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PRESENTATION TO THE
TOWN OF BROOKLYN ZONING BOARD OF APPEALS
IN SUPPORT OF THE APPEAL OF DALE & VALORIE LYON

APRIL 27, 2015

INTRODUCTION

- Good evening. My name is Bill Sweeney and I am a land use attorney with the law firm of Tobin Carberry in New London, Connecticut.
- I am also a former town planner for both Norwich and Canterbury and I currently serve as special land use counsel for the East Lyme Planning & Zoning Commission and the East Lyme Zoning Board of Appeals.
- Over the years I have sat on your side of the table, so to speak, and can certainly appreciate the commitment you all make to serve your community.
- I am here tonight on behalf of Dale and Valorie Lyon of 133 Wauregan Road.
- My clients are joined tonight by large contingent of supporters.
- As you aware, my clients have appealed a December 30, 2014 Cease and Desist Order issued by the Land Use Administrator which alleges that my clients are operating an unpermitted landscape maintenance business from their property on Wauregan Road.
- This order was issued after a seven month investigation during which my clients did nothing but cooperate with the Town of Brooklyn and the Land Use Administrator.
- Despite our best efforts to resolve this issue short of this hearing, the Town has refused to rescind the Order, even in the face of overwhelming evidence that it was issued in error.
- Tonight, I cannot stress enough the seriousness of this proceeding.
- The Town of Brooklyn threatens my clients very livelihood by attempting to close a family business that has been operating here in Brooklyn since 1976, based solely on the complaints of ^{Ra Singh} an angry and malicious neighbor.
- Tonight, I intend to review with you your legal charge as a Zoning Board of Appeals, important background on the historic use of their property and the dispute with their neighbor, the defenses we have raised, relevant case law, and most importantly, the reasons why you must overturn and reverse this Order.
- I will attempt to be as brief as possible, as I know your time is valuable and there are many members of the public that want to speak on this appeal, but I must also build a

legal record tonight in the event that this matter proceeds beyond this hearing. I thank you in advance for your patience.

LEGAL CHARGE

- A Zoning Board of Appeals has only the powers given to it by state statute.
- Section 8-6 of the Connecticut General Statutes grants your board the sole authority to hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of the zoning regulations.
- This is a solemn and important duty, to be the primary check and balance against unreasonable, unfair, and simply erroneous enforcement of the zoning regulations.
- When this board sits on an appeal it has all the powers of the zoning official.
- You can uphold the order, you can reverse the order, or you can even modify it. Your power is broad and sweeping and yours alone.
- However, there is one significant limitation.
- To reverse an order or to modify it, there must be a concurring vote of 4 members of this board. A simple majority is not enough, you have to have 4 votes.
- I remind you of your legal authority so that you understand that tonight you look at this matter with fresh eyes. You are not beholden to the Land Use Administrator or her interpretations and/or opinions.
- Your review of the order is also not a personal attack on her, her competence, or her decision-making ability.
- Instead, it is your duty as a member of this board to be impartial and to reach a fair and just result, based on the law.

BACKGROUND

- My clients' family has operated a landscape maintenance business from 133 Wauregan Road for the last 39 years.
- Over those four decades, the company has been very successful, primarily due to the hard work and perseverance of the Lyon family.
- Today, my clients' landscape maintenance business has a variety of commercial, industrial, residential, institutional and governmental accounts.
- Ironically enough, the Town of Brooklyn itself has been a customer on more than one occasion.
- Landscape maintenance is a growing industry which has evolved and modernized significantly over the last several decades.

- Today, commercial and even industrial property owners desire professionally-manicured grounds and landscaping and more and more residential homeowners are turning to landscape maintenance businesses to perform routine tasks.
- My clients' business is regularly called upon to complete work related to planting, pruning, weeding, fertilizing, applying pesticides, gardening, irrigating, lawn care and cutting, snow removal, and even the construction of minor drainage structures, retaining walls, and earth moving for the purpose of enhancing, protecting, and improving soil, plants, lawns and gardens.
- The Lyon family has operated their business behind their residence on Wauregan Road for 38 of 39 years without any major issues or complaints from the Town or their neighbors.
- That all changed last spring.
- Over the last year, my clients have been the target of dozens of complaints filed by their next door neighbors, the Lockards, with various federal, state, and local officials.
- These complaints are without basis and are part of an orchestrated effort by the Lockards to pursue a personal vendetta against my clients by using governmental agencies to interfere with their business.
- In fact, the relationship between the Lockards and my clients was friendly and cordial up until last spring when Mr. Lockard accused Mr. Lyon of killing certain trees on his property, trees which he had hired Dale Lyon to plant the year prior.
- Yes, you heard right, both the Town of Brooklyn and the Lockards are former customers of my clients.
- The complaints which are the basis of this zoning enforcement action were filed only after Dale Lyon refused to replace those trees at his own expense.
- The numerous complaints filed by Lockards, and apparently adopted by the Land Use Administrator, contend that my clients operate an unauthorized and illegal business from the property in violation of the Town of Brooklyn Zoning Regulations.
- This allegation is patently false.
- My clients' property has historically been used for landscape maintenance services since 1970, prior to the adoption of zoning regulations within the Town of Brooklyn in 1972, and consistent with uses permitted as of right in 1976.
- As we will demonstrate tonight, the use of this property is pre-existing non-conforming and it is entitled to continue without any additional approvals or permits from the Town of Brooklyn.

- More importantly, the Town of Brooklyn validated and confirmed my clients' lawful and compliant use of the Property in 2002 when it reviewed and granted zoning approval for the replacement of certain outbuildings on the property used by my client for his business operations.
- My clients have a constitutionally protected right to continue the business use of the property without any further harassment or interference from the Town of Brooklyn or their neighbor.
- We will also demonstrate that other activities on the property, most notably a pond dredging project, are completely unrelated to the business operations in question and all necessary approvals have been obtained and are in proper order.

HISTORY OF THE PROPERTY

- To fully understand the nature of our appeal, a review of the history of the use of my clients' property is necessary.
- Attached to our appeal, we included 2 letters detailing the history of this property along with a series of affidavits, sworn under oath, from individuals who witnessed and have first-hand knowledge of the historic use.
- Some of these individuals, particularly Ken Hunter and Joe Beauregard, are well-known and respected residents of this community with no financial or familial connection to the Lyons.
- Prior to 1946, my clients' property was part of a large farm and used exclusively for agricultural purposes.
- In the late 1940s a residence was built on the Property adjacent to Wauregan Road, and the brook at the rear of the property was dug out to create a pond.
- By 1953, Abraham Konopny owned the Property as part of a larger assemblage of farmland.
- Mr. Konopny was a poultry farmer and constructed a series of barns and coops behind the residence, in which he raised chickens.
- The property remained limited to residential and agricultural use through 1970 when Mr. Konopny sold the property to Robert Hunter.
- Mr. Hunter renovated the residence and sold the property later that same year to Robert and Virginia Beardmore.
- The Beardmores owned the property and resided there from 1970 to 1976.

- During that period, their use of the property for various business operations, and in particular the barns at the rear of the property, was extensive.
- Robert Beardmore was a foreman with the Asplundh tree company, clearing land and rights-of-way. He also had his own independent tree and landscape business that he ran from the site.
- In those capacities, he stored a significant number of heavy trucks, equipment, and other machinery onsite. Ken Hunter remembers that his equipment included, but was not necessarily limited to, two large logging trucks both equipped with cherry pickers, a skidder, a dump truck, a wood chipper, a forklift, a log splitter, a saw rig, two trailers, a spray rig, a tractor, and a number of other trucks, vehicles, and assorted equipment.
- Mr. Beardmore routinely brought trees and other cuttings, including wood chips, onto the property from his various offsite jobs and both stored and processed them onsite into logs, boards, firewood, and even pallets.
- Wood chips, shavings from the saw rig, and sawdust were routinely piled and stored on the property.
- He both delivered all of these products to customers and also sold them at retail directly from the property.
- During his period of ownership, Mr. Beardmore's son also operated a lawn care business and sought assistance from neighbors, including Joe Beauregard, to repair his equipment.
- Mr. Beardmore also grew evergreen trees along the edge of the pond and sold them for both landscape plantings and Christmas trees.
- It is critical to note that Mr. Beardmore's use of the Property predated the adoption of zoning here in Brooklyn in 1972.
- In 1976, the Beardmores sold the Property to Philip Lyon, Dale Lyon's father.
- Philip Lyon continued the business use of the rear portion of the Property and the barns.
- Philip Lyon and his sons cut and sold firewood and evergreen trees from the Property.
- In the outbuildings, Philip Lyon operated a variety of businesses, manufacturing hinges and woodstoves, importing antiques and pottery, and even welding and truck repair.
- Philip Lyon's sons continued the lawn care and landscaping business from the Property, originally started by the Beardmores, and by the late 1970s their operations had naturally grown to servicing commercial accounts for businesses and apartment complexes in the area.

- Philip Lyon approached the Town of Brooklyn on at least one occasion during this period to inquire about placing a sign on his property advertising the various business operations taking place there.
- He was advised by a town official that the town “didn’t care what he stored, made, or sold on the property.”
- That statement actually makes sense because by 1976 the zoning regulations had been amended to permit a variety of light industrial manufacturing, repairing and storage uses, arguably including storage for landscape maintenance, as a permitted uses as of right in the Rural Agricultural District. (Submit 1972 & 1976 Regulations)
- By 1983, Dale Lyon had taken over his family’s landscape maintenance business and he continued to use the property and the barns to store his lawn care and landscaping vehicles and equipment.
- Dale Lyon also sold mulch from the property, which he stored behind and next to the barns.
- Throughout the 1980s and 1990s Dale Lyon continued to operate his landscape maintenance business from the property and its outbuildings, which remained owned by his father, Philip Lyon.
- Dale Lyon’s use of the Property then was essentially as it was during Beardmore’s time, minus the wood product processing, and what it still remains as of today, primarily for the storage of his vehicles, equipment, and wood mulches he uses in his work.
- It is important to note that landscape maintenance is inherently an offsite business, you have to travel to a customer’s property to maintain it.
- The historic use of this property has always been principally storage with limited accessory retail sales.
- His company, while it has remained a family-owned and operated business, naturally evolved as the landscaping industry as a whole modernized.
- Originally a sole-proprietorship, Dale Lyon’s company was formally constituted as a limited liability company, Lyon & Co., LLC, in 2000.
- That same year, Philip Lyon passed away and my clients purchased the property on Wauregan Road from Dale Lyon’s mother, Constance Lyon.
- My clients moved into the residence on the property and Dale Lyon continued to run his landscape maintenance business from the barns at the rear.

- But by 2002, the barns, built nearly 50 years earlier by Mr. Konopny, had fallen into disrepair.
- Dale Lyon approached the Town of Brooklyn with a plan to demolish the buildings and construct new buildings, including a large barn to house his landscape maintenance business.
- The new large barn was to be located in the same general location as the existing ones but with a smaller total footprint.
- The Town of Brooklyn Zoning Enforcement Officer at the time, Chuck Dobrowski, visited and inspected the site and Dale Lyon's business operations.
- On November 22, 2002 Mr. Dobrowski issued an administrative zoning permit for the project to proceed.
- Relying on Mr. Dobrowski's approval of the barn project, my clients proceeded to construct the buildings, at a cost of approximately \$200,000, and use them for their ongoing landscape maintenance business.
- That use, that was first established by Robert Beardmore in 1970, continues in substantially the same nature and scope through today.

PRE-EXISTING NON-CONFORMING USE

- The Cease Desist Order was issued in error and must be overturned.
- The primary reason is that the my clients use of the property is pre-existing non-conforming.
- The protection and preservation of pre-existing non-conforming uses is a basic tenant of zoning law.
- In fact, both Section 8-2 of the Connecticut General Statutes and Article 14 Town of Brooklyn Zoning Regulations explicitly permit the continuance of any use existing at the time of adoption or later amendment of zoning regulations.
- Once established, no subsequent approval, review, or authorization is required to continue such a use.
- The transfer of nonconforming property between owners does not extinguish any use nor does anything accept the affirmative intent of the property owner to do so. The simple passage of time is not enough to extinguish a nonconforming use.

- While nonconforming uses cannot be expanded or extended, they can be legally intensified as business naturally increases over time.
- In addition, improvements to equipment and other modernization of existing nonconforming uses is also permitted.
- Most importantly though, and contrary to the suggestion of the Land Use Administrator, a non-conforming use does not have to remain identical to original use of the property.
- Instead, when deciding whether a current use is within the scope of an original non-conforming use, our Connecticut Supreme Court has ruled that it is necessary to weigh, on a case by case basis, how the current use reflects the nature and purpose of the original use, differences between the current and original use, and any substantial difference in impacts to the surrounding area.
- The simplest way to describe the legal standard is whether the current use is substantially similar to the original one.
- The available evidence indicates that prior to the adoption of zoning regulations within the Town of Brooklyn in 1972, the property was used for a variety of business purposes which fall within the scope of landscape maintenance services.
- Mr. Beardmore and his family were actively engaged in land clearing, landscaping, tree service, wood product processing and storage, lawn care, and a variety of retail sales.
- These uses continued after Philip Lyon took title to the property in 1976 and the Lyon family took no affirmative action to abandon any of these uses, but rather only added to them.
- Perhaps as important as the Beardmore's use of the property, under amendments to the zoning regulations adopted in 1976 additional light industrial manufacturing, repair, and storage uses were also permitted under the auspices of a use referred to as "home industry."
- All of the various uses of the property, including the fledging landscape maintenance business, arguably fall under the definition of home industry and were permitted as of right.
- In 1976 such uses did not require formal approval of the Planning & Zoning Commission.

- It was only many years later, in the late 1980s and early 1990s that stricter regulation of home-based businesses and performance standards regulating them, including special permit approval, were adopted.
- Those later regulations cannot be applied to this property and to uses that were already lawfully in existence.
- My clients landscape maintenance business grew naturally through the 1980s and 1990s without any interference or any issues with the Town of Brooklyn.
- It is important to note that the footprint of my clients' operation has never deviated from the same rear portion of the Property used by Robert Beardmore or Philip Lyon for business purposes.
- Dale Lyon currently uses the same portion of the property primarily for the storage of vehicles and equipment and mulch (wood chips) used in his landscape maintenance business.
- He sells mulch from the Property primarily in April and May during the spring planting season.
- He has only four full-time employees, including himself, and two of the remaining three are family members.
- Dale Lyon's use of the Property is wholly consistent, if not far less intensive, than the use established by the Beardmores prior to 1972.
- Dale Lyon's operations have grown over the years with a natural increase in his business, but this constitutes a legal intensification and not an unlawful expansion of a nonconforming use.
- The Land Use Administrator has focused heavily on my clients vehicles and equipment, and it is true that he owns a variety of commercially registered vehicles and other equipment and machinery used for his landscape maintenance business.
- These business vehicles and equipment include several pickup trucks, trailers, mowers, dump trucks, small construction vehicles and various hand-held equipment.
- However, this collection is not inconsistent in the scope of what Mr. Beardmore maintained on the property up until 1976.

- Moreover, the majority of these vehicles and other equipment are often stored on off-site locations for extended periods of time. If anything, the use of vehicles onsite is less intensive than the original nonconforming use.
- Furthermore, it should also be noted that the current zoning regulations for the Property, which is located in the Residential Agricultural District, permit a wide range of business uses, including home businesses, home enterprises, and even limited business uses.
- This fact, coupled with the acknowledgement that his operation has been ongoing since the mid-1970s, makes it impossible to argue that Dale Lyon's business operation is in anyway inconsistent with the neighborhood or the Comprehensive Plan for Zoning within the Town of Brooklyn.

MUNICIPAL ESTOPPEL

- The second reason that the Cease and Desist Order should be reversed is that the Town of Brooklyn is estopped, or in other words barred, from enforcing against my clients based on the actions of its previous zoning official.
- Again, the Connecticut Supreme Court has ruled that a town cannot enforce its zoning regulations against a property owner when its agent induces that property owner to act in manner that results in a later zoning violation, especially where the later enforcement is particularly inequitable or oppressive or results in a substantial loss.
- What this means is that a town zoning official can't grant you a permit one day and then revoke it the next, and certainly 13 years later, particularly when you have relied on their approval to your detriment.
- Not only did Philip Lyon approach the town regarding approvals for his businesses and was told that the town didn't care what he stored, made or sold on the property, but Dale Lyon sought approval from the Town of Brooklyn to replace the barns on his property in 2002.
- By the issuance of a zoning permit for the replacement barns, which were and remain clearly utilized for business purposes, the former zoning official, Chuck Dobrowski, confirmed and certified the use of the Property for a landscape maintenance business as conforming to the Town of Brooklyn Zoning Regulations. (Submit Zoning Permit).
- The Zoning Permit he signed in November 2002 includes the following statement"

"I certify that the proposed structure(s) permitted by the above Zoning Permit appears to be in compliance with the Zoning Regulations of the Town of Brooklyn, in effect on the date of issuance of the above permit."

- At no time in 2002 did any official from the Town of Brooklyn make any indication whatsoever to my clients that the business use of the Property was unauthorized, unpermitted, or was even in question.
- In fact, I contacted Mr. Dobrowski, who is now retired, and discussed the issuance of this permit with him.
- When Mr. Dobrowski learned that this matter was headed to a hearing before this board, he agreed to execute an affidavit, sworn under oath to his actions in 2002. (Submit Affidavit).
- READ AFFIDAVIT
- Mr. Dobrowski was correct in his determination and his approval of the permit in 2002 induced my clients to reinvest approximately \$200,000 into their property believing that their business use was lawful and conforming.
- The Land Use Administrator's later enforcement order, nearly 13 years after the fact, is inequitable, oppressive and would certain result in a substantial loss.
- It cannot stand as a matter of law.

CEASE AND DESIST ORDER

- Finally, the Cease and Desist Order issued on December 30, 2014 itself is plagued with deficiencies, extraneous information, and improper comments.
- First, the acceptance of documents submitted by the Lockards as evidence of a violation without independent confirmation is not only inappropriate but it is an unlawful delegation of the zoning authority.
- I compare it to getting a ticket in the mail because your neighbor saw you speeding and called the police.
- The Land Use Administrator has based a substantial portion of her enforcement action on claims made by two individuals who harbor a deep seeded animus toward my clients.
- Second, the Order includes reference to "nuisance dust" associated with a pond dredging project on the property. This residential improvement project has no connection whatsoever to my client's landscape maintenance business and reference to it is inappropriate.

- The CTDEEP investigated my clients' property twice last summer for dust complaints filed by the Lockards and both times found no evidence of any violation. (Submit DEEP reports).
- This residential improvement project is fully permitted and my clients remain in compliance with the terms and conditions of that permit.
- The Town of Brooklyn Inland Wetland Commission reviewed a proposal submitted by Dale Lyon in 2011 to dredge the pond for "drainage, safety, fire protection, farming and recreation" purposes and granted a permit for this activity on September 13, 2011. (Submit Wetlands Permit).
- The plans for the dredging project called for the stockpiling of the dredge materials up-gradient of the pond and along the common property line shared with the Lockards.
- My clients acquired separate vehicles and equipment specifically for this project which will not be stored or kept on the property after the project is complete.
- The approved plans for the project clearly give Dale Lyon the authority to stockpile and remove the spoils, but as a practical matter these spoils have to be dewatered and then screened before trucked off site.
- My client anticipated finishing the project last year, but repeated complaints from the Lockards and the Land Use Administrator halted this work.
- My client is making arrangements to remove the stockpiles this year but we would note that the approved and issued wetland permit is effective for five (5) years and at minimum, my clients have until September 2016 to remove the spoils.
- Third, without any legal authority cited, perhaps because none exists, the Land Use Administrator suggests that my client and his brother were too young to have their involvement in the family landscape maintenance company constitute a continuation of the non-conforming use of the property.
- Not everyone goes to a four year college and some people actually go to work after or, in the case of my client, even during high school. The suggestion that Dale Lyon's enterprise as a young man, which he built into a successful small business, isn't worthy of protection under the zoning regulations is ludicrous and without basis in law.

- Fourth, the Land Use Administrator makes a series of statements regarding the impact of the business and “repercussions on neighborhood property values and quality of life”. That is not charge or job to make such determinations.
- She is not a licensed land appraiser nor is she a Planning & Zoning Commissioner evaluating a special permit application. Her sole responsibility is to enforce the zoning regulations. She may not like my clients’ business and she may not think it fits within her vision for this community, but that is not her place and its irrelevant to the matter at hand.
- Finally, any signs that my client erected on the property were removed immediately after the Order was received and will not be replaced without appropriate permits.
- In terms of mulch sales, neither he nor his father took any affirmative action to abandon the retail sale of mulches from the property. Whether he imports the mulch or actually creates it onsite (which by the way is much, more intensive, and more disruptive to neighbors) is completely irrelevant to the zoning analysis of whether it is allowed.

CONCLUSION

- We appreciate your time and attention to our appeal tonight.
- It is readily apparent to us that Brooklyn, like many other towns in Eastern Connecticut, has a long and established history of home based business, particularly involving construction services and the trades, many of which have been in operation for decades and do not have actual permits on file with the Town.
- Based on my review of the town’s permit files, even if a permit had been issued for a particular use, there are significant gaps in the records, and very few if any records exist prior to the early 1980s.
- Requiring long standing and respected local businesses to validate their lawful existence, sometimes forty or more years after the fact and without any reliable municipal permit archives in existence, is fundamentally unfair and will be nearly impossible to do with the passing of the next generation.
- More importantly though, the larger concern we see with this situation is the potential for the misuse of local zoning enforcement by residents in neighborhood squabbles.
- There is certainly no love lost between the Lyons and the Lockards.
- But the Town of Brooklyn needs to make concerted efforts to avoid being unnecessarily pulled into civil disputes between warring neighbors.

- This matter has been going on for almost a year now and it needs to end tonight and end with you.
- Send a message to the Town of Brooklyn that this type of zoning enforcement is wrong, bad public policy, and bad for Brooklyn and its small business community.
- Respectfully, we request that the Zoning Board of Appeals reverse the Cease and Desist Order.
- Alternatively, if you don't have the four votes to overturn it, modify it to allow those business operations which you believe are legitimate and protected on this property.
- Even if you side completely with the Land Use Administrator, which we certainly pray you don't, we would ask you at minimum to extend the date for compliance and grant the Lyons a stay of execution of the Order for at least 6 months so they can try to relocate and save their business.
- After being part this community for nearly 40 years, I can't imagine that would be too much to ask.
- Thank you. I reserve the right of rebuttal at the end of this hearing.