

TOWN OF KINGSTON
ZONING BOARD OF APPEALS

MINUTES
September 14, 2022

Members:

Mr. Paul Dahlen – Chairman
Mr. Doug Dondero – Vice Chairman
Mr. Lane Goldberg
Mr. Robert Mullen
Mr. Kevin Wrightington

All members were in attendance.

Mr. Goldberg read the public hearing notice for 48 Marion Drive and motioned to open (1) as described in the public hearing notice, Zoning Board of Appeals at 7:02 PM in Room 200, seconded by Mr. Wrightington with a **VOTE of 5-0-0.**

Appointment:

7:00 PM Applicants Mary and Shawn O'Donnell, Trustees of the O'Donnell Family Trust, both (1) appeal a certain cease-and-desist order issued by the Building Commissioner regarding the commercial importation of fill to 48 Marion Drive (Parcel No. 75-38), said appeal being conducted pursuant to G.L. c. 40A, §15 and §10.4.B.2 of the Zoning Bylaws; and (2) apply for a Special Permit under §4.2.A.1 of the Kingston Zoning Bylaws to alter or extend an existing use by adding reclamation and restoration of the property via the importation of fill.

Mr. Jason Silva, Community Development Director, and Zoning Enforcement Officer has been a Massachusetts certified building official since 2006. Have been with the Town of Kingston since 2016. The decision to endorse the Town of Kingston issuing a cease-and-desist order on 48 Marion Drive was certainly by far one of the most difficult decisions. Understanding the serious implications of the order I made sure to involve the administration of the town including Conversation, Planning, Health, Town Administrator's office, Town Counsel and Board of Selectman. The governing laws that originate on this situation are general laws of chapter 40A Massachusetts general laws and continue into our zoning by law. The state and local regulation provide for a democratic process with checks and balances built into the zoning. Zoning Board of Appeals is one of those instruments. Any administrative zoning order may be appealed to this local body for determination. This appeal process allows for the ultimate decision in cases of this nature to be adjudicated and resolved to the desires and perspectives of the community assigned representatives. Deserve to be allowed to make the decisions in the town that you live in. It's by the very nature of this administrative order and this appeal that brings the question to the community. The question being, Is the commercial importation of these DEP soils in acceptable and permissible use in the town of Kingston. We have staff and Attorney Mike Kennefick to speak of these issues.

Attorney Kennefick, Town Counsel, spoke that a lot of things will be talked about regarding the O'Donnell's property and the effort to remediate some of the impacts and conversations that they may have had with some of the neighbors. ZBA is hearing a very simple issue this evening. It is literally a zoning determination. It is based on §4.1.A. It's one sentence that is the subject of the hearing tonight – "Any use of a building structure or land not specifically permitted by the bylaw is prohibited." That refers you to §5 which is your table of uses. In this case Jason's determination after doing an investigation and looking into the operation he determined that this is a

commercial soil importation operation. It is not listed in the table of uses in §5. That is why he issued the cease-and-desist order. Jason did that in conjunction with consultation with several staff in town and town counsel. Attorney Kennefick proceeded to explain the "Richardson Case" which is the exact same issue from the town of Uxbridge which he represents as Town Counsel. Once they approach DEP they negotiated an administrative consent order. There is one in this case. It is a detailed agreement between the property owner, the third parties and the ascending companies. It outlines how the soil has to be tested, inspected, sent out for reports and how the whole process is to be laid out. Going back to when this was new, one of the requirements is that you get some sort of community support. Years ago, the Select Board endorsed this. There was a letter of support from Bob Fennessy stating that supported the importation operation. The exact same thing happened in the Uxbridge case.

Mr. Dahlen questioned whether there was a tax break offered to bring in the soil from the City of Boston. Why would anyone want the soil except the one person who is receiving it in town? How do you become a receiving location?

Attorney Kennefick stated he's sure that there is some sort of tax benefit.

Mr. Goldberg asked Attorney Kennefick to back up and frame what the ZBA as a board need to decide tonight. The order by Jason includes a nuisance, air pollution, erosion, and siting other sections of the bylaw. For the ZBA to decide whether this is a nuisance, we don't know if this is going onto abutter's property. Frame the issue.

Mr. Kennefick stated that the cease and desist is based on the prohibition under 4.1.A stated earlier. In this case Jason investigated it and issued the cease and desist. Judge wants this process to play out before it goes back to Brockton Superior Court. The issue to decide is whether §4.1 applies here.

Mr. Jason Silva explained the two orders issued, the cease-and-desist order that is relevant this evening is all strictly zoning. A few weeks earlier DEP issued a nuisance order and the Town's nuisance order was piggy backed to that DEP order. That DEP order including that nuisance complaint has been resolved. The only thing in front of the board tonight is the zoning related issue

Attorney Kennefick proceeded to read the 4.1.A code.

Mr. Goldberg asked if this was allowed by the Board of Selectman.

Attorney Kennefick stated that it was endorsed back in 2015 by the Board of Selectman. That does not have any binding on this board. You're in charge of the enforcement of zoning bylaws.

Mr. Goldberg reviewed and had a question pertaining to the memorandum of law that the board received regarding sand and gravel operations in preexisting, nonconforming use have existed on these properties dating back to the 1940's. Which is prior to the enactment of the zoning code. Is that a preexisting, nonconforming use?

Attorney Kennefick replied that they're arguing that the graveling is a grandfathered use. They can also see that a removal permit would be required to the Board of Selectman every year. That doesn't have any bearing on the importation. The importation started 7 years ago. That has not happened in

Mr. Goldberg asked Attorney Kennefick what is allowed and what is not allowed.

Mr. Kennefick replied that the applicant is allowed to gravel the property, remove soil so long as they go to the Board of Selectman every year and get a permit to do so. Which they have not in about 3-5 years. The importation is an unrelated use that they've started approximately 7 years ago according to what the applicant stated. DEP

says that the original plan was a 60 acre reclamation where they were going to bring in two million cubic yards of these urban soils. There was a reduction and then an increase. The proposal is to bring in between two and two and a half million cubic yards of these urban soils. The property owners are going to be paying millions of dollars to receive these materials. They're undesirable materials. There's not much that you can do with them but put them in the ground and flatten them out.

Mr. Goldberg asked if the Conservation Commission involved in this at all?

Attorney Kennefick replied they are. That's a parallel proceeding. We don't want to blur the lines here to cause any kind of confusion. Planning Board may be involved as well. Tonight, is just the zoning issue.

Mr. Dahlen asked in order for Dep to allow you to dump on your own property you have to become a receiving site and then you need a consent. Who decides, you can only bring in bad soils, if you're a bad soil property to begin with, Correct? How do you determine if your property is bad to begin with to bring in bad soils?

Attorney Kennefick replied They determine the level of contaminants at the receiving site. When they're shipping the materials from Boston or anywhere.

Mr. Mullen replied that the soil goes to a third-party lab for testing.

Mr. Goldberg asked if the DEP works with the town at all?

Attorney Kennefick stated that there is a third-party that does testing and provides quality control reports. Then they are supposed to test the materials as they are being brought to the site.

Mr. Dahlen asked again who determines and allows bad soil to be brought in.

Attorney Kennefick replied that it is all done through the administrative consent order.

Mr. Goldberg asked who in the Town of Kingston do they report to and wouldn't they need to get a permit?

Mr. Dahlen asked who in the state?

Attorney Kennefick replied, the DEP.

Mr. Dahlen asked again who in the town allowed it in order for the DEP to be allowed. How was it allowed to start?

Attorney Kennefick the ACO requires that the parties require construction reports to the Select Board quarterly.

Mr. Keith Hickey, Town Administrator clarified how this permit was issued. One of the processes that needs to be satisfied is the applicant needs to go to the Board of Selectman and request the Board of Selectmen's support to allow this contaminant soil to come into Kingston. The Board of Selectmen several years ago heard the request and supported the request and wrote a letter to MassDEP stating that they supported the delivery of these soils into a property in Kingston.

Mr. Dahlen asked that they received a letter from MassDEP stating that the Marion Drive property is contaminated enough to allow other contaminated soil?

Mr. Hickey replied respectfully that is not the case. He thinks the Marion Drive property was removing soil to have the opportunity to accept, fill at their site to replace the fill that had been removed. It was a clean site. Have to get permission from the Board of Selectman to bring in soil. DEP is allowing bad soil to be put on good soil. The contaminants in the soil are below the threshold that have been established as contaminated soil. The soil that they are bringing in does have some contaminants in it. When they're tested at the site where they're being removed from, the results of those tests and contaminants in the soil the allowable limits that have been established by MassDEP. Mr. Hickey's understanding is that they need to go to the Board of Selectmen once during the application process seeking permission or support to allow this soil to be brought into the community. They've done that. At a Board of Selectmen's meeting three weeks ago due to a lack of activities on the property the Board of Selectmen has sent MassDEP a letter that this Select Board does not support the activities on the O'Donnell site. Not sure how much of an impact this letter is going to have. They have already issued their letter of approval with a variety of stipulations that have to be met by the property owner to continue to hold that MassDEP permit.

Mr. Dahlen asked in order to be an industrial sand and gravel pit which is selling sand and gravel, it has to have a yearly license through the town and has to be updated every year. If they need a permit when bringing in fill, then do they need a permit when getting rid of fill?

Mr. Keith Hickey stated there is an annual application to remove gravel. Considered by DEP during the application process there are a number of requirements that Mass DEP will have on the receiving site. Mass DEP monitors that receiving site to make sure that the property owner and/or representatives are operating within the parameters set forth in the permit. There is no need to come back to the Town of Kingston seeking a permit to accept the gravel.

Mr. Dahlen stated that he didn't understand why we would have a permit to sell soil but but we don't have a system of permits to buy it and bring it in.

Mr. Keith Hickey replied that there is a local requirement to get a permit to sell the gravel off of that site. This is a Mass DEP project. Mass DEP approval. The Town of Kingston, once they have submitted their support back several years ago as part of the application process that letter of support was all they needed from the Town of Kingston to satisfy the requirements of Mass DEP for the approval of the accepting community.

Mr. Dahlen asked how much per year does the town get soil comes into town? When we sell it out, we get either .05 or .25. Questioned earth removal and permit.

Mr. Keith Hickey spoke of what Attorney Kennefick mentioned earlier. There may be an opportunity to collect revenue on what is coming into town. It can be negotiated by both parties. Rules were never established.

Mr. Kennefick replied that there was never a determination that the O'Donnell' property had polluted soils. You cannot bring in soil that is more polluted than the receiving site. There is monitoring by third parties. There are glitches in the system. The general bylaw of permitting for earth removal is a yearly requirement through the Board of Selectmen. In the bylaw it does actually explain what the process is. Those requirements in the bylaw is attached to the yearly earth removal permits. Spoke of Chapter 12, There is a bond required for the reclamation activity. Spoke of Article 13, restoration shall be carried out in accordance to plans and property owner submits plans which is presented to the Select Board annually.

Mr. Dahlen asked what stops them from bringing in 15 million yards of fill other than trucking per year?

Mr. Wrightington stated nothing.

Mr. Dahlen expressed concern of lack of regulation of importation of soil.

Mr. Kennefick replied that another requirement of restoration is that the slopes have to be restored to a maximum of a 3 to 1 grade.

Mr. Dahlen asked if they can only bring in enough soil to fill in the hole that they dig out.

Mr. Kennefick replied yes to stabilize the site, so you do not have a washout or anything like that.

Mr. Goldberg asked if the O'Donnell's go yearly to the Board of Selectmen.

Mr. Kennefick stated that they are supposed to but, in this case, it has been 3-5 years since they've had a permit. They need a warrant article to authorize importation. Does not see how this could be allowed under the bylaw.

Mr. Goldberg asked how would they have known to come to the Zoning Board if the Select Board didn't tell them what the process was? Why didn't the Board of Selectmen say now you need to go before the Zoning Board to get a special permit?

Mr. Kennefick asked do you mean back in 2015-2016?

Mr. Dahlen replied yes.

Mr. Mullen added also Conservation.

Mr. Wrightington stated that this has been a sand and gravel pit for 50 years. In 2015, they received approval from the Selectmen. DEP said it was okay to fill. They were allowed to bring it up to sea level. Now they are almost 200' above sea level. Every sand and gravel business brings in and takes out.

Mr. Mullen stated that if you change the elevation you're going to have run off and slopes.

Attorney Galvin, representing the O'Donnell' stated that they have the utmost respect for Jason Silva but have some fundamental disagreements. There is nothing contaminated.

Mr. Dahlen expressed his concern about operating years without a permit and questioned taking fill.

Attorney Galvin stated that the applicant returned this year because of the Cease-and-Desist Order. There has been 105 acres of combined ownership between the Hamilton's and O'Donnell's since 1982. Perry Corporation mined the property. Commercial Industrial District. Considered one property. In 1971, the original statute read, "safe and usable condition". Selectmen decides.

Mr. Dahlen asked when it is decided by the Selectmen?

Attorney Galvin stated that the Selectmen have the right and would be up to the Selectmen to determine. Attorney Galvin continued to speak of the materials going to landfill, elevation disclosed up front and discussed when Mr. Paul Armstrong was Building Inspector and spoke at the original meeting.

Mr. Dahlen again expressed his concern of operation for 7 years with no permit. He also went on to remind the Applicant that in 2016 there was a consent order for monitoring by DEP and an independent person provided to the Town.

Shawn O'Donnell explained that the reports were completed and listed on the DEP site. DEP in the process of reviewing the last 16-18 months of reports that were not submitted.

Mr. Goldberg pointed out what is allowable under bylaw and stated that it never went in front of ZBA.

Attorney Galvin stated that it did not go in front of ZBA.

Mr. Silva stated that there are relevant questions taken out of context. Give the appropriate facts, the Board could decide.

Attorney Galvin asked the Board to look at Paul Armstrong's comment on exhibit B, page 3.

Ms. Sheila Vaughn, Board of Selectmen, spoke of the DEP letter and Cease and Desist Order.

Mr. Keith Hickey spoke of the application submitted. The Town notified DEP. They tabled the earth removal permit twice. Both parties agreed to hold off.

Attorney Galvin gave dates of the permit being pulled, DEP investigation and read Ms. Val Massard's memo.

Mr. Dahlen questioned whether the DEP sent a letter and who in the Town received it.

Attorney Galvin spoke of the Emmanuel Sand and Gravel case.

Mr. Goldberg asked when the construction was planned to start.

Attorney Galvin stated that there is a conceptual plan to work on developing property trust and has taken 7 years.

Mr. Mullen questioned a grandfather clause. There's no definitive construction and they keep bringing in soil without a permit.

Mr. Goldberg questioned where the plans are from the 2015 project, what's the grade and is it loose or definitive and what is the trajectory.

Shawn O'Donnell replied that they stopped during 2020 and then proceeded to hire Brad McKenzie.

Mr. Jason Silva expressed his concern that the materials are unsuitable. Construction cannot be done on Boston clay that has been brought in. The process would be to go in front of the Planning Board and then ZBA. DEP is overseeing this.

Mr. Dahlen asked if there was a way to run the gravel pit but not import soil. He pooled the Board.

Mr. Jason Silva replied yes, that has been going on for many years and has all permissions. Importation of fill is primary not incidental can't be involved with negotiating of permit process for conflicting issue to clear up and decision to make. Not addressed in the past.

Mr. Dahlen asked how many trucks per day and how many employees while shut down.

Shawn O'Donnell stated that there are 32 yards per truck. RCS1 material is regulated, daily LSP approvals, water testing and professional engineers.

Mr. Goldberg stated that the Board is not going against Mr. Jason Silva's Cease and Desist Order by continuing because the Board is not making a decision.

Motion: To **CONTINUE** the hearing with conditions in one week by Mr. Goldberg to October 19, 2022, at 7:00 PM, seconded by Mr. Wrightington.

Condition of continuance with information provided in one week:

1. Timeline of construction
2. Dep information, contaminants, or no contaminants
3. Quality control reports
4. Greenway information
5. Bylaw section
6. Selectmen letter

VOTE: 5-0-0

Mr. Goldberg read the Public Hearing Notice for the O'Donnell Family Trust Appeal to apply for a special permit under section 4.2.A.1.

MOTION: Mr. Goldberg motioned to open the public hearing and seconded by Mr. Dondero

VOTE: 5-0-0

MOTION: Mr. Goldberg motioned to approve Attorney Galvin's request to **WITHDRAW** without prejudice, seconded by Mr. Wrightington.

VOTE: 5-0-0

MOTION: to adjourn by Mr. Goldberg, seconded by Mr. Wrightington.

VOTE: of 5-0-0.

ADJOURNED: 9:41 PM

Respectfully submitted,

Debora Barry
ZBA Executive Secretary