to both DEP and town staff members, and that they are not going unnoticed.

Howie Stone asked why the board does not already have this information, and why it is necessary to question the residents. Chairman Rand explained that this is an open hearing, and is the hearing that will likely be appealed to the judge, so it is important for all of these facts to be part of the record. Mr. Stone questioned why Mr. Anza is still conducting the activity if there has been a Cease and Desist Order issued. Mr. Farnsworth explained that it is impossible to police the parcel 24 hours a day. Mr. Stone

suggested that the town take the landowner to court. Chairman Rand suggested that the matter is moving in that direction.

Jody Martinson, 50 Coolidge Circle, noted that she has lived in town for 41 years and voiced her opinion that Mr. Anza is “thumbing his nose” at the town and the board. She voiced frustration about how slow the town has been to act, considering the amount of visual evidence that the residents have accumulated and presented over the past two years.

Christopher Senie explained that he owns property in Berlin that might be negatively impacted by this activity. Also, as a practicing zoning attorney, he understands that the board can choose to affirm, reverse, or modify their decision. He commented that the board has tonight all of the powers that the Building Inspector had when he issued the Cease & Desist Order and, in light of what has happened, he would suggest that the board modify the Cease & Desist Order to strengthen the language. Mr. Senie also noted that he has heard from many residents that truckloads of material have continued to be brought to the site and that the materials are of a bad nature. He requested that the board order Mr. Anza to remove all of the material that has been brought onto the site since the Cease & Desist Order was issued.

Gretchen Matthews stated that she had observed Mr. Anza working on his land and voiced her assumption that he has moved things around so that the board cannot tell what he has done. She reiterated that the activity should not be allowed to continue.

Jackie Wellman, 67 Coolidge Circle, suggested that the board now has the opportunity to revisit their decision about Mr. Anza operating a farm on the property, re-evaluate the facts and declare that this is not a farming operation.

Attorney Mark Lanza, who represents several residents from the Coolidge Circle area, stated that previous hearings addressed earth materials being imported, but it now appears that it is garbage that is being brought in. He suggested that Mr. Anza’s failure to appear at tonight’s hearing should support the board’s denial of his appeal. Attorney Lanza noted that Mr. Anza states in his appeal that this activity is all necessary for the purpose of agriculture, and he vacillates between composting and food to feed his animals. Attorney Lanza noted that the board’s previous decision included a finding that the primary use of the property to date was not agriculture, and he questioned what evidence has been received to support an agricultural use since that time. Attorney Lanza reiterated that operating a composting site is not in pursuit of agriculture, and that the use of the property is not primarily agriculture; it is a solid waste disposal facility. He voiced his opinion that the DEP will issue an order requiring Mr. Anza to cease all activity with relation to solid waste. Attorney Lanza reiterated that the board should affirm the Building Inspector’s decision and deny Mr. Anza’s appeal.

An abutter (his name was not heard) explained this he is the sole direct abutter to this property, and that his property has now been ruined by the stench emanating from Mr. Anza’s land.

Mr. Farnsworth stated that the issue before the board tonight is not whether the use on the property is agricultural, but is simply to address the order to stop composting on the site.

Ms. Wellman asked if it is within the board’s authority to fine Mr. Anza for every day that he is in violation of the Cease & Desist Order. Attorney Doyle confirmed that it is. Mr. Farnsworth noted that, while it is, there is a certain procedure that must be followed. He voiced frustration with the system, the inability to back-up Cease & Desist Orders, and the amount of time the process takes. Mr. Wellman

asked where this system is documented in writing. Ms. Joubert explained that noncriminal disposition is part of the Town Code, and suggested that Mr. Wellman contact the Town Clerk's office for more information. Mr. Wellman asked how the town can move forward and begin imposing fines on Mr. Anza.

Richard Kane suggested that the board support Mr. Farnsworth's Cease & Desist Order and instruct Town Counsel to notify Mr. Anza that the board has ruled to do so and to give him one week to clean up the property, after which the town will impose a fine of \$25,000 per day for violation. Ms. Joubert explained that the maximum allowable fine is \$300 per day, per offense.

James Black, 14 Stone Drive voiced his understanding from recent newspaper articles that Mr. Anza has similar problems in Boston, where he is being fined \$25,000 per day to clean up his act. He noted that Mr. Anza has a history of doing this type of thing and, until the town stops him, he will continue doing so. Mr. Black emphasized the need to act now.

Mr. Berryman commented that a State Trooper's car was parked in front of Mr. Anza's driveway earlier today, and it appeared that the Trooper was watching every move in and out of the property. He noted that a garbage truck had dumped material at approximately 1:00PM, and he has a picture of the truck's license plate. Chairman Rand asked for a copy of all photos.

Mr. Frank voiced his opinion that there appears to be an enforcement issue, and asked if the board can look into taking more aggressive action against Mr. Anza. Mr. Rutan asked Town Counsel if there is any procedure that will allow the town to seize or close the property. Attorney Doyle stated that the town can seek a preliminary injunction in court, but emphasized the importance of ensuring that we do not interfere with the state's investigation. Mr. Rutan commented that it is clear the Mr. Anza has no intention of complying with the Cease & Desist Order and will continue to run trucks into the property unless there is a physical restraint stopping him from doing so. He questioned at what point the town can legally interfere. Attorney Doyle reiterated that the most likely route would be to request a preliminary injunction, and while it is unlikely that the judge would order placement of jersey barriers to block the driveway, he may order that the trucks be stopped. If the property owner chooses to defy the court order and the town can prove it, monetary fines can be imposed. Attorney Doyle also noted that the Board of Selectmen has control over litigation, so ultimately the Town Administrator would have to agree.

Nancy Lepore, 388 Whitney Street, asked what proof the board, town and ultimately the courts would need. Attorney Doyle commented that tonight's hearing is preliminary, allowing the board to gather information.

Kevin Carroll voiced his understanding that a permit is required in order to operate a trash truck in town, and asked why the town cannot simply prohibit the trucks from operating here.

Gina Babcock explained that she has kept a record of photographs and email complaints, which number in the hundreds. She noted that there were days when she could hear as many as six garbage trucks dumping loads on the property and she had notified the police, but was told that the town cannot do anything about the activity. She emphasized that, despite Mr. Anza's assurances, this is not a farm. She also voiced her opinion that this board did not do its due diligence to say that the primary activity on the property is not agricultural, and because the dumping has been allowed to continue she now has mounds of garbage 200 feet from her home. She reiterated that the residents have been suffering for over a year and pleaded with the board to take action.

Jim Shore, 34 Coolidge Circle, commented that the activity has been ongoing for two years. He also stated that he had asked Mr. Anza publicly what he planned to do with the property and was informed that it was none of his business. He noted that Mr. Anza had previously stated that he intends to do whatever he wants on the property and the town cannot do anything about it. Mr. Shore discussed the horrible conditions and safety concerns about trucks dragging material into the roadway, as well as the presence of dead animals and rodents. He also voiced his desire for the board to take action.

Jeff Faulkner voiced his understanding that Mr. Anza has plans for a similar operation on the parcel at 432 Whitney Street, which is four times the size of the parcel at 429 Whitney. He questioned how much worse the odor and noise will be when Mr. Anza is conducting this type of activity on a substantially larger parcel.

Mr. Kane asked if the board has the power to retract their ruling that concluded that Mr. Anza had met the criteria for an agricultural use. Attorney Doyle stated that there was no agricultural finding to retract. She explained that the board's finding in March was that what Mr. Anza had been doing on the parcel up to that point was not agricultural and what he described as his plan was to be agricultural. However, what is being done on the property currently was never discussed.

Mr. Farnsworth commented that there is some livestock on the property, and that activity is agricultural, but whether the primary use of the property is agricultural remains to be seen. He also stated that the board needs to determine whether the truck activity is agricultural in order to support the farm animals or part of the composting operation.

Brian Harris, 416 Whitney Street referred to Mr. Faulkner's comments about 432 Whitney Street, and asked what action the board will take.

Attorney Doyle informed the board that the town had just received a phone call from Mr. Anza's attorney indicating that they are dropping the appeal, but that the town has received nothing in writing. Chairman Rand stated that, absent a formal written request, the board should proceed with the hearing and issue a decision. Ms. Joubert & Attorney Doyle agreed.

Mr. Rutan asked to what extent the board can modify the Cease & Desist Order, and questioned whether there is any way to expedite the process to stop the operations currently underway on the parcel. Attorney Doyle indicated that the board has the same authority as the Zoning Enforcement Officer and can modify the order within its discretion. Mr. Rutan asked about requiring the removal of the material and questioned whether doing so would create a larger problem. Attorney Doyle explained that the town should coordinate with the DEP to ensure that there are no environmental issues caused by any proposed corrective action, but she also wants the neighbors to be aware that the stench could be worse for a period of time.

Ken MacLean, 92 Coolidge Circle, suggested that there should be some way for the odors to be ameliorated during the time that the refuse is being removed. Mr. MacLean also commented that compost typically takes 6 to 9 months to decay, so the residents would have to deal with the odor for at least that long if nothing is done.

Kevin Carroll voiced his opinion that the person who caused the problem should not be charged with removing the material, and requested that the board stipulate that the removal must be done by a licensed contractor approved by the town.

Mr. Barrows reiterated that the town charter clearly states that anyone moving garbage via truck must have a permit for that truck, and suggested that the town should enforce that regulation.

Howie Stone stated that he had bumped into a truck driver at the Shell station at the Berlin rotary who admitted that he was coming from Boston to dump trash on the Whitney Street parcel. Mr. Stone explained that he took pictures of the truck and license plate. He also voiced concern about what else is being dumped on the property.

Ms. Babcock voiced her opinion that, though the stench might be worse during removal, the residents would be able to accept it with the knowledge that it would be for a finite period of time, with the end result being an improvement over what currently exists.

Mr. Rutan asked about the logistics of requiring the landowner to hire a licensed contractor to appropriately remove the material. Attorney Doyle indicated that she can start drafting language for a modified Order tonight and can include a stipulation requiring Mr. Anza to hire a qualified, licensed professional. She also noted that she can consult with someone on staff at DEP about what those qualifications should be. Mr. Rutan stated that it is not possible to separate out what material has been brought into the site since July 15. He explained that the board's original intention was to stop the filling activity on the property and for the material already onsite, which was rock and dirt at the time, to be redistributed within the site to make the property useful. Instead, Mr. Anza has brought in the garbage and other unsuitable materials and imperiled the health of the neighbors. Mr. Rutan emphasized his desire that Mr. Anza should now be required to have all organic material removed from the property.

Mr. Shore stated that, after the Cease & Desist Order was issued, Mr. Anza built up berms along the property lines closest to the railroad tracks and placed trailers at the top of the berms to block the view onto his property. Mr. Shore requested that the board also require Mr. Anza to bring the elevations back to their original levels.

Mr. Farnsworth explained that he was on the property on August 5th with Mr. Anza's permission and, while he was not able to take any photographs, he did record that there had been more containers brought in for the animals and dirt had been moved around.

Mr. Farnsworth explained that the original Cease & Desist order stipulated that no additional fill could be brought into the site. Mr. Shore stated that the area closest to the railroad tracks was the highest point on the property, and it is now 20 feet higher than it was. He voiced his opinion that justice should be handled appropriately.

Mr. MacLean asked how many citations have been issued to Mr. Anza. Mr. Farnsworth indicated that none have been issued to date.

Mr. Senie urged the board not to write a new resolution tonight, but suggested that it be done thoughtfully and carefully to ensure that it contains the best language possible.

Ms. Joubert suggested that the board close the hearing and let Town Counsel and staff start drafting language for the modified order. Attorney Doyle agreed. Ms. Joubert explained that anything received prior to tonight will be part of the public record. Attorney Lanza stated that State Law (Chapter 48) requires that whenever there is an administrative appeal, everything in the Building Inspector's file must

be transmitted to the zoning board. Attorney Doyle commented that, based on recent experience, the Attorney General's office strongly prefers that the information be handed in the night of the meeting.

Ms. Woodruff explained that she has audio clips of the noise and agreed to burn the file to a CD and provide it to the town. Ms. Joubert voiced her opinion that the noise has been well documented. Mr. Farnsworth reminded the board that the issue before them is the Cease & Desist Order, and that the information about rock grinding and soil moving is not pertinent to tonight's hearing. Mr. Kane stated that he would like to see the board enforce the Cease & Desist Order.

Ms. Babcock commented that the DEP has received hundreds of complaints and asked whether the town can use that information to support their decision.

Ms. Wellman stated that it is imperative that Mr. Anza be required to remove the fill. Given the situation in Boston, she is concerned that there will be even more excessive fill brought in.

Mark Rutan made a motion to close the hearing. Craig Gugger seconded, vote unanimous.

Mr. Rutan stated that he sees no reason to lift the Cease & Desist Order, and that leaving it the way it stands could preclude any legal action on Mr. Anza's part. Mr. Kane agreed. Mr. Gugger voiced his opinion that the order can be modified, and he believes Mr. Anza will appeal the decision no matter what action the board takes. He commented that he would like to employ stronger language.

Mr. Gugger also emphasized that he would like the compost removed from the site. Mr. Rutan agreed, but voiced his opinion that this has reached such a dangerous potential that it has to be removed very carefully and very professionally. He expects that this will be a very expensive process and wants to be sure that Mr. Anza is compelled to pay for it to be done properly.

Mr. Gugger asked about an injunction recommendation. Mr. Rutan suggested that this be a recommendation at Town Meeting and that we should seek to have the maximum fine limit increased. Mr. Farnsworth explained that state statute sets how high you can go. Mr. Byun voiced his opinion that the board's decision should have as much "bite" to it as possible. He also agreed with pursuing a preliminary injunction, requiring the removal of the material and imposing fines on Mr. Anza.

Chairman Rand asked if the board can condition how much time Mr. Anza can take to remove the material. Attorney Doyle suggested that staff should consult with a professional as to what an appropriate time frame should be. Ms. Joubert asked if the board is in agreement about upgrading the Cease & Desist Order. Mr. Rutan stated that he supports affirming the Building Inspector's Cease & Desist Order as well as upgrading the language to express maximum displeasure with the process thus far.

Members of the board agreed to meet at 8:00AM on Tuesday, September 6, 2011 to review the draft Order and vote. Ms. Joubert agreed to provide a draft document for review prior to September 6, 2011.

Adjourned at 9:01PM

Respectfully submitted, Elaine Rowe, Board Secretary