

**ZONING BOARD OF APPEALS
REGULAR MEETING MINUTES
May 22, 2023**

The Brooklyn Zoning Board of Appeals held a regular meeting and public hearing on Tuesday, May 22, 2023, at 6:30 p.m. at the Clifford B. Green Memorial Meeting Center, 69 South Main Street, Brooklyn, CT as well as virtually via ZOOM on the following:

Members Present: Bruce Parsons, Adam Brindamour, Stephen Mylly and Bill Macnamara.

Members Absent: Lucien Brodeur with notice.

Staff Present: Lisa Lindia, Recording Secretary, Margaret Washburn, Zoning Enforcement Officer.

Also Present: Attorney Peter Alter Town Counsel, Attorney William McCoy, Wayne Jolley, Attorney Vincent Dooley, Linda Trahan, James Booth, Tim Albee

Call to Order: The meeting was called to order at 6:30 p.m.

Seating of Alternates: None.

Approval of Minutes: William Macnamara made a motion to approve the Regular Meeting Minutes from March 4, 2023 as written. Adam Brindamour seconded this motion. No discussion was held. All in favor. The motion passed unanimously.

Public Hearing: 6:31 pm

Reading of legal notice: Chairman Bruce Parsons

ZBA23-001 530 Wauregan Road – Map 30 Lots 97, 97-1 & 97-2, Wayne & Leslie Jolley. RA Zone. Appeal of Decision made by ZEO on March 6, 2023.

Attorney Peter Alter, Town Counsel reminded the ZBA members and public to review and refresh the process. CT Statutes, Section 8-7 requires four votes of the ZBA members to approve the action. All four members have to agree. Mr. Jolley must understand that he needs all four votes – missing member is considered a non-vote. This is not an application for a variance with hardship as the Commission is accustomed to. They are to act as fact finders. Facts are as members find relevant, non-relevant, importance and credibility. The burden of proof is on the applicant, Mr. Jolley, not Ms. Washburn. Distinguish between what is the principal use vs. and accessory use.

Ms. Washburn laid out her reasoning in making her decision and presented evidence to the ZBA members. Brooklyn adopted Zoning Regulations in 1972. Mr. Jolley has operated by Special Permit since 1990. Ms. Washburn started receiving letters regarding historical activity on the subject parcel. She requested more information from Mr. Jolley on multiple occasions. On March 6, 2023, she issued a zoning enforcement decision that she could not conclude, based on Mr. Jolley's submitted evidence and her own research, that the five business uses identified by Mr. Jolley in a letter dated 1/12/2023

predated the adoption of Zoning Regulations. **[Note: Ms. Washburn's evidence is attached as items a-z.]**

Bruce Parsons – asked if the deed included all the land. The taxes on the field cards do not refer to any processing equipment. Lisa Lindia explained to Mr. Parsons that it referenced buildings.

William Macnamara – Can the Commission sort through the five uses and approve one or another?

Attorney Alter – Confirmed that the uses could be approved separately.

William Macnamara – Asks for clarification of a principle use vs. accessory use.

Attorney Alter and Margaret Washburn – Explain the difference between principle use vs. accessory use. Attorney Alter states that gravel is a diminishing asset. You can expand on the original site and continue operation under a Special Permit. Uses can evolve over time.

Attorney William McCoy of Heller, Heller & McCoy – Here to represent Mr. Jolley and Brooklyn Sand & Gravel. The Jolley's are the property owners. Under the law 'grandfathering' is not the right term. Pre-existing nonconforming is the correct term. Attorney McCoy disagrees with Attorney Alter to some degree as to the basis of Judge Aurigemma's decision from December 2020. On page 2 in the judge's decision, it stated that the subject property was used to excavate and process gravel since the 1950's. Attorney McCoy referenced another section on page 18 which stated that "The importation of material was pre-existing non-conforming use". In regards to the 1977 deed conveying the property to Mercier & Sons, most deed does not carry language about the activity on the property, just the land descriptions. Rarely do you see a reference for use. The Superior Court Judge found from the hearing that without question, gravel mining was used for many years. Gravel banks should not go away. The town has purchased material from the site. All they have to show is a pre-existing nonconforming use since before 1972. Attorney McCoy Submits an exhibit. Judge Aurigemma's decision turned on a statement by the Planning Zoning Commission member. There was no intent to abandon the use and it continues to this day. You can have multiple principle uses. Attorney McCoy urges 2 principles uses, the campground and the gravel operation. The gravel pit supplied material to the campground, but it wasn't its only use. The use is not just onsite excavation but importation offsite material. Attorney McCoy submitted a document to Chairman Parsons. **[Note: Atty. McCoy's evidence is attached as item aa.]**

The Jolley's own the property, but Brooklyn Sand and Gravel operates the business.

William Macnamara - How long has Brooklyn been issuing Special Permits?

Attorney Alter – Since 1990, Special Permits approved that a certain amount of material could be imported. From 1990 onward, Special Permits were not establishing a pre-existing, non-conforming use.

Attorney McCoy – Most taxpayers do not go to the assessor and ask to include more possessions on their assessor card. Most cards do not include everything. The cards did not change after the Special Permits were issued.

Bruce Parsons - Town does reevaluations every ten years or sooner. Are you saying that no one has been out and looked at the property?

Attorney McCoy – The Assessor is a separate issue from zoning.

Austin Tanner – When the Assessor came out my house, the barn was measured but I wasn't asked how many tractors I have.

William Macnamara – Was there another date than 1972 that limited the amount of imported material?

Attorney Alter – As far back in the regulations as he knows, at least twenty years.

Adam Brindamour – What was Judge Aurigemma statement about 1950 based on?

Attorney Alter – I am reluctant to offer that information I am not a fact provider. You can ask staff for the records of the Planning Zoning Commission hearing transcript from 2019. Judge Aurigemma did not state that importation of material was a primary use. It's up to ZBA to decide if importation was a primary use.

Attorney McCoy – The ZEO decision is that there is no pre-existing non-conforming use.

William Macnamara - In 1970 were their requirements for processing equipment.

Wayne Jolley –showed there was pond at the Northeast corner of the site which was used for swimming and processing.

Explained he didn't have the outdated ZBA form in his archives and that he downloaded it from the website.

Fred Jolley bought the property from the Fisk family. Material from the gravel pit supplied the state to build Route 205 in 1950.

Bruce Parsons -When did you move the processing equipment in?

Wayne Jolley – In the earlier years we were operating without permits until 1990 when we were told we needed them. Bill Mercier was selling gravel to the state of CT. There was a canal in Wauregan which was filled with gravel from the subject property.

Mentions that the letters he submitted are from reputable people Jack Burke, Paul Sweet and Glen Parent etc.

Wayne Jolley – Bill Mercier closed the campground within a year.

Public Comments 7:55 pm

Attorney Vincent Dooley – 165 Cooney Rd., Pomfret, CT, filed a memorandum with the Town Clerk last Wednesday. He left three copies and asked the Town Clerk who the Town Attorney was and was told they didn't have one. He emailed a copy to Attorney Alter. He was a prior prosecutor, began in the state's attorney's office in Wallingford. Worked there for about a year and handled 30 or 40 appeals before moving on to the Superior, Appellate and Supreme Courts. He is committed to this community. He has spent most of the time in Windham County and has been in Pomfret since 1987. He grew up in Branford and played in gravel banks as a kid. If anyone grew up or lived in Branford, they would understand gravel banks with rocks being quarried in their hometown. This was a part of the town's economy. This is what led him to write a ten-page brief. **[Note: Atty. Dooley's evidence is attached as item bb.]**

In Federal Court Jolley claims he has a constitutional right and is suing the Town. He reviewed specifically paragraphs 22 and 23 where Wayne Jolley used the words "Upon information and belief".

The regulations became enacted as of May 24th, 1972 which became effective as of 12:01am.

Since 1972, the activities have been subject to the regulations. Since 1972, every piece has been done under a permit or as an illegal, unpermitted use. The uses after 1972 were permitted, not legally nonconforming.

Attorney Dooley states that Mr. Jolley has never had any intent to end this activity. The ZBA decision will be appealed one way or another. There is no right to expand unauthorized use.

Linda Trahan – 26 Maynard Road

Involved with traffic problems caused by sand and gravel operations since 1989. There has been a marked increase in truck traffic since 2005 on Maynard Rd. We have been researching all gravel bank permits, we made numerous FOI requests. There appeared that there was a lack of record keeping, including renewals and enforcement. At that time the Town Planner had no grandfathered pits on record. Attorney McCoy was Mr. Jolley's attorney years ago and never said it was a pre-existing non-conforming. Mr. Jolley was aware that he was running out of material. The town has been lenient with him. Linda Trahan states that Wayne Jolley's application for variance in 2019 was denied by the ZBA. Linda Trahan submitted a document to Chairman Parsons. **[Note: Linda Trahan's evidence is attached as item cc.]**

Margaret Washburn – No gravel pits in the state of CT have been grandfathered 50 years after zoning. This will set a precedent for future land use.

William Macnamara – Do they lose their right once they file Special Permits?

Attorney Alter – If some believes they have a right to pre-existing non-conforming then they typically assert their right and don't apply for Special Permits to continue that use.

William Macnamara – Inquires would you lose the status of pre-existing non-conforming once you start applying for Special Permits?

Attorney Alter – There are a variety of cases that go both ways. There was a case in Colchester that lost their status non-conforming once they applied for Special Permits but also aware there are cases that don't say that.

Austin Tanner - We have shown a lot of history, but I don't believe that is what we are basing tonight on. It should be the evidence. I believe Mr. Jolley was advised to apply for a Special Permit. Margaret had mentioned to me that she was uncomfortable in making this decision and wanted it to go to the Commission.

Attorney Alter – Once the ZEO decides anyone can appeal her decision. We would have ended up here anyway.

William Macnamara – Is it common to accept letters?

Attorney Alter – Yes, it is common to accept letters. As evidence comes in to the ZBA, whatever was presented can be considered.

William Macnamara – Is there any reason to dismiss the letters as hearsay?

Attorney Alter - The Commission decides what is credible or dismisses what they feel is not. The letters are evidence, the ZBA assigns value as you deliberate.

Stephen Mylly – Asked are we looking at a non-conforming business use or a non-conforming land use?

Attorney Alter – From a zoning standpoint use of the property will be used for processing and on-site excavation etc. Could processing off-site material stand-alone without excavation? Right now, our zoning regulations state no. He has a Special Permit right now that allows him to excavate and bring in 50 % of imported material to be processed.

William Macnamara – If the ZBA approved importing and processing can Mr. Jolley do an unlimited and unregulated amount?

Attorney Alter – Yes, he will be able to import and process all he wants. There was no limitation before 1972. There will be no limitation if you decide it was a legally existing non-conforming primary use before zoning.

James Booth – 549 Wolf Den Road

His family ran a nonconforming business for almost 70 years. It started as farming, processing fine wool and then a restaurant. As a small kid I would go down with my dad and get sand to bring to the farm. We purchased screened sand for animal bedding. We purchased material from 1986-1987. I know a few gravel mines have closed down; some have sunset. Some remain open; Rawson is still on Munyan Road. It is expensive to move these plants.

Tim Albee – 507 Wauregan Road

Has been with Brooklyn Sand and Gravel since 1979, he lived on the subject property. His dad worked for Fred Jolley in the '60s. I also worked at the gravel pit when Mercier owned it and hauled for Fred Green at that time. There are holes on the tree farm that have old trees growing in them now from excavation there years ago.

Margaret Washburn – Asked the Chairman to inquire of Mr. Jolley: if it has been a pre-existing nonconforming use, why did he pay for Special Permits for over 30 years?

Wayne Jolley – Explained that he didn't know he wasn't grandfathered. Just doing what the Town told me I had to do.

Attorney Dooley – Commented that ignorance of the law is not a defense for anything. Might want to discuss this with your attorney. The fact that after 1990 he realized all his gravel would disappear then his response is to sue the Town.

Attorney McCoy -It's not a case of ignorance of the law. If he talks to the Town, it's a smart move to get the permit. This is not a criminal case it is a civil case.

Austin Tanner – We are wasting time. We are here to determine if Brooklyn Sand and Gravel is a pre-existing non-conforming use prior to 1972.

Adam Brindamour – Just a quick question to Mr. Jolley or Attorney McCoy: you have made several mentions of Mr. Mercier selling to the state. Are there any invoices to support this?

Wayne Jolley – No, my dad passed away 37 years ago I do not have his records. I keep business slips for 7 years like everyone else and then shred them.

Public Hearing Closes time 8:35 pm

Mr. Macnamara - Asked for some information after the Public Hearing closed.

Peter Alter – The public Hearing should continue in order for staff to provide the information.

Mr. Macnamara – States that is not necessary he does not want the information anymore.

Mr. Macnamara – States that it comes down to five questions. He feels that 3, 4 and 5 (numbered items from decision of ZEO) he could say yes to. However, 1 and 2 (numbered items from decision of ZEO) are questionable. Do we accept the letters into testimony and decide today?

Bruce Parsons – Explains that the 1970 photo does not show processing on site. Jim Booth stated that processing equipment is huge. He can't believe the Tax Assessor could miss such a large object.

Adam Brindamour – Would have liked more than just the letters.

William Macnamara – Knows all the people who wrote letters and has no reason to doubt what they say.

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Does it rise to the level of sufficient acts? If it gets appealed will rise it to the level of sufficient acts down the road?

Bruce Parsons - Knows 20% - 30% of the people who wrote the letters, remembers the campground but not the operation. He was sure it was a small operation then.

Attorney Alter- Recommends doing two separate motions.

Motion was made by W. Macnamara - **ZBA23-001 530 Wauregan Road – Map 30 Lots 97, 97-1 & 97-2, Wayne & Leslie Jolley. RA Zone.** To overrule the Zoning Enforcement Officer's ("ZEO") decision with respect to the following uses:

1. Excavating raw material on site for processing.
2. Processing on site excavated raw material to clean usable material.
3. Selling the processed material to customers.

Based on evidence provided to the Board and submitted into the record of the hearing and based on testimony offered during the public hearing and by evidence and testimony provided by the ZEO as part of the record and during the public hearing, the decision of the ZEO is overruled. The Board's decision is based on the substantial evidence presented to the Board that supports a finding that with respect to the property at 530 Wauregan Road, the uses are legally existing, non-conforming uses that pre-date the zoning regulations (as of May 24, 1972) of the Town of Brooklyn:

Second by S. Mylly.
(4 votes Aye) Motion carried unanimously.

William Macnamara – If it is uncontrolled, it sits a little badly granting 3, 4 and 5 (numbered items from decision of ZEO); almost causes approval of 1 and 2 (numbered items from decision of ZEO) because it is based on the same evidence. If the ZBA approves importing material to the site how does that affect the Special Permit? Does the Special Permit die?

Peter Alter- If you approve 1 and 2, he will never need another Special Permit. He never needed a permit.

William Macnamara – If we deny 1 and 2?

Attorney Alter – He continues in accordance with the regulations.

Adam Brindamour – Explains that almost all the letters talk about bringing material out, almost none about bringing it in.

William Macnamara – Knows all the people who wrote letters and has no reason to doubt what they say. Does it rise to the level of sufficient acts? If it gets appealed, will it rise to the level of sufficient acts down the road?

Adam Brindamour – I'm not comfortable with it.

Attorney Alter – States the motion should be in the affirmative.

The motion was made by A. Brindamour **ZBA23-001 530 Wauregan Road – Map 30 Lots 97, 97-1 & 97-2, Wayne & Leslie Jolley. RA Zone.** To overrule the Zoning Enforcement Officer’s (“ZEO”) decision that the following uses do not constitute legally existing, non-conforming uses that pre-date the zoning regulations (as of May 24, 1972) of the Town of Brooklyn:

1. Importing raw material to the location.
2. Processing the imported raw material to clean usable material.

The ZEO’s decision was sustained as a result of the failure of the motion to garner the four votes necessary for adoption. The motion to overrule failed as a result of the applicant’s inability to provide sufficient substantial evidence that would cause the Board to overrule the Zoning Enforcement Officer’s decision. The members of the Board voting against the motion or abstaining were not satisfied that the evidence presented to the Board was sufficiently substantial to overturn the ZEO’s decision. The applicant did not bear its burden of proof as to the uses that were claimed to be legally existing, non-conforming uses of the property.

Second by William Macnamara.
(2 votes Aye / 1 vote Nay / 1 vote abstained) Motion fails.

Unfinished Business: None.

Other Business: None.

Adjourn: Meeting closed at 8:52 pm motioned by Adam Brindamour seconded by William Macnamara all in favor motion carried.

Lisa M Lindia, Recording Secretary

Attachments to 5-22-2023 ZBA Minutes:

Margaret Washburn’s evidence items a-z.

- a) 1970 black and white aerial photo of subject property in Brooklyn with property lines, CT State Archives,
- b) 1970 black and white aerial photo of gravel operation in Windham, CT showing processing equipment and wash pond, CT State Archives,
- c) 1986 black and white aerial of subject property, no processing equipment, CT State Archives,
- d) 2/22/2020 color aerial of subject property showing processing equipment and wash pond, Google Earth,
- e) Letter to W. Jolley from ZEO M. Washburn requesting more information (2 pages), dated 1/3/23,
- f) ZBA Minutes of 3-26-19, Page 4 of 9, marked in red comments of David Held, P.E. of Provost and Rovero,
- g) Gravel Bank Permit GB 91-3, issued 10/17/1990, and associated “Site Plan prepared for Wayne L. Jolley Route #205 Brooklyn, CT”, dated 11/12/1990,

- h) Notice of Decision for Gravel Bank Renewal GBR 22-003, renewal of Special Permit Gravel SPG 19-002, dated 8/16/2022 and associated “Proposed Gravel Excavation and Processing Operation, Wauregan Road (Route 205) Brooklyn, CT, Applicant: Brooklyn Sand and Gravel, LLC”, dated 4/28/2022, revised 9/15/2022,
- i) Letter to W. Jolley from ZEO M. Washburn additional request for more information (2 pages), dated 1/11/23,
- j) Margaret Washburn’s handwritten meeting notes of 1/30/23 (4 pages),
- k) Email from M. Washburn forwarding handwritten notes Wayne Jolley 2/6/2023,
- l) Wayne Jolley’s signed transcription of meeting notes of 1/30/23. 2 pages, received 2/6/2023,
- m) Email from M. Washburn to W. Jolley requesting 2/15/23 deadline for submission of historical documentation dated 2/7/2023,
- n) Letter to W. Jolley containing decision of ZEO M. Washburn regarding five business uses, dated 3/6/23,
- o) Publication of ZEO decision in Turnpike Buyer dated 3/15/2023,
- p) ZBA Appeal application ZBA 23-001 (2 pgs.), dated 3/6/2023,
- q) Email to W. Jolley from M. Washburn re: revised form request, dated 5/1/2023,
- r) Certified Notices to Killingly and Plainfield Town Clerks dated 3/16/2023,
- s) Publication of Public Hearing Notices on ZEO Appeal in Turnpike Buyer dated 5/10/2023 and 5/17/2023,
- t) Letter to Planning and Zoning Commission dated 2/16/2023,
- u) Brooklyn Assessor’s field cards for the three subject parcels Assessor’s Map 30, Lots 97, 97-1, and 97-2,
- v) Memorandum of Decision of CT Superior Court Docket No. LND HHD CV-19-6119135-S dated 12/2/2020 (19 pages),
- w) Deed from June 14, 1977, BTC Vol. 64, Page 350-352,
- x) Sixteen letters re: grandfathering (range of dates 9/15/2022-1/31/2023),
- y) Last letter re: grandfathering dated 4/24/2023 from Glenn Parent,
- z) Other various emails between M. Washburn and W. Jolley, dated 1/3/2023, 1/3/2023 with letters to date, 1/4/2023, 1/11/2023, 1/26/2023, 3/6/2023, and 3/23/2023, and

Submitted evidence items aa-cc.

- aa) State of CT Business Formation - Certificate of Organization for Brooklyn Sand and Gravel, LLC formed 10/7/1999 submitted by Atty. McCoy,
- bb) Testimony to the Zoning Board of Appeals regarding Appeal of Wayne Jolley on behalf of Linda Trahan and Pamela Lukin, dated 5/17/2023 (11 pages) submitted by Atty. Dooley,
- cc) Testimony to Zoning Board of Appeals regarding Appeal of Wayne Jolley from Linda Trahan, dated 5/22/2023 and submitted at hearing including 2-page letter, 10/4/2006 email, 2/22/2007 letter re: CEPA Intervenor, 2/11/2009 email, and 12/11/2006 article from Norwich Bulletin concerning Brooklyn gravel pits.