



TUESDAY, MARCH 20, 2018

REGULAR MEETING

**NEW TOWN HALL
CONFERENCE ROOM
40 MAIN STREET
NORTH STONINGTON, CT 06359**

MINUTES APPROVED ~ JULY 17, 2018

1. CALL TO ORDER: Chairman Charlie Burger called the Regular Meeting of the North Stonington Zoning Board of Appeals to order at 6:00 p.m. at the New Town Hall, Conference Room.

BOARD MEMBERS PRESENT: Charlie Burger, Chairman, James Lord, Vice-Chair, Candy Palmer, Mark Leonard, and Alternate Member Shawn Murphy

COMMISSIONERS ABSENT: Robin Hall, Secretary and Alternate Member Gary Thompson

STAFF PRESENT: Juliet Hodge, Planning, Development & Zoning Official, Cheryl Konsavitch Administrative Assistant, Atty. Robert Avena, Counsel for J. Hodge, Atty. Thomas Collier, Counsel for the Board.

2. ADDITIONS TO THE AGENDA: None

3. PUBLIC HEARINGS:

ZBA Application #17-007 (*Appeal*), In a matter involving property owned by Shawn Michael Ward, 79 Pine Woods Rd. N. Stonington, CT 06359, located on the north side of Pine Woods Rd. approximately 4000 feet east from the intersection of Denison Hill Rd. with Pine Woods Rd. in an R-80 Zone. Tax Map #90, Lot #1981. Applicant is appealing the decision made by the Zoning Enforcement Officer which alleges a violation of Chapter 5 of the Zoning Regulations regarding the improper use of the property by operating a "Commercial Landscape Construction Business. (*PH scheduled for 03/20/18, Board received on 12/19/17 & was granted an extension from 02/21/18 to 03/20/18*)

Chairman Burger read the application into the record.

Prior to opening up the Public Hearing, C. Palmer stated for the record that to eliminate the possibilities of any appeals, that she believes one of the complainants is her sister-in-law, Pat Lewis and she believes the appellant is a friend of her husbands. C. Palmer asked if anyone had any issues with her being seated. Atty. William Sweeney, representing the applicant had no issues with C. Palmer being seated as long as she could hear it freely, without bias and pre-determination. Atty. Avena stated he had no objection to C. Palmer being seated. Atty. Collier asked C. Palmer if she can be open-minded, objective and had not made any pre-determination with respect to this application. C. Palmer stated that she could be objective and Atty. Collier stated the Board has no objection to C. Palmer being seated.

MOTION by C. Burger, SECOND by S. Murphy to open the Public Hearing on ZBA Application #17-007. MOTION CARRIED UNANIMOUSLY.

Seated: C. Burger, C. Palmer, J. Lord, M. Leonard, S. Murphy

Atty. Avena stated he would like J. Hodge to present her 15 exhibits to provide the basis for her Notice of Violation to which the appeal was taken and that J. Hodge would explain them further during her presentation. Atty. Avena gave a presentation to the Board about some of the legal aspects of this appeal, including the doctrine of estoppel and how he believed it did not apply to this appeal.

J Hodge submitted all 15 Exhibits for the record which included: *Monumented Perimeter Survey for 79 Pinewoods Road (#2), 2016 aerial map of 79 Pinewoods Road (#3), 2016 aerial map of 79 Pinewoods & 108 Pine Woods Road (#4), 7 aerial photos of 79 Pine Woods from 1990-2016 and 2 aerial photos of 108 Pine Woods from 2012 and 2016 (#5), 2009 property cards of 79 & 108 Pine Woods Road (#6), and 2018 property cards of 79 & 108 Pine Woods Road, Zoning Permits issued from 1996-2004 (#8), Complaints & inspection reports received 2000-2003 (#9), 11/12/09 inspection report by J. Leeming, SPZEO (#10) and business information for Fields of Dreams Tree Farm & Landscaping, Inc. from the internet (#11), Relevant sections of 1992 Zoning Regulations (#12).*

J. Hodge gave each Board Members Exhibits 1-3, 9-11, and 14 (Summary of findings Document).

J. Hodge stated she is here before the Board tonight to ask them to uphold her *November 17, 2017 Notice of Violation (Exhibit 1)* in which she ordered Mr. Ward to cease operating what she observed to be a commercial landscaping business on his property at 79 Pinewoods Road, as the use exceeds the very limited exception for an Agriculture Use in a Residential Zone.

J. Hodge stated that Mr. Ward owns multiple parcels on Pine Woods Road and 79 Pine Woods is his primary residence and referred Board to a town GIS map of 79 Pinewoods Rd and surrounding parcels displayed on the computer screen in the room.

J. Hodge explained *Exhibit 8 - Zoning Permits issued from 1996-2004*. J. Hodge stated there is currently an unpermitted structure on this parcel that is being used as a hay barn per Mr. Ward. There are also no permits for any Home Occupation or Commercial Services Use, however the address is listed as the location of the Stones by Fields of Dream, LLC. And there is a website as well as evidenced by *Exhibit 11 Business information for Fields of Dream Tree Farm and Landscaping, Inc. taken from the internet in 2009 when she was researching the issue at the time.*

J. Hodge reviewed the remainder of the Summary of Findings Document which contained the following information:

There are no specific permits for any excavation, quarrying of stone, or other specific Agricultural Use, only the PA490 Farm and Forest Designation.

Mr. Ward also owns 88 Pinewoods Road which is a 2.03-acre lot with a barn and parcel #90, Lot#6665 is a 12.33-acre parcel off Pine Woods which is not adjacent to the other 2 parcels listed above. That parcel is vacant and is used to grow trees which are then used in the Landscaping Business and has a Lot Line Adjustment permit on file to split off a 6.33-acre portion of the parcel to add to 108 Pine Woods Road. Again, there are no permits on file declaring the Agricultural Use via a zoning permit nor is it in the PA490 status. It is considered a vacant, residentially zoned parcel per the Assessor.

Additional history provided: the agricultural use existed in 1996 when Mr. Ward bought the property and was listed as a use “permitted by right” in the R80 zone as opposed to needing a special permit. J. Hodge explained that a commercial use such as retail was allowed “as of right” with the “P” designation in the Commercial Zones, but would require a site plan as it is a Commercial Use. J Hodge referred to ***Exhibit 12: Relevant sections of 1992 Zoning Regulations.***

J. Hodge stated that agriculture, unless it was a Special Agriculture Building, was not considered a Commercial Use and therefore would have only needed a zoning permit to establish it as a use. J. Hodge stated that to her knowledge, based on the land use records on file, no agricultural use was ever formally established via a zoning permit as was required in the regulations at the time.

J. Hodge stated that in many cases where the agricultural use was obvious, and unless an issue arose, it was not ever a problem that there was no permit on file. The Town supported and encouraged agriculture and Mr. Ward was afforded the same treatment. Former ZEO’s acknowledged that there was a Tree Farm and that a Tree Farm was considered an agricultural use. It wasn’t until 2000 that complaints began about his running a commercial business from 79 Pine Woods Road. J. Hodge referred to ***Exhibits 9-11: Complaints & inspection reports received 2000-2003 (#9), 11/12/09 inspection report by J. Leeming, SPZEO (#10) and business information for Fields of Dreams Tree Farm & Landscaping, Inc. from the internet (#11).***

J. Hodge state that inspection reports coincide with a written complaint and it is important to remember that they represent a snapshot in time. A ZEO cannot monitor a property for the time necessary to really know what is occurring on the property. ZEOs rely on complaints, photos and sometimes videos from abutting or nearby property owners. J. Hodge stated from her limited vantage point, she was able to see that there was an agricultural use, a tree farm and horses. J. Hodge stated she has been told, and verified that Mr. Ward did have a Landscaping Business and that the business location was advertised on the website as 79 Pine Woods. J. Hodge stated she was only brought part way onto the property when she inspected it in 2009. She stated she has never inspected the “back 40” and would not be able to see any of the area where the stone was stock piled from the street or the front portion of the property by the house.

J. Hodge stated the website in 2009 describes the business as a landscape construction business. The services provided included masonry and stone sales. J. Hodge referred to ***Exhibit 11: Business Information for Fields of Dreams Tree Farm & Landscaping, Inc. from the internet.***

J. Hodge stated that during her site visit in 2009, she did discuss the issue of operating a business vs strictly agricultural activities with Mr. Ward. J. Hodge stated she did discuss the option of a Home Occupation, but explained that there could only be 1 additional non-family employee. She stated she explained that the PZC was considering changes to the Agricultural Regulations that might help his situation and at the time decided to postpone further enforcement until the Commission acted on the possible new regulations J. Hodge stated she asked Mr. Ward to stop parking employee vehicles on site and he did comply with this at the time (Exhibit 10) 11/12/09 inspection report by J. Leeming, SPZEO.

J. Hodge stated in the Summary of Findings that in 2014, the PZC did expand the scope of permitted uses under “agriculture”, but commercial services still weren’t one of them. The PZC also expanded the Home Occupation Regulations and added Commercial Services as a Home Occupation, but Mr. Ward still would not comply due to the number of employees and the intensity of activity, outdoor storage of material and the size of vehicles. After the 2017 complaints, she thoroughly reviewed all the aerial photos over the years which clearly show an expansion of what was occurring in 2009 when she last

visited the site. J. Hodge showed each Board Member copies of the photos provided in ***Exhibits 3 & 5; including 2016 aerial map of 79 Pine Woods Road (#3) and 7 Aerial photos of 79 Pine Woods Road from 1990-2016 & 2 aerial photos of 108 Pine Woods Road 2012, 2016 (#5).***

J. Hodge stated the types of activity occurring on the property currently would require permits. Nothing is grandfathered, you can only grandfather a legally existing non-conforming use. Mr. Ward purchased the property and started a tree farm and later registered his landscaping business using 79 Pine Woods Road as the address well after the adoption of zoning regulations. J. Hodge stated there are no permits on file establishing any use in addition to the existing permitted single-family residence, and no permits for the expansion of the use as required per Section 1001.2 of the current Regulations.

J. Hodge stated a significant amount of the parcel is classified as PA490 Forest and PA490 Farm which affords Mr. Ward a significant tax break. The stockpiling of stone is not an agricultural activity, per the definition and is not permitted to occur in the areas determined to be PA490 land. This activity is clearly part of his landscaping business and not his agricultural operation and is not permitted on the property as part of an Agricultural Use.

J. Hodge stated Mr. Ward has a commercial farm and if the number of employees working on the farm equals or exceeds 5, he would need a Special Permit per our regulations to operate such a farm. The Special Permit requirement for the Specialized Agricultural Building has been in place since Mr. Ward bought the property. J. Hodge referred to ***Exhibit 12: Relevant Sections of 1992 Zoning Regulations.***

J. Hodge stated Mr. Ward is not unique and that this zoning issue has surfaced before. There are other landscaping companies currently being enforced or who have been the subject of enforcement in the past. It is important function of Zoning and Zoning Enforcement to maintain the character of the neighborhoods in Town and to protect property values and residents' quality of life. That is why we have regulations and staff to enforce them. It is essential that I be able to maintain clarity with respect to what is considered a permitted, non-residential use in a residential zone, and to be able to ensure that use does not expand in such a way as to no longer be considered a permitted use in the Zone.

J. Hodge read (***Exhibit 1***) ***November 2017 Notice of Violation issued by Juliet Hodge, PDZO*** into the record and record and stated the nursery is not part of the violation and for the Board to uphold her decision.

Atty. William Sweeney who represented Mr. Ward cross examined J. Hodge and asked her about a 2009 inspection report and if that report was sent to Mr. Ward. J. Hodge stated she did not recall. Atty. Sweeney asked if J. Hodge inspected Mr. Ward's property before she sent the Notice of Violation and she stated she inspected it from the road and she had examined photos that people took. Atty. Sweeney also asked J. Hodge about a website that she found when she looked his name up on the internet.

S. Murphy asked if the ZEO can go on properties to inspect. Atty. Avena stated that the right to inspect is limited and they would need permission from the owner. J. Hodge stated that she personally always asks for permission to come onto the property.

Atty. Sweeney, introduced himself and addressed the Board explaining the Power and Duties of the Zoning Board of Appeals.

Atty. Sweeney stated he was there tonight on behalf of Mike Ward and his client is joined tonight by his wife and several of his neighbors and supporters. Atty Sweeney read from a document he prepared.

Atty. Sweeney stated that his client appealed the November 17, 2017 Notice of Violation issued by the Zoning Official which alleged that his client was running an illegal commercial landscape construction business from his property at 79 Pine Woods Road. This Notice was issued nearly 18 years after his client first opened his business, Fields of Dreams Tree Farm and Landscaping, Inc., on the property. He stated that he and his client believe that there is overwhelming evidence that the Notice of Violation was issued in error by failing to acknowledge his client's right to maintain a legal, pre-existing, non-conforming use, and is in direct conflict with the decisions and interpretations of former Zoning Officials upon which his client reasonably relied.

Atty. Sweeney stated the Town of North Stonington has threatened his client's livelihood and property rights by attempting to undermine and unreasonably restrict a family-owned agricultural business that had been in North Stonington since 2000, based primarily on the complaints of individuals who have personal ill will toward his client. Atty. Sweeney stated he intended to review the Board's legal charge as a Zoning Board of Appeals, important background on the historic use of the property, the defenses he has raised on behalf of his client, relevant case law, and most importantly, the reasons why the Board must overturn or at least modify the Notice of Violation being appealed.

Atty. Sweeney explained that a Zoning Board of Appeals has only the powers given to it by state statute. Section 8-6 of the Connecticut General Statutes grants the ZBA 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.

Atty. Sweeney stated that over nearly two decades, this company had been successful, primarily due to the hard work and perseverance of Mr. Ward, his family, and his loyal employees, and while Mr. Ward owns several properties along Pine Woods Road in North Stonington that support the tree farm operation, only 79 Pine Woods Road is referenced in the issued Notice of Violation. This property is Mr. Ward's personal residence and the business address of his company. In addition to his home, gardens and several agricultural outbuildings, including a carriage house and a horse barn, the property also includes a small gravel parking area for company vehicles and employees, growing areas for nursery stock, and a yard for palletized landscape stone products. He noted that these areas are not visible from Pine Woods Road, a private dirt road, and this area only occupies approximately 3 acres of the entire 114-acre property. Atty. Sweeney stated that for the last 18 years, Mr. Ward's company was primarily used for the nursery business, growing trees, shrubs and plantings and then installing and maintaining them.

Atty. Sweeney stated Mr. Ward services a variety of commercial, industrial, residential, and institutional customers primarily, if not exclusively, in Rhode Island. In connection with the tree farm operations, his client is regularly called upon to complete associated work related to planting, pruning, weeding, fertilizing, gardening, irrigating, lawn care and cutting, and the construction of minor retaining walls, patios and earth moving for the purpose of enhancing, protecting, and improving soil, plants, lawns and gardens. Atty. Sweeney stated that Mr. Ward may take delivery of a young ornamental tree in the spring, plant it on his property, dig it back up several years later - and several feet taller, and then transport it to a residential home in Newport where he replants it, fertilizes it, mulches it, and puts some nice landscaping stones around its base. These ancillary landscaping services take place offsite, at customer's properties, and while they are customary and incidental to the tree farm and nursery business, they are an integral part of his overall business model. Fields of Dreams Tree Farm & Landscaping, Inc. has historically parked a dozen commercial vehicles on the property, including several larger delivery vehicles, but primarily pickup trucks, as well as stored a variety of nursery and landscaping equipment including a bulldozer, an excavator, a tractor, two utility RTVs, and a wide variety of vacuums, blowers, trimmers, and other similar equipment. These vehicles and equipment are used for both nursery operations onsite and offsite landscaping activities and palletized landscaping stone is stored on the property as it has been for the last 18 years, as an ancillary use to the overall tree farm business.

Atty. Sweeney stated there is no loose landscaping stone stored onsite for commercial purposes and there is no commercial processing of stone taking place on the property. Similar to almost every other large farm in North Stonington, the employees of the company, which typically number approximately 15, park and muster on the property each morning during the active nursery and landscaping seasons. Unlike many other farms Mr. Ward's business is carefully laid out so that his nursery areas and parking areas at 79 Pine Woods Road are not visible whatsoever from the road and are suitably screened and buffered to his adjacent neighbors.

Atty. Sweeney stated that unfortunately, over the last year, his client and his business have been the target of complaints filed by two property owners along Pine Woods Road who are either zoning commissioners or town employees and have personal conflicts with Mr. Ward. These complaints are the basis of the zoning enforcement action before you tonight and to the best of he and his client's knowledge, the Zoning Official has not recently inspected Mr. Ward's property nor has she any current first hand observation of any alleged violation. Atty. Sweeney stated their defense to these allegations is simple and straightforward: the property has historically been used for a tree farm and landscaping business since 2000, consistent with agricultural uses permitted as of right as of 1999, prior to the adoption of new definitions for agriculture and commercial services in the Zoning Regulations over the last few years.

Atty. Sweeney stated that he would demonstrate that the use of this property is legal, pre-existing, non-conforming and it is entitled to continue without any additional approvals or permits from the Town of North Stonington. Further, the Town of North Stonington validated and confirmed his client's lawful and compliant use of the Property in 2000 and then again in 2003 when then ZEOs inspected the operation and determined it was a legitimate agriculture use which was permitted as of right under the Zoning Regulations that were in effect at those times, and my client has a constitutionally protected right to continue the business use of his property without any further interference from the Town of North Stonington. Atty. Sweeney submitted Exhibit 1 consisting of 57 pages for the record.

Atty. Sweeney handed out (*Exhibit 1*) *Appellant's Exhibits* so that the Board could follow along during the presentation. He stated that the property at 79 Pine Woods Road encompasses approximately 114 acres and has been used for agricultural purposes for well over 100 years (*Page 2*). Aerial photography from 1934 shows the property in active farming use while it was owned by the Hultkrans family (*Page 3*). The configuration of the two main fields which are lobe-shaped and are separated by a stone walled pentway running south to north from the farmhouse on the sharp corner of Pine Woods Road. This agricultural use was still maintained in 1964 when North Stonington first adopted Zoning Regulations and continued uninterrupted through Mr. Ward's purchase of the property over 20 years ago. In 1996, Mr. Ward had just sold a very successful nursery and landscaping business in Rhode Island and was looking to move to Connecticut and open a new similar venture. Mr. Ward purchased the farm property in January of 1996 from Ruth Hultkrans Hastings, and spent the next couple years renovating the main house and building a pond along Pine Woods Road (*Page 4*).

Atty. Sweeney stated that aerial photography from 1997 shows much of the farm overgrown but the two main farm fields remained as open pastures and some of the preliminary work on the pond was just beginning (*Page 7*). During this time Mr. Ward met with George Brown, who was the North Stonington Zoning Official in the late 1990s, and discussed starting a tree farm and landscaping business in one of the back fields. Mr. Brown advised my client that the historic use of the property had always been agriculture and that a tree farm with incidental landscaping services was still agriculture and was permitted as of right within the R80 district and no approval was required.

Att. Sweeney stated that in February of 2000, following Mr. Brown's prior advice, Mr. Ward incorporated Fields of Dreams Tree Farm and Landscaping, Inc. and opened for business that following

Spring at 79 Pine Woods Road within the western field area (**Page 8**) and exactly as Mr. Brown had indicated, as a permitted use as of right on a property where agricultural use had already been established, no zoning permit or change of use approval was required. This fact is supported by the Zoning Regulations that were in place in February of 2000 and had last been amended on November 3, 1999 (**Page 9**) and Section 202 of the 1999 Zoning Regulations makes clear that a zoning permit is only required for a change of use, and not the continuation of an existing use (**Page 10**). In the 1999 Zoning Regulations, Section 403.3 also provided that agriculture, agricultural facilities, and accessory structures and uses were all permitted as of right in the R80 zoning district (**Page 11**).

Atty. Sweeney stated that, under Appendix A, very simple and broad definitions of agriculture, agricultural facilities, and accessory uses permitted growing trees and other horticultural products as well as other customary and incidental activities related to agriculture (**Pages 12-13**). Mr. Ward had no reason to think that his start up business did not fully comply with the Zoning Regulations that were in place at the time he started his company in the spring of 2000.

Atty. Sweeney stated in May of 2000, an anonymous individual filed complaints with both the Zoning Official and the Board Selectman alleging that Mr. Ward was running an illegal landscape construction business on his property without the proper approvals (**Pages 14-16**). The Zoning Official, now Mr. Marc Benjamin, investigated these complaints, conducted a site walk of the property, and on May 15, 2000 ruled that Mr. Ward's tree farm business was a "legitimate agricultural use" and that he was taking no further action (**Page 18**). This is perhaps the most important document that you will see tonight as this zoning complaint form and Mr. Benjamin's notations substantiates the fact that Mr. Ward was in compliance with the Zoning Regulations when he started his business in 2000, the same business that he operates there today. Mr. Ward was aware of the complaints made against him and Mr. Benjamin's determination, and he went forward from that date relying on the representations of Mr. Benjamin, as he did previously with Mr. Brown, as he continued to invest in his business at this location. Atty. Sweeney stated that he actually tracked down Mr. Benjamin who today lives up in Norwich and is the Chairman of the Zoning Board of Appeals there and asked him about this zoning complaint and whether he remembered it. After 18 years Mr. Benjamin stated he didn't recall it specifically but he advised me that back in 2000 the community was concerned about the viability of local farms and it was the policy of both the Town and the Planning & Zoning Commission at that time to be flexible with agricultural and related uses to keep farms from going under and being converted to house lots.

Atty. Sweeney stated that over the next three years, Mr. Ward pulled several additional zoning permits for a pool, a barn, and an addition on his residence and Mr. Benjamin, followed by Ms. Liz Rasmussen, and then Ms. Cheryl Konsavitch all granted approvals without any enforcement action against him or his business operations (**Pages 19-21**). It would have been impossible for these projects to have been inspected and approved without the Zoning Official at the time seeing the business operations ongoing on the property. The perspective photo from 2002 and the aerial photo from 2003 clearly show both the nursery and landscaping business now fully occupying the western field of the former Hultkrans farm (**Pages 22-23**). In October of 2003, another complaint was lodged against the property, once again claiming the operation of an illegal landscape business, this time by Mr. Daniel Morrison who was also engaged in a property line dispute with Mr. Ward (**Page 24**). The Zoning Official, now Mr. Craig Grimord, made an initial inspection on November 4, 2003, but saw no activity (**Page 25**). He followed up that inspection with another inspection on November 18, 2003 where he noted he found no zoning violations.

Atty. Sweeney stated that on November, 19, 2003, Mr. Grimord wrote a letter to Mr. Morrison, noting that there was an active agricultural use on the property and that "activities associated with this use are permitted as of right." (**Page 26**) Mr. Grimord concluded that there were no zoning violations on the site at that time. Once again, a zoning official of the Town of North Stonington inspected Mr. Ward's use of

his property as a tree farm and landscaping business and determined there was no violation of the Zoning Regulations and that his use was agricultural in nature.

Atty. Sweeney stated that in 2004, Mr. Ward constructed a fairly sizable horse barn on the eastern field and began improving the pasture around it to raise horses. **(Page 27)** *The* aerial photo from 2004 shows the horse barn under construction and the nursery and landscape business still operating in the western field. **(Page 28)** *From* 2004 to 2009 the company continued to operate on the property without any issues or complaints.

Atty. Sweeney stated there was a small building erected on the property in early 2008 at the rear of the western field for hay storage, but aerial photos from 2006 and 2008 demonstrate that the scope of the nursery and landscape operation essentially remained the same during this period. **(Pages 29-30)** However, in November of 2009 the Zoning Official, Ms. Juliet Leeming (now Hodge), inspected the property in connection with an auction that Mr. Ward had scheduled for excess landscaping materials. Ms. Leeming drafted an inspection report at that time which was not shared with Mr. Ward that contained some important notes and observations. **(Page 31)**

Atty. Sweeney stated that Ms. Hodge herself indicates that both 79 Pine Woods Road and another parcel owned by Mr. Ward on the same road have an established primary agricultural use. Second, she also acknowledges the prior inspections completed by her predecessors, Mr. Benjamin and Mr. Grimord, and their findings of no violation of the Zoning Regulations. What is troubling though about the inspection report is that it discusses the possible need to bring the property into compliance with the "current regulations." Ms. Hodge makes no reference to what the Zoning Regulations permitted back in 2000 or the fact that his operation may otherwise be protected as a non-conforming use. Ms. Hodge concludes her report by noting that Mr. Ward has been allowed to operate his landscaping activities for "some time now" but that she was deferring any enforcement action until the Planning & Zoning Commission considers new regulations better defining allowed uses accessory to agricultural operations.

Atty. Sweeney stated the Planning & Zoning Commissions and their Zoning Officials cannot amend their Zoning Regulations to retroactively regulate legal pre-existing non-conforming uses. Zoning Regulations are prospective, that is they regulate use going forward into the future, and they do not work backwards in time to restrict and prohibit already lawfully established uses. The question of whether Mr. Ward was violating the Zoning Regulations had already been settled in 2000 when Mr. Benjamin noted he was operating a legitimate agricultural use and nothing the Planning & Zoning Commission or Zoning Official could do in 2009 or later would or could change that. Atty. Sweeney added he would note that this is the last note, report or correspondence in the Town file for this property from Ms. Hodge until her Notice of Violation was issued almost exactly 8 years later.

Atty. Sweeney stated that aerial photography from 2010, 2012, 2014, and 2016 and the most current satellite imagery from just last summer, show that 79 Pine Woods Road has continued to be used in the same scope and intensity as it had been since its inception in 2000. **(Pages 32-36)** *If* anything, the intensity of use of the property for the business actually decreased in the last few years as more and more landscaping materials are now being delivered directly to my client's customer sites from other third party providers. This is especially evident in the satellite photo from last summer where much of the northwestern portion of the western field is overgrown with brambles due to disuse. During the span of almost eight years since Ms. Hodge first inspected the property there was no enforcement action but the Planning and Zoning Commission certainly was busy amending its regulations to add to and tighten its provisions pertaining to agriculture and most recently "commercial services" which now specifically regulates landscaping contractors. However, as I have noted, these new amended regulations cannot be applied to my client and his lawfully existing businesses at this location as a matter of law.

Atty. Sweeney stated that Ms. Hodge's Notice of Violation was issued in error and must be overturned or at least modified. The primary reason is that my client's use of the property is legal pre-existing non-conforming. In fact, both Section 8-2 of the Connecticut General Statutes, which was strengthened just this last year, and Section 305 of your current Zoning Regulations permit the continuance of any use existing at the time of adoption or later amendment of the zoning regulations. Once established, no subsequent approval, review, or authorization is required to continue such a 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, a non-conforming use does not have to even remain identical to the original use of the property, only substantially similar. The available evidence indicates that prior to the adoption of zoning regulations within the Town of North Stonington in 1964, the property was used for agriculture. Mr. Ward continued that use with the establishment of the tree farm and ancillary offsite landscaping activities in 2000 which was permitted as of right at that time. Under the Zoning Regulations that were in effect on November 3, 1999, the nursery and associated landscaping operations were considered agriculture, agricultural facilities, and/or accessory uses.

Atty. Sweeney stated that it was only in the last few years that stricter regulations of agriculture and specifically commercial service landscape contractors, and the 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. Mr. Ward's landscape maintenance business grew naturally from 2000 to 2018 without any significant interference or any issues with the Town of North Stonington. It is important to note that the aerial photos over the last two decades demonstrate that the footprint of my client's operation has never essentially deviated from the same western field where it was initially established in 2000. Mr. Ward's use of the Property is wholly consistent, if not even slightly less intensive, than the use he established in 2000. Any increase in his business operations over the years is been related to a natural increase in his business, but this constitutes a legal intensification and not an unlawful expansion of a nonconforming use. The Zoning Official has focused heavily on my client's vehicles and employees but this has not changed measurably over the last 18 years either. Mr. Ward has operated a small and efficient business within the carrying capacity of the property it is located upon. This fact, coupled with the Town's acknowledgement that his operation has been ongoing since 2000, makes it impossible to argue that Mike Ward's business is in anyway inconsistent with this neighborhood or the Comprehensive Plan for Zoning within the Town of North Stonington.

Atty. Sweeney stated that the second reason that the Notice of Violation should be reversed or modified is that the Town of North Stonington is estopped, or in other words legally barred, from enforcing against my client based on the actions of its previous zoning officials. 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 cannot rule that you are in compliance one day and then revoke that statement the next, and certainly not 18 years later, particularly when you have relied on their interpretation to your detriment.

Atty. Sweeney stated that not only did Mr. Ward approach Mr. Brown to make sure he could establish his business and was told that no approvals were required, but both Mr. Benjamin and Mr. Grimord inspected his operation in 2000 and 2003 respectively and found it constituted a legitimate agricultural use, permitted as of right. Even if Mr. Brown, Mr. Benjamin, and Mr. Grimord were somehow all wrong in their interpretations of the Zoning Regulations, by their actions, these zoning officials confirmed and certified the use of the Property for the tree farm and landscaping business as conforming to the Zoning Regulations that were in effect at that time. At no instance from the Spring of 2000 to the Fall of 2017

did any official from the Town of North Stonington, including Ms. Hodge, make any formal indication whatsoever to my client that his business use of the property was unauthorized or unpermitted. In reality, Mr. Brown, Mr. Benjamin, and Mr. Grimord were all correct in their determinations that Mr. Ward's use of 79 Pine Woods Road was compliant with the Zoning Regulations and these determinations induced my client to reinvest hundreds of thousands of dollars into his property believing that his business use was lawful and conforming. Atty. Sweeney stated Ms. Hodge's later enforcement order, nearly 18 years after the fact, is inequitable, oppressive and would certainly result in a substantial loss if it was upheld.

Atty. Sweeney stated that the Notice of Violation issued on November 17, 2017 itself is flawed. There is no evidence that the Zoning Official has conducted any first hand inspection of the property in recent years. The acceptance of allegations submitted by neighbors who either own property or live on Pine Woods Road as evidence of a violation without independent confirmation is not only inappropriate but it is an unlawful delegation of the zoning authority. The Zoning Official has based her enforcement action on claims made by individuals who harbor a deep seeded resentment toward my client and this undermines the validity of her action. The Notice includes references to alleged illegal activities which are not commercial and are clearly residential in nature, including the so-called "processing of stone." While my client freely admits to the storage of landscaping stone on his property associated with his business, there is no commercial processing whatsoever taking place on the property.

Atty. Sweeney stated that over the years, his client has harvested natural field stone on his property from his pasture land, much like every farmer for the last several hundred years has done in North Stonington. With this stone, he has built some significant stone walls around his horse barn and gardens and has even clad his home and other outbuildings in this material. **(Pages 37- 45)** Mr. Ward has on occasion cut stone for this purpose and is currently working on cladding the carriage barn across the street from 79 Pine Woods Road. These residential improvement projects have no connection whatsoever to my client's business and are not commercial activities. That being said, I would note that there is one allegation in the Notice that may have some validity and that is reference to the hay barn on the property that was erected in 2008 and the lack of a zoning permit for the structure on file.

Atty. Sweeney stated it is unclear why this issue wasn't raised during Ms. Hodge's visit to the property in 2009 as the aerial photos make clear the existence of the barn at that time. Mr. Ward has an established history of seeking zoning permits for any new building he has erected but for some reason the town has no record of this building. Mr. Ward believes that he had obtained a permit for the building and cannot explain the lack of the permit in the town records except that he spoke to Lou DiCesare who was the Building Official at the time and he indicated to my client that there were issues with the computerized permit system in 2008 and 2009 that may have led to the permit being lost.

Atty. Sweeney stated that in a demonstration of good will, Mr. Ward has voluntarily submitted a zoning permit application today to the Town to address this issue and to permit a clearly accessory agricultural building.

Atty. Sweeney stated that before he concludes tonight, there has been one final development in this matter which he must share with the Board. On March 1, 2018 my client chose to voluntarily begin the process of relocating some of his business operations to a new location in Hopkinton, Rhode Island. The majority of his commercial vehicles and equipment have now been moved to an industrial property and building at 31 Gray Lane in the Ashaway section of town. This does not mean that these vehicles will not still travel to the North Stonington site to pick up trees and other vegetation for planting, nor will it eliminate all of the vehicles from Pine Woods Road as the nursery operations will still be fully served, but my client has elected to move much of the operations for landscaping services offsite to this new location. **(Pages 46-50) Included** in this move is the palletized landscape stone materials which are now being delivered and stored at the Rhode Island location. **(Pages 51-54)** Atty. Sweeney stated he wanted to

be clear that Mr. Ward has made this decision not because he admits any wrong doing or violation, nor does he affirmatively intend to abandon his legal pre-existing non-conforming use, but because he is frustrated with the Town of North Stonington and has begun to accelerate his plans for retirement and sale of his business hopefully to his employees over the next several years. If Mr. Ward has effectively complied with the Notice of Violation by removing the bulk of the landscape services operations from Pine Wood Road, I think you might reasonably ask why we are even here tonight. That answer is very simple. Mr. Ward is a man of principle and he feels this Notice of Violation was wrongly issued. While he is moving these uses off his property he has no intention of affirmatively abandoning his rights to reestablish them at a later date. He believes he deserves to be vindicated as a respected businessman in this community who has always followed the rules and has not knowingly violated any Zoning Regulations. The majority of his neighbors, including his immediate abutting neighbors, support his business and its continuance on Pine Woods Road. (*Pages 55-56*)

Atty. Sweeney stated that we appreciate your time and attention to our appeal tonight. It is readily apparent to us that North Stonington, like many other towns in Eastern Connecticut, have a long and established history of agricultural and agriculture related businesses, many of which have been in operation for decades and likely do not have actual permits or approvals on file with the Town for every possible aspect of their business operations. In this case, the notes made by Mr. Benjamin and Mr. Grimord provide clear evidence of the Town's prior acknowledgement and acceptance of Mr. Ward's business in the years following its establishment. That being said, requiring long standing and respected local businesses to validate their lawful existence, sometimes decades after the fact, is fundamentally unfair and will be nearly impossible to do as time passes, records are lost, and people pass on. If you uphold this Notice of Violation, you will set a dangerous precedent for every other farmer and small business person in this community. Equally as important, 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 Mr. Ward and the neighbors that have tried to harm his business. The Town of North Stonington needs to make concerted efforts to avoid being unnecessarily pulled into what are essentially civil disputes between warring neighbors. This matter has been going on for several months now and it needs to end tonight. Trying to enforce current zoning regulations on long established farm operations is not only illegal, but bad public policy, and bad for North Stonington and its agricultural businesses. Respectfully, we request that the Zoning Board of Appeals reverse the Notice of Violation or at least modify it to overturn it with the exception of the requirement for Mr. Ward to obtain a zoning permit for his hay barn.

Atty. Sweeney also submitted (*Exhibit 2*) *Zoning Regulations of 11/03/99* for the record.

Atty's Avena and Collier questioned page 23 and 33 of Atty. Sweeney's exhibit. The Board asked questions pertaining to this appeal.

Chairman Burger asked if there was anyone from the public wishing to speak in favor of this appeal. The following people spoke:

Nick Mullane, Jackie Spiers, Mike Plessner, Bob Beattie, Chris White, Dave White (letter for the record), Mark Vankruiningen, Tracy Pion, Marian Plessner, Charlie Smith

Chairman Burger asked if there was anyone from the public wishing to speak against this application: The following people spoke:

Connie Berardi, Pat Lewis who also submitted pictures (*Exhibit 16*), Wayne Berardi

Atty. Avena and Collier gave closing remarks along with Atty. Sweeney

MOTION by C. Palmer, SECOND by J. Lord to close the Public Hearing on ZBA Application #17-007. MOTION CARRIED UNANIMOUSLY

4. PENDING APPLICATIONS:

ZBA Application #17-007 (*Appeal*), In a matter involving property owned by Shawn Michael Ward, 79 Pine Woods Rd. N. Stonington, CT 06359, located on the north side of Pine Woods Rd. approximately 4000 feet east from the intersection of Denison Hill Rd. with Pine Woods Rd. in an R-80 Zone. Tax Map #90, Lot #1981. Applicant is appealing the decision made by the Zoning Enforcement Officer which alleges a violation of Chapter 5 of the Zoning Regulations regarding the improper use of the property by operating a “Commercial Landscape Construction Business.

Seated: C. Burger, C. Palmer, J. Lord, M. Leonard, S. Murphy

The Board deliberated with Atty. Collier present.

C. Palmer started by stating she agreed 100% with the ZEO regarding her interpretation of the regulations, and she also agreed with Atty. Avena that if the use is illegal, it’s always illegal but where she was tripping up is that in 1999-2005, she used to walk 3.2 miles along Pinewoods Road 5 days a week, and she saw the stones being delivered there. C. Palmer stated that when Craig Grimord and Marc Benjamin did site inspections, they must have seen the stone on the property and that the therefore interpreted the regulations such that the storing of stones were accessory to the Tree Farm use in place. C. Palmer stated she does see it as estoppel as the ZEOs at the time interpreted the activities taking place relating to the stones, as permitted accessory to a tree farm and that Mr. Ward relied upon that interpretation.

J. Lord stated he agreed with the ZEO in that Mr. Ward is still out of compliance. J. Lord stated that Mr. Ward stated that the rocks are gone. C. Palmer stated that it was put on the record that Mr. Ward would like to leave the door open if he wishes to bring back that business.

M. Leonard stated when looking at the Notice of Violation pertaining to the illegal construction of a structure, no zoning or building permits are on file. The permit was just filed today, which took a year to do. M. Leonard discussed the other activities cited in J. Hodge’s 2017 Notice of Violation including: Parking commercial business vehicles and machinery onsite, and the mustering of employees on the property at the start and end of work day, the high volumes of truck traffic which he stated could be a nuisance to neighbors. He stated that some vehicles and equipment have been moved off-site per Atty Sweeny, but that Mr. Ward still wants to leave the door open to bring them back in the future. M. Leonard stated that the property is in a residential area and is used in part for agriculture, but that in his opinion, is clearly being used as a Commercial Use and that is why he would ultimately want uphold the ZEO’s order.

C. Burger agreed with C. Palmer and stated that agriculture is commercial in nature. C. Burger stated the Board needs to take in account that two zoning enforcement officers did allow this activity to take place and he stated that he did not agree with the current ZEO’s decision on this because the precedent was set in the early 2000’s by the former ZEOs’ decisions.

The Board referred back to exhibits during the deliberations, which included the aerial photos submitted.

S. Murphy asked questions pertaining to inspections done by the previous enforcement officers. S. Murphy stated he believed all they addressed was the Tree Farm and never addressed the landscaping

part of the business as evidenced by their inspection reports. He also questioned whether they actually went onto the site.

C. Palmer referred to **page 26** of the Exhibit submitted by Atty. Sweeney which is the letter from C. Grimord to D. Morrison submitted by Atty. Sweeney in which the finding that there was an active agricultural use on this property as a tree farm, and that this fact was confirmed by all three attorneys present tonight. C. Palmer stated that activities associated with this use are permitted by right. C. Palmer stated she is of the opinion that activities associated with the delivery and removal of stones to and from the property were accessory uses to the tree farm because the activity has been ongoing since she saw the stones being delivered in 2003.

The Board discussed **page 18** of the Exhibit submitted by Atty. Sweeney referring to M. Benjamin's inspection report which stated that he did a site-walk and observed a startup tree farm which was a legitimate agriculture use in May of 2000. C. Palmer and C. Burger stated they believe they made it very clear how they interpreted this inspection report. C. Palmer stated that the stones were on the property back in 2000 and 2003 when inspections were done by C. Grimord and M. Benjamin.

S. Murphy questioned Atty. Sweeney about whether he had a written record of George Brown's statement that a tree farm and landscaping business in one of the back fields was permitted. Atty. Sweeney stated that he did not have anything in writing from Mr. Brown.

S. Murphy stated that what is hard about this is the use of a tree farm can have the same negative effects as the landscaping business on the dirt road. S. Murphy believes this is a commercial operation that wasn't allowed back then and isn't allowed now. C. Burger stated agriculture is a commercial activity, a tree farm is a commercial activity. Atty. Collier directed the Board to look at **Exhibit 11** explaining how the zoning categories were set up at that time, explaining that agriculture uses and commercial uses were listed in two different sections.

S. Murphy stated if the Board doesn't uphold the ZEO's enforcement decision on this issue, then the Board is saying the commercial landscaping aspects of the business are incidental to the tree farm. S. Murphy stated he does not interpret the old zoning regulations as allowing the agricultural use to include the landscaping business.

Atty. Collier explained estoppel to the Board and the Board. M. Leonard suggested modifying the decision as the matter of the unpermitted structure was about to be resolved. Atty. Collier warned them that it would be complicated to modify at this point.

S. Murphy stated he believes J. Hodge was correct in her interpretation that the landscaping use was not incidental to the tree farm according to the zoning regulations back when Mr. Ward established it. C. Palmer stated that she is going on the interpretation of the other two ZEOs who inspected the property and found no violations.

Atty. Collier stated the Board needs to decide whether they agree with the appeal or not based on all the evidence provided and the testimony/comments provided by the citizens that spoke tonight. He stated that what you heard and read this evening all made up the record and that their decision should be based on that record.

MOTION by S. Murphy, SECOND by M. Leonard to uphold the Zoning Enforcement Officers Notice of Violation. MOTION CARRIED (4 votes necessary to overturn ZEO's Decision)

In favor: M. Leonard
S. Murphy

Against: J. Lord
C. Palmer
C. Burger

5. NEW APPLICATIONS: None

6. NEW BUSINESS: None

7. OLD BUSINESS: None

8. MINUTES:

Review minutes of February 20, 2018 meeting

**MOTION by C. Palmer, SECOND by J. Lord to approve the minutes of February 20, 2018.
MOTION CARRIED UNANIMOUSLY**

9. ADJOURNMENT:

**MOTION by C. Palmer, SECOND by J. Lord to adjourn the meeting at 9:30 p.m. MOTION
CARRIED UNANIMOUSLY.**

Respectfully Submitted,

Cheryl Konsavitch

Cheryl Konsavitch, Administrative Assistant,
Zoning Board of Appeal