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Mark Wickstrom, Chair
Bruce Desilets, Member
Kevin Harn, Member
Chris Currie, Alternate Member
Joseph Frisk, Alternate Member
Joseph Alves, Alternate Member



Uxbridge Town Hall
21 South Main Street, Room 205
Uxbridge, MA 01569
508-278-8600 x2013 p
508-278-0709 f

ZBA Case# FY 17-19
Zone: Residential C Zone
Owners: Immanuel Corporation
Property Address: 775 Millville Road
Assessor's Reference Map: 46 **Parcel:** 2079
Worcester District Registry of Deeds References: Book: 21529 Page: 249

DECISION ON APPEAL OF CEASE AND DESIST ORDER

G.L. C. 40A, §§7, 8 AND 15
Decision Date APRIL 19, 2019

BACKGROUND: The Building Commissioner, under his authority as zoning enforcement officer, issued various cease and desist orders on January 9, 2017, February 1, 2017 and February 6, 2017 (the "Orders"). As noted in the February 6th Order, the Building Commissioner concluded that soil importation activities on the Property constituted a principal use that is not permitted under the zoning bylaws. The Orders also required removal of a trailer associated with soil importation activities.

On or about February 7, 2017, the Appellant duly appealed the Orders. The appeal asserts two distinct but conflicting arguments: (1) that the soil importation is a principal use that is allowed upon receipt of a permit under the new amendment to Section 181 of the General Bylaws; or (2) that the soil importation should be construed as accessory to the historical gravel removal operation on the Property.

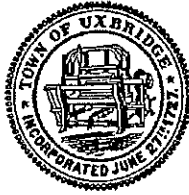
The Board unanimously voted to reject the Appellants appeals and uphold the Orders of the Building Commissioner. As a consequence, the Appellants are hereby directed to immediately and permanently cease all soil importation activities and comply with any subsequent orders for the restoration of the property. The Board also requires that the trailer on the Property be removed.

VOTING MEMBERS PRESENT: Chair Mark Wickstrom, Members Bruce Desilets and Kevin Harn

SUBMITTALS: Application form and materials, copy of a certified abutters list, plot plan and fees.

- Exhibit 1: Quitclaim Deed
- Exhibit 2: Tax Bills
- Exhibit 3: Plan and Easements
- Exhibit 4: Affidavit of Kenneth W. Robinson dated 8/15/2005
- Exhibit 5: Decision of Hector Girouard dated 6/4/1999
- Exhibit 6: Letter of Attorney Jerry Effren dated 1/5/2007
- Exhibit 7: Letter of Town dated 8/3/2016
- Exhibit 8: ZBA hearing minutes 6/4/2014
- Exhibit 9: Recorded Decision for Special Permit
- Exhibit 10: DEP Similar Soils Provision Guidance
- Exhibit 11: Letter of Planning Board dated 10/20/2016
- Exhibit 12: Letter of Immanuel dated 11/4/2016
- Exhibit 13: The Decision states that Immanuel is in violation of the Town's Zoning Bylaws
- Exhibit 14: The Cease and Desist that directs Immanuel to stop depositing soil at it's property.

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PRESENTATION:

Hearing sessions were held on March 1, 2017 and April 19, 2017.

In between the hearing sessions, the Appellant submitted a memorandum in which it explained its argument that the soil importation was a permitted principal use.

The hearing was closed on April 19, 2017 and the Board rendered a decision on such night.

The Appellants were represented by Attorney Lawrence McCarthy during the hearing. Numerous members of the public offered testimony throughout the hearing, most of which was opposed to the soil importation activities on the Property.

FINDINGS:

1. The Board finds that, under the Uxbridge Zoning Bylaws, any principal use not specifically listed is expressly prohibited. Soil importation is not a listed principal use. Accordingly, it may only be permitted if it were accessory to a permitted use. In order for the soil importation activities to be accessory to the agricultural use on the Property, it must be customarily incidental and subordinate thereto.
2. Notwithstanding the Board's finding in this regard, the Appellant primarily argues, per the case of Jaworski v. Earth Removal Board of Millville, 35 Mass.App.Ct. 795 (1994), that Section 181 of the General Bylaws which requires permits for soil importation, occupies the field and precludes any construction of the zoning bylaws that could be read to prohibit soil importation. However, for the reasons described by the Board's Special Counsel, the Board finds that the Appellant's argument in this regard is without merit. To wit:
3. The Jaworski case, and related cases, discuss gravel removal. Under each such case, it is explained that G.L. c. 40, §21(17) expressly allows towns to regulate earth removal through their general bylaws, rather than zoning bylaws. However, there is no analogous statute for soil importation activities which are a complete separate industry, as conceded by the Appellant. Accordingly, the General Bylaw in question cannot be read to supersede the Zoning Bylaws' prohibition of soil importation.

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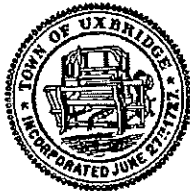
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4. Even assuming, for the sake of argument, that the Appellant's argument was correct, then his soil importation business would constitute a second principal use (earth removal has been the primary use of the Property for more than 50 years). As any given property can only have one principal use, soil importation would constitute an illegal second principal use.
5. Furthermore, even if the Appellant's argument was correct, and the Board concluded that Section 181 of the General Bylaws operated as an ersatz zoning bylaw, the Appellant has conceded that it has not obtained a permit, as required under such General Bylaw. Accordingly, given such facts, the cease and desist order would be valid, albeit for a different purpose (under G.L. c. 40A, §14, the Board has the powers of the zoning enforcement officer in this matter).
6. The Appellant's argument that the soil importation business that it plays host to is a principal use of the Property is belied by his contemporaneous argument that the soil importation is accessory to the longstanding gravel removal operation. Both such arguments cannot be valid.
7. Furthermore, the Board finds that the Appellant's view of Section 181 is overly narrow. Particularly, it is conceivable that accessory soil importation (as presented by the Appellant) could be legal under both zoning bylaws and pursuant to a permit issued under Section 181 of the General Bylaws. Accordingly, unlike the situation in Jaworski, both forms of regulation are valid.
8. The Property has a long history of use as a gravel mining operation although, at present, gravel mining operations have lessened.
9. Based upon materials supplied to the Board, the Appellant has imported close to 700,000 tons of fill to the Property since 2014 and, according to the Appellant's own testimony, intends to bring in at least another 500,000 tons. It is understood that the importation of fill is a separate industry from the industry of gravel mining which results in a financial benefit for the Appellant (and the soil importation company).
10. The Board finds that, based upon material and testimony before it, the soil importation business also generates a substantial amount of noise and dust.
11. Based upon the foregoing, the Board finds that the soil importation activities are not customarily incidental to the earth removal operations activities. Rather, the Board finds that, while the routine "capping" or loaming and seeding of a gravel removal site would be accessory to a gravel removal operation, the

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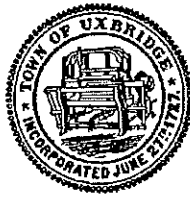
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massive industrial-scale soil reclamation activities at present on the Property are a separate business activity. The Appellant's primary argument (above) concedes this fact. Accordingly, the Board finds that the importation of the soil that is evident is not reasonably incidental or sufficiently related to the gravel removal operations to constitute a legitimate accessory activity thereto.

12. The Board also finds that the soil importation activities are not subordinate to the gravel removal activities. The Appellants' importation of over a million tons of fill, along with the attendant noise and dust, overwhelms the existing gravel removal operation
13. Accordingly, for all of the above reasons, the Board finds that the Building Commissioner correctly concluded that the soil importation activities are a separate principal use that is not permitted on the Property. Alternatively, the Board concludes that the soil importation is illegal due to lack of a permit per Section 181 of the General Bylaws; or that the soil importation activities constitute an illegal second principal use of the Property.
14. Additionally, the Board finds that the trailer has been placed on the property solely to support the massive soil reclamation activities. Thus, the Board finds that the trailer must be removed.
15. Finally, the Board recognizes that the 2014 Zoning Special Permit for Earth removal activities references some importation of soils but the Appellant agreed that any large-scale importation was not before the Board and rather, was discussed with the Board of Selectmen. The Board only considered minor restoration activities.

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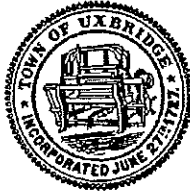
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MOTION / VOTE:

Mr. Desilets made a **MOTION** to close the public hearing FY17-19 775 Millville Road. **MOTION SECONDED** by Mr. Harn and carried unanimously by **VOTE** (3-0-0).

Mr. Wickstrom made a **MOTION** that for the reasons stated above for application FY17-19 775 Millville Road, the Board find that we uphold the Zoning Enforcement Officer's letter of 1/29/2017 and the cease and desist letters of 2/1/2017 as amended on 2/6/2017. **MOTION SECONDED** by Bruce Desilets and carried unanimously by **VOTE** (3-0-0).

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SIGNATURE PAGE

Mark Wickstrom, Chair

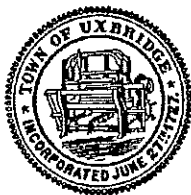
Christopher Currie, Clerk

Bruce Desilets, Member

Kevin Harn, Member
Joe Frisk, Alternate Member
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May 2, 2017
Date

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Appeals, if any, from this decision shall be made pursuant to M.G.L. Chapter 40 A, Section 17 and filed within 20 days after the date of the filing in the Office of the Town Clerk.

I hereby certify that twenty (20) days has elapsed from the file date and no appeal has been filed in this office.

A true copy: **ATTEST**

Town Clerk, Kelly Dumas or
Assistant Town Clerk

Town Seal

****THE APPLICANT IS REMINDED OF THEIR RESPONSIBILITY TO RECORD THIS
DECISION AT THE REGISTRY OF DEEDS PER THE CERTIFICATE OF GRANTING.
NO PERMITS SHALL ISSUE UNTIL THE PERMIT IS RECORDED. ****