



OFFICE OF THE  
LITTLETON BOARD OF APPEALS  
LITTLETON, MASSACHUSETTS 01460

received  
5/28/2020 1030AM  
Kasey Clow

Petitioner: M & M Realty Trust  
Case No. 946A  
Date Filed: April 20, 2020

The Littleton Board of Appeals conducted a virtual hearing on May 21, 2020, at 7:50 PM via the Zoom program hosted by Littleton Community Television, Shattuck Street, Littleton, for an Appeal from an Order of the Building Commissioner to Cease and Desist Zoning Violation at 9 Ayer Road, Littleton. Notice of the hearing was given by publication in the Littleton Westford Eagle, a newspaper circulated in Littleton, on April 24, and May 1, 2020, and by mail to all abutters and parties in interest. Present and voting: Members, Sherrill Gould, Jeff Yates, Rod Stewart and Marc Saucier, and John Sewell, Alternate. Present and not voting were Cheryl Hollinger, Member, and Alternates John Field and Jillian Shaw.

The petitioner, represented by Attorneys Jennifer Platt and David McKay, presented first. They stated that the Petitioner is a home builder who has built numerous projects in Littleton, Ma. Petitioner purchased 9 Ayer Road, with the express purpose of building homes on the property. The site is zoned residential. It has approximately 5.22 acres and 441+/- feet of frontage on Ayer Road. Ayer Road is a heavily traveled state highway. The grade from road to house site is, in the Petitioner's words, "very steep, close to 55% and requires earth removal incident to construction." The Petitioner had obtained from the Littleton Planning Board Approval to create 3 conforming building lots. Due to the conforming size of the lot and the adequate frontage, the Planning Board issued approval for the 3 lots without the formality of a subdivision plan, so-called "Approval Not Required" endorsement. In addition, Petitioner obtained from the Conservation Commission an Order of Conditions to control soil erosion, and a permit from MassDOT to allow highway cuts for one shared driveway and one single driveway on Ayer Road. The Petitioner had also obtained a permit to relocate an existing barn on the property to the rear.

The Petitioner then commenced large scale earth removal operations on the site which included, *inter alia*, substantial cuts into the hillside along Ayer Road, which petitioner described "are necessary to achieve a safe driveway grade and comply with MassDOT permit requirements for residential driveway grading to a public road." The Petitioner stated that the work they commenced to start cutting into the grade for the driveway and to lower the grade for the homes to be built, was permissible without any further permits as "incidental to the (building permit issued for) relocation of the barn." The Petitioner described that some 20,000 to 30,000 cubic yards of fill were already removed and that approximately 160,000 cubic yards total would need to be removed. The Petitioner also presented evidence that the pre-existing elevation at the top of the property near the Sleigh Ride Lane neighborhood to the rear is approximately 270 feet and that the elevation at Ayer Road is 223 feet. The Petitioner proposes to construct the homes at a mean elevation of approximately 245 feet to top of foundation, which requires removal and cuts to lower the elevation about 30 feet total from the rear to the front of the site. The entire earth removal operation was originally intended to take about 2 years.

During the work, the Petitioner elected to demolish instead of relocating the barn and the Building Commissioner issued a Stop Work Order stating that since the building permit for relocation of the barn was revoked as a consequence of the barn demolition, there was no longer excavation “incidental to the building permit.” Concurrently the Building Commissioner directed the Petitioners to apply for a Soil Removal Permit from the Board of Selectmen. (March 23, 2020). (It was stated that without work “incidental” to the building permit, the Petitioner was required to seek a Soil Removal Permit under the town Bylaw Section 147-2 to continue any earth removal.)

Chapter 147 of the Town Code governs soil removal. Petitioner applied for the soil removal Permit on March 25, 2020. After the first hearing and request for additional information by the Selectbody (April 6, 2020), the Petitioners applied for and received building permits for 3 homes (April 9, 2020). The Petitioners then recommenced earth removal operations, stating that the Town Bylaw specifically allows removal of earth materials in connection with the construction of a building on a parcel, *Soil Removal Bylaw Section 147-2*. It was their contention that the activity was allowed as of right as “incidental to and in connection with the construction of a building on the parcel.”

On April 16, 2020, the Building Commission issued the Cease and Desist Order which is appealed from. The Building Inspector’s Order stated that “There is presently a commercial earth removal/gravel mining operation being conducted at the property...”, contrary to the zoning which is a Residence (R ) Zoning District. He stated that based on his review of the site and the current operations, “the scale of the commercial earth removal/gravel mining presently underway at 9 Ayer Road is substantially in excess of what could reasonably be described as incidental or accessory to the construction of the three (3) single-family dwellings.” He ordered Petitioner to immediately cease and desist “all commercial mining activity at the site.....all harvesting of earth materials for immediate or eventual sale to a third party....and all commercial removal of earth material from the site.”

Petitioners appealed from that order asserting that all of the earth removal was incidental to and in connection with the construction of a building on the parcel. They cited various other large scale subdivision projects and one commercial project in Littleton where far greater quantities of earth were removed from sites as incidental to and in connection with the permitted construction and without soil removal permits. They also argued and presented evidence specifically distinguishing their operation from a “commercial mining operation” by emphasizing that this earth removal is temporary, is not the primary purpose of activity on the site and is a necessary and essential component of building homes as the primary purpose. They also offered various mitigation measures and indicated their willingness to work with the town to insure the public safety should their activities be allowed to continue. Some of their proposals include shortening the time line to 12 months from recommencement of the work to completion, restricting the hours of operation, installing watering devices for dust, noise controlling measures, and possibly fencing the site to the neighbors.

The Building Commissioner, represented by Town Counsel, Christopher Heep, then offered additional evidence that prior to this hearing, the Petitioner had withdrawn their Application for Soil Removal Permit and as a result the Selectmen, in Executive Session have filed for a Preliminary Injunction due to be heard the following week. According to Town Counsel, it is his belief and opinion that the volume of materials being removed elevates this site to a commercial

operation far in excess of “incidental to the construction of single family homes”. He also stated to the Zoning Board that the distinction between this site and others which were allowed earth removal incident to the subdivision, was that other sites referenced were all subject to the formal process of Subdivision Approval. That process insures to the abutters and the community that there is engineering peer review and adequate protection from noise, dust, pollution, erosion, safety, and other factors. That process affords the abutters adequate opportunity to have their concerns heard in a public forum. When there is subdivision approval, he stated, there is oversight as to engineering of the grades prior and subsequent to the work and there is often a bond requirement to insure that the work is done properly and through to completion. In the absence of formal subdivision approval, he opined that the soil removal permitting process would afford the same protections and allow the abutters input to the mitigating measures which would protect their quality of life.

Attorney Kevin Cloutier, representing abutter, Thomas Connors, then spoke in opposition to the Petitioner’s request for relief. He stated that this was a simple case of determining whether the ongoing activities were commercial in nature and thereby prohibited. He stated that his client, the direct abutter at 5 Ayer Road, suffering the most inconvenience and disturbance from the ongoing noise, dust, pollution, grade alteration, etc., was forced to seek judicial relief. The Attorney presented evidence supporting his allegation that this is a commercial operation, with the following examples: the contractor brought onto the site scales for weighing and crushers for processing gravel on site; had advertised the site as a commercial pit with “gravel, processed gravel, stone & more” for sale; had registered the site with the federal Mine Safety and Health Administration as a mine; and that at one hearing before the Board of Selectmen the contractor stated that the application for a federal registration was necessary for “commercial removal operation(s).” Atty. Cloutier also cited two cases where excessive earth removal was determined by the Courts to characterize the activity as greater than “incidental” to the ultimate use. Atty Cloutier also informed the Zoning Board that his client had a Preliminary Injunction pending before the Superior Court, which the Judge had denied without prejudice pending a determination of the “unresolved permitting issues best left to the municipal authorities.”

The Petitioner refuted each of these allegations stating that the federal registrations were OSHA related standards undertaken by the contractor for safety in the transporting and removal of materials and did not elevate the activities to commercial mining activities, even though regulated by similar safeguards. They also challenged the applicability of the cases cited to this case.

Several abutters appeared, generally expressing their concerns relative to mitigation. They don’t have objection to a residential use of the property, but wanted to be sure that their quality of life is not disrupted during the period of construction activity. They asked for safeguards as to time to completion, hours of operation, dust, noise and air pollution controls, landscape buffers, and safety. The current confinement to their homes due to the COVID epidemic is also contributing to the annoyance and disturbance experienced since they are home with their children and significant others almost all day every day.

Town Counsel instructed the Zoning Board that it had the authority to deny the Petitioner’s appeal and affirm the Building Commissioner’s decision; to grant the appeal overturning the Building Commissioner’s decision; or to make a determination which could impose conditions on continued operations or modify the cease and desist order. He instructed the Board to

determine from the evidence whether the earth removal going on at the site was commercial in nature or was incidental to the construction of residential dwellings.

The hearing was closed for deliberation.

The Zoning Board reviewed the materials presented and examined for the hearing. Materials consisted of the following:

1. Written Presentation with supporting Exhibits and Affidavits of Counsel for petitioner.
2. Littleton's Earth Removal Bylaw
3. Minutes of Selectmen's Meetings relative to 9 Ayer Road
4. Building Commissioner's Zoning violation Order to Cease and Desist 4/16/20
5. Building Commissioner's Stop Work Order 3/23/200
6. Atty. Cloutier's Opposition letter in the nature of a Brief with supporting Exhibits and Affidavits
7. Planning Board Minutes approving the mylar plan for recording as an Approval Not Required Plan for a 3 lot subdivision.

During deliberation Board members were polled. Most of the members agreed that the activity seemed excessive to what was normal and incidental earth removal for a 3 lot development, in sheer scope of the time involved to completion and the quantity of earth removed. One member stated it was the type of thing that happens in every subdivision all the time when elevations are altered to locate and grade the home, driveways, septic systems and foundations. The Board were all in agreement that there should be some regulatory oversight of the Petitioner's activities in completing the project and protecting the abutters with mitigation measures, and that the Zoning Board did not want to be the regulatory authority. The Board agreed, however, that they were not convinced this was a commercial earth removal/mining operation.

**FINDINGS:** The Board found that the earth removal currently underway is in excess of what could reasonably be described as incidental or accessory to the construction of the three (3) single family dwellings, but in a split opinion did NOT agree that the activity elevated to a commercial earth removal/gravel mining operation as found by the Building Commissioner. The Board therefore determined to direct the Petitioner to obtain the requested relief to complete the project within the regulatory oversight of the Board of Selectmen via the Soil Removal Permit application process.

**DECISION:** The Board finds that the extent of the activity at 9 Ayer Road is substantially in excess of what could reasonably be described as incidental or accessory to the construction of three (3) single family dwellings, and upholds the Order of the Building Commissioner to cease and desist all harvesting of earth materials for sale and removal of earth materials from the site to third parties, with the exception of that which is necessary to stabilize the site, to comply with the Conservation Commission Enforcement Order(s), and to dig septic systems and foundations, until such time as a Soil Removal Permit is obtained from the Board of Selectmen.

Appeals, if any, shall be made pursuant to G.L. 40A, Section 17 and shall be filed within twenty days after the date of filing of this Notice in the office of the Town Clerk.

Signed: Marc Saucier  
Marc Saucier, Clerk

Dated: 5/29/2020  
Deed Reference: Book 73786, Page 320.

I hereby signify that twenty days have elapsed since the filing of the above decision by the Board of Appeals and that no appeal concerning said decision has been filed or that any appeal that has been filed has been dismissed or denied.

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True Copy Attest: \_\_\_\_\_  
Town Clerk

Littleton, Massachusetts