

Board Members
Brian White, Chair
Gibb Phenegar, Vice Chair
Christina Oster, Member
Joe Barresi, Member
Tom Emero, Member



Medway Town Hall
155 Village Street
Medway, MA 02053
Telephone (508) 321-4890
zoning@townofmedway.org

TOWN OF MEDWAY
COMMONWEALTH OF MASSACHUSETTS
ZONING BOARD OF APPEALS

DECISION
APPEAL - DENIED
25 WINTHROP STREET

RECEIVED TOWN CLERK
SEP 27 '22 PM 2:35

20 Day Appeal
October 17, 2022

Applicant(s): Paul Doherty
D & D Mulch and Landscape, Inc.
236 Maple Street
Bellingham, MA

Location of Property: 25 Winthrop Street (Assessors' Parcel ID: 38-010)

Approval Requested: The application is for an **appeal** under M.G.L. chapter 40A section 8 seeking to reverse a cease and desist order issued July 27, 2022 by the Building Commissioner acting as Zoning Enforcement Officer, which prohibits the applicant from operating at the site.

Members Participating: Brian White (Chair), Gibb Phenegar (Vice Chair), Joe Barresi (Member), Tom Emero (Member)

Members Voting: Brian White (Chair), Gibb Phenegar (Vice Chair), Joe Barresi (Member), Tom Emero (Member)

Date of Decision: September 21, 2022

Decision: DENIED

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Date of Decision: September 21, 2022

Decision: DENIED

I. PROCEDURAL HISTORY

1. On August 24, 2022, the Applicant filed an appeal from a cease-and-desist order issued July 27, 2022, by the Building Commissioner acting as Zoning Enforcement Officer, prohibiting the applicant from operating at the site.
2. Notice of the public hearing was published in the Milford Daily News on September 7, 2022, and September 14, 2021, and notice sent by mail to all interested parties and posted in Town Hall as required by G.L. c. 40A, §11.
3. The public hearing was opened on September 21, 2022. The hearing was closed that same date.
4. The property, 25 Winthrop Street (the “Property” or the “Briggs property”), is located in the Agricultural Residential I (AR-I) Zoning District. The front setback requirement is 35 feet, and the side and rear setback requirements are 15 feet. The minimum lot area requirement is 44,000 sq. ft. and the minimum frontage requirement is 180 feet.
5. The Board notified Town departments, boards, and committees of this application.
6. All documents and exhibits received during the public hearing are contained in the Zoning Board of Appeal’s files and listed in Section V. of this Decision.

II. SUMMARY OF TESTIMONY

Attorney Amy Kwesell, KP Law, was present as town counsel to advise the Board. Attorney Kwesell reviewed the history of the appeal, stating the initial cease-and-desist order was issued July 1, 2021, by Jack Mee, Building Commissioner, and was appealed to the Board on July 20, 2021. Attorney Kwesell read a portion of that cease-and-desist order, which stated that “You have indicated this is a composting operation that provides this product [compost] to add nutrients to Mr. Briggs’ growing fields. It has become quite apparent that this operation is a commercial enterprise which is not allowed in the AR-1 zoning district.” The Board denied that appeal and found that the operation on the site was a commercial enterprise in a decision dated October 1, 2021 (date of filing with Town Clerk), and the Applicant appealed this decision to the Superior Court. The appeal to the Superior Court was dismissed due to a procedural error on the part of the Plaintiff (the Applicant), rendering the decision made by the Zoning Board of Appeals final.

Attorney Kwesell continued that on July 27, 2022, Mr. Mee issued another cease-and-desist, for the same operations as the order from 2021. That cease and desist stated in part: “While you have indicated that your composting operation is an agricultural use associated with Mr. Briggs’ agricultural use, it has become quite apparent that this operation is a commercial enterprise, which is not allowed within the AR-1 zoning district.” Attorney Kwesell stated that the two cease and desists were for the same operation. She cited M.G.L chapter 40A section 16:

No appeal, application or petition which has been unfavorably and finally acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of final unfavorable action unless said special permit granting authority or permit granting authority finds, by a unanimous vote of a board of three members or by a vote of four members of a board of five members or two-thirds vote of a board of more than five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings, and unless all but one of the

members of the planning board consents thereto and after notice is given to parties in interest of the time and place of the proceedings when the question of such consent will be considered.

She stated that, under this statute, the Board needs to determine if there are any specific and material changes since its previous decision, as this is a repetitive petition filed within 2 years of the Board's original decision.

John Maciolek, the Applicant's attorney, was present and stated that the use of the property has always been agricultural, which is allowed in the AR-I zoning district. Therefore, he stated the cease-and-desist order of July 27th was not justified. Mr. White asked attorney Maciolek for any new information to be presented to the Board to allow them to make new findings. Attorney Maciolek noted the documents provided to the Board contain the information for the appeal. Mr. White again asked attorney Maciolek if he had any information with respect to material changes and attorney Maciolek stated he did not. Mr. Phenegar asked if there is any information that is materially different than the information presented to the Board in 2021, attorney Maciolek stated he had not compared the documents submitted. Mr. Phenegar and Mr. White stated that there appears to be no substantive differences between the information given to the Board in 2021 and 2022. Mr. White reiterated that the Board is looking to see if there is any new information to be presented by the Applicant that has not already been reviewed and decided on previously, Attorney Maciolek said there is not, and stated he believes the use of the land is agricultural.

Attorney Kwesell reiterated the language of M.G.L chapter 40A section 16 and stated that the applicant has not provided any information as to specific and material changes as required by the law. Mr. White asked for comments from town staff or members of the public, there was none. Mr. Phenegar stated he does not see any substantive changes to the information provided to the Board, Mr. White agreed that there were no specific and material changes in the conditions upon which the previous unfavorable action was based.

III. FINDINGS

In making its findings and reaching the decision described herein, the Board is guided by G.L. c. 40A, as amended, and by the Medway Zoning Bylaw. The Board also considered evidence and testimony presented at the public hearing and comments submitted by residents placed in the public record during the course of the hearings.

1. The July 27, 2022 cease and desist is for the same operation that was the subject of the Board's September 22, 2021 decision. This appeal is the same appeal that was before the Board previously, and was denied by the Board on September 22, 2021, less than two years ago.
2. Accordingly, in order for the Board to act favorably on the appeal, the Board would need to find specific and material changes in the conditions on which the previous unfavorable action was based, and the Planning and Economic Development Board would need to consent by a four-fifths vote after a public hearing.
3. The applicant did not present any information or evidence of any specific and material changes in the conditions on which the previous denial was based.

The Board by a vote of 4 to 0 found that there were not specific and material changes in the conditions on which the previous unfavorable action was based, as required by G.L. c. 40A §16. Thus, since this is a repetitive appeal, the appeal could not be favorably acted upon by the Board, and was denied.

IV. INDEX OF DOCUMENTS

A. The following materials were submitted by the applicant:

1. Appeal Form dated August 24, 2022
2. Letter from Jack Mee, Building Commissioner, “Re: Cease and Desist Commercial Operations at 25 Winthrop Street Medway, MA” dated July 27, 2022
3. Zoning Board of Appeals Decision Letter dated October 1, 2021.
4. Defendant’s Opposition to the Plaintiff’s Motion for a Preliminary Injunction, undated.
5. Affidavit of Paul Doherty, President of D&D Mulch and Landscaping Inc., dated August 20, 2021
6. 2019 January-December Compost by Tons brought into Shady Oaks.
7. 2020 January-December Compost by Tons brought into Shady Oaks.
8. 2021 January-December Compost by Tons brought into Shady Oaks.
9. Letter to Donna Greenwood, Assessor, regarding agricultural income under the 61 A Assessment, from Robert A. Briggs, dated September 28, 2021.
10. Fiscal Year 2022 Application for Forest-Agricultural or Horticultural- Recreational Land Classification, received September 29, 2021.
11. Document labeled “Exhibit 5” showing images of the land.
12. Document labeled “Exhibit 6” showing Notice of Violation of the Medway Town By-Law or Regulation, address to Paul Doherty, dates 7/6/21, 7/7/21, 7/8/21, 7/13/21, 7/14/21, 7/15/21, 7/16/21, 7/19/21, 7/20/21, 7/21/21, 7/22/21, 7/23/21, 7/26/21, 7/27/21, 7/28/21, 7/29/21.
13. Medway Police Department Incident Report dated July 30, 2021.
14. Zoning Board of Appeals application package dated July 20, 2021.
15. Letter to David Linardy, 28 Winthrop Street, “Re: Complaint Regarding 25 Winthrop Street/ D&D Mulch,” from Jack Mee, Building Commissioner, dated February 8, 2021.
16. “Motion for Preliminary Injunction,” by the Town o Medway, dated July 30, 2021.
17. “Memorandum of Law in Support of Motion for Preliminary Injunction” by the Town of Medway, dated July 30, 2021.
18. “Verified Enforcement Complaint” by the Town of Medway, dated July 30, 2021.
19. Document labeled “Exhibit 3” titled “BWP Data Management – Solid Waste Input Form.”
20. Massachusetts Department of Environmental Protection Bureau of Air & Waste – Solid Waste Program General Permit for Recycling, Composting & Aerobic or Anaerobic Digestion Operations dated January 12, 2022.
21. Paul Doherty responses to questions from Jack Mee, Building Commissioner, undated.
22. Google Earth images of Shady Oaks Farms dated April 2017, April 2018, June 2019, and October 2020.
23. “Defendant’s Emergency Motion to Reschedule Hearing on Plaintiff’s Motion for a Preliminary Injunction” dated August 15, 2021.
24. Affidavit of Attorney John R. Maciolek dated August 15, 2021.
25. “Straight Bill of Lading” shipping forms from January-December 2020.

B. During the course of the review, the following materials were submitted to the Board:

1. Letter to Attorney Maciolek from Amy E. Kwesell, KP Law, re: “Town of Medway by and through its building Commissioner v. D&D Mulch and Landscaping, Inc.,” dated September 12, 2022.
 - a. “Plaintiff’s Motion for Entry of Permanent Injunction and Final Judgement,” by the Town of Medway dated September 12, 2022.

- b. “Plaintiff’s Memorandum of Law in Support of Plaintiff’s Motion for Entry of Permanent Injunction and Final Judgement,” by the Town of Medway dated September 12, 2022.
- c. Exhibit 1: Order on Defendants’ Motion to Dismiss by the Superior Court dated July 22, 2022.
- d. Exhibit 2: Massachusetts Trial Court 1 – 2182CV00954 D&D Mulch and Landscaping Inc vs. Town of Medway, Zoning Board of Appeals, et al
- e. “Proposed Order for Permanent injunction and Final Judgement”
- f. “Plaintiff’s Motion to Stay Discovery” by the Town of Medway, dated September 12, 2022.

B. During the course of the review, the following materials were submitted to the Board by Town departments and boards:

- a. Decision of ZBA dated September 22, 2021

VI. VOTE OF THE BOARD

By a vote of 4 to 0, on a motion made by Gibb Phenegar and seconded by Tom Emero, the Zoning Board of Appeals hereby **DENIES** the Applicant, D & D Mulch, an **APPEAL** under M.G.L. chapter 40A section 8 seeking to reverse a Cease and Desist order issued July 27, 2022 by the Building Commissioner acting as Zoning Enforcement Officer, as a repetitive petition under G.L. c. 40A, §16.

Member:	Vote:	Signature:
Brian White	AYE	_____
Gibb Phenegar	AYE	_____
Tom Emero	AYE	_____
Joe Barresi	AYE	_____

The Board and the Applicant have complied with all statutory requirements for the issuance of this appeal on the terms herein set forth. A copy of this Decision will be filed with the Medway Town Clerk and mailed to the Applicant, and notice will be mailed to all parties in interest as provided in General Laws, chapter 40A, section 15.

Any person aggrieved by the decision of the Board may appeal to the appropriate court pursuant to Massachusetts General Laws, chapter 40A, section 17, and shall be filed within twenty days after the filing of this notice in the office of the Medway Town Clerk.

VI. VOTE OF THE BOARD

By a vote of 4 to 0, on a motion made by Gibb Phenegar and seconded by Tom Emero, the Zoning Board of Appeals hereby **DENIES** the Applicant, D & D Mulch, an **APPEAL** under M.G.L. chapter 40A section 8 seeking to reverse a Cease and Desist order issued July 27, 2022 by the Building Commissioner acting as Zoning Enforcement Officer, as a repetitive petition under G.L. c. 40A, §16.

Member:

Vote:

Signature:

Brian White

AYE

Gibb Phenegar

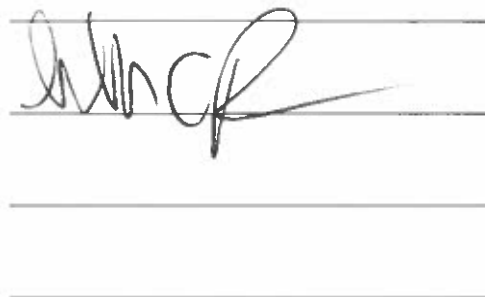
AYE

Tom Emero

AYE

Joe Barresi

AYE

A handwritten signature in black ink, appearing to read 'Tom Emero', is written over a horizontal line. Below this line are two more empty horizontal lines.

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