

FALMOUTH ZONING BOARD OF APPEALS
APPEAL # 103-16

DECISION

Introduction

This matter concerns an application filed by the Estate of R. Gilbert Allenby and one of its tenants, All Cape Recycling, Inc. for modification of prior special permits pertaining to the property located at 0, 996, and 1006 E. Falmouth Highway, in East Falmouth, Massachusetts (hereinafter "the Locus"). The Application for Modification comes to this Board by way of a Settlement Agreement and a resulting Order of Remand from the Land Court in connection with an appeal pending in that Court of this Board's prior decision in Appeal #63-09. For the reasons set forth herein, this Board grants the current request for relief subject to the conditions set forth below.

The Locus

Locus consists of approximately 11.34 acres, fronts entirely on East Falmouth Highway (Route 28), and is situated within an Agricultural Zoning District. Mahoney's Too Cape Cod & Islands, Inc. (hereinafter "Mahoney's") a retail garden supply center abuts Locus to the west along the entirety of Locus's westerly lot line. Various single-family residences and a parcel of undeveloped land also owned by Mahoney's abuts Locus along its easterly lot line. Locus is abutted on the north by the Falmouth Airpark, a combination of single-family homes alongside a private airport.

There are three uses on Locus, namely a landscaping and arborculture business known as Davey Tree Service, a cell telephone tower, and a wood recycling business owned and operated by the applicant, All Cape Recycling, Inc. Each of the uses is owned or operated independently, the owners being lessees of the property owner, the Estate of R. Gilbert Allenby. The wood recycling operation is the primary focus of this case.

Zoning and Use History

R. Gilbert Allenby acquired locus in 1982 by means of a deed recorded on February 11, 1982 in the Barnstable County Registry of Deeds in Book 3435 Page 83. At that time, Locus was situated within a Public Use District that permitted agricultural and horticultural use. Prior to obtaining title, on or about November

20, 1981, Mr. Allenby applied for a special permit from the Falmouth Zoning Board of Appeals, Special Permit #205 – 81, for a determination from the Board "... that the proposed use of arborculture and a landscaping business closely resembles the use of agriculture and horticulture which are permitted uses in a Public Use District." The Board voted unanimously to grant a special permit allowing use of Locus for an arborculture and a landscaping business, determining in its decision dated January 19, 1982 that "... arborculture and a landscaping business very definitely resembles the uses of agriculture and horticulture, which are permitted uses in this Public Use District, and will have similar impacts to the neighborhood."

In 1995, in Appeal #141 – 95, Mr. Allenby sought modification of the prior special permit, namely Special Permit #205 – 81 to allow on Locus a wood recycling operation in addition to the arborculture and landscaping business. The Board voted unanimously to grant the modification of the existing special permit to include a wood recycling operation subject to three conditions. These conditions were that (1) operational hours were limited to Monday through Friday, 8:00 AM to 4:00 PM; (2) the recycling of painted or treated wood, leaves or hazardous products was prohibited; and (3) the wood recycling operation was limited to an area shown on a plot plan dated December 13, 1995 prepared by Holmes & McGrath, Inc. and was to be a minimum of 500 feet from the property line fronting on E. Falmouth Highway.

By means of a decision issued on June 16, 1998, namely Special Permit #65 – 98, the Board granted a special permit to allow the construction of a cell telephone tower on Locus in addition to the previously permitted uses.

In 2009, Mr. Allenby submitted a plan to the Falmouth Planning Board that subdivided the Locus into three separate lots, namely Lot 3A, 3B, and 3C. On or about March 30, 2009 the Falmouth Planning Board endorsed the plan as an ANR plan. Thereafter, in September of 2009 Mr. Allenby filed an application with the Falmouth Zoning Board of Appeals for a modification of Special Permits 205 – 81, 141 – 95, and 65 – 98 to permit the subdivision of Locus as shown on the ANR plan. This was Appeal #63 – 09. The ANR plan presented to the Board was a plan entitled "Site Plan prepared for Allenby Tree & Landscaping, Inc. in Waquoit, Falmouth, MA," Scale: 1" = 40' dated November 9, 2006 prepared by Holmes & McGrath, Inc. The Board voted unanimously to grant the modification as requested by Mr. Allenby, approving the subdivision of the Locus as shown on the aforementioned plan. In its decision issued on December 2, 2009, the Board imposed conditions providing among other things that the arborculture and landscaping operation approved in the original Special Permit #205 – 81 was to be located on Lot 3A (Condition #3), the cell telephone tower as approved in Special Permit #65 – 98 was to be located on Lot 3B (Condition #4), and the

wood recycling operation approved in Special Permit #141 – 95 was to be located on Lot 3C (Condition #5).

During the course of Appeal #63 – 09, certain abutters to Locus represented by Attorney Edward Kirk had appeared in opposition to the request for modification of the prior special permits. After Special Permit #63 – 09 was issued, Attorney Kirk representing various abutters filed an appeal with the Board alleging that the Building Commissioner had failed to enforce Condition #5 of Special Permit #63 – 09. Ultimately, in that appeal, Appeal #96-09, the Board voted unanimously to deny the appeal from the Building Commissioner's action, issuing its decision on February 8, 2011.

Later in 2011 by virtue of Special Permit 34 – 11 the Board permitted the cell tower located on Lot 3B to be extended by an additional 10 feet and permitted the addition of an additional cell phone carrier on the monopole.

Notably, Mr. Allenby did not record the site plan that had been approved by Special Permit #63 – 09. Instead he recorded a revised plan entitled "Plan of Land Prepared for Allenby Tree & Landscaping, Inc. in Waquoit, Falmouth, MA" Scale: 1" = 40', dated December 17, 2009, prepared by Holmes & McGrath, Inc. This plan had been approved by the Falmouth Zoning Board of Appeals as an ANR plan on January 5, 2010 and was recorded in the Barnstable County Registry of Deeds in Plan Book 638, Page 98 (hereinafter "the Recorded Plan"). The Recorded Plan relocated a portion of the southerly boundary line for Lot 3C the wood recycling operation area by moving the line southerly. Additionally it re-designated Lot 3A as Lot 3D where the arborculture and landscaping business operated by Davey Tree Service is located and re-designated Lot 3C as Lot 3E.

Litigation History

Certain abutters filed an appeal with the Land Court from the decision of the Board rendered in Special Permit #63 – 09. Later, after denial of their appeal in Appeal #96 – 09, the applicant's in that matter then filed an appeal in the Barnstable Superior Court from the Board's decision. This action was later transferred to the Land Court. On or about August 1, 2016 the plaintiff – abutters and the applicants in this appeal, namely the Estate of R. Gilbert Allenby and All Cape Recycling, Inc. entered into a Settlement Agreement resolving both of the cases now pending before the Land Court. As a result of the Settlement Agreement, the Land Court issued an Order of Remand dated August 4, 2016 that remanded Special Permit #63 – 09 to this Board for a hearing and decision on the pending application for modification of the prior special permits. The Order of Remand provides that in the event that this Board approves the requested modification consistent with the terms and conditions of the

Settlement Agreement, after the expiration of the 20 day statutory appeal, assuming that there is no appeal the parties are directed to file stipulations of dismissal in both of the pending cases that will then terminate each.

Procedural History

The current application for modification of the prior special permits was filed with the Town Clerk's office on October 3, 2016. The matter was initially set down for hearing on November 9, 2016 but at the request of the Applicants and Attorney Kirk representing certain abutters the matter was continued on several occasions for various reasons. The Applicants have executed appropriate extension agreements waiving the required time frames set forth within Massachusetts Gen. Laws Chapter 40A. The matter was heard on April 13, 2017 at which time the Applicants were represented by Attorney Charles M Sabatt who presented the case for modification. Attorney Edward Kirk representing certain abutters was also present and addressed the Board confirming that his clients supported the application for modification of the prior special permits. The Members of the Zoning Board of Appeals who heard the current appeal were Kimberly Bielan, Chairman, Kenneth Foreman, Vice-Chairman, Terrence J. Hurrie, Clerk, Edward Van Keuren, and Paul Murphy.

Proposed Site Changes and Request for Relief

All Cape Recycling processes wood waste material including stumps, branches, and leaves into usable products such as mulch, compost, woodchips, and loam. All wood waste processing occurs entirely on Lot 3E shown on the 2016 Site Plan.

The Applicants propose and seek approval for certain site changes to be made on Locus. These proposed changes are shown on a plan entitled "Proposed Site Plan Prepared for All Cape Recycling in Waquoit, Falmouth, MA" Scale: 1" = 40', Dated September 28, 2016, Prepared by Holmes & McGrath, Inc. (hereinafter "the 2016 Site Plan"). The proposed changes are intended to reduce the impacts of dust and noise that are the chief complaints of the various abutters who have pursued the appeals in the Land Court. First, the Applicant's propose to extend out the easterly berm located on Lot 3B and to vegetate the top of the berm. Second, the Applicants propose the planting of evergreen trees on the easterly border or edge of the easterly berm. Third, the Applicants will eliminate the roadway that currently runs along the top of the vegetated berm on Lot 3B. Fourth, the Applicant, All Cape Recycling will create an internal berm

that will be 75 to 100 feet in length having a base of 20 feet and a height of 25 feet. The internal berm will be centered along the middle line of Lot 3E. The tub grinder and screener used in the wood recycling operation will be located to the west of and behind the new internal berm. Fifth, the Applicant, All Cape Recycling will remove stone and boulders currently located in the northeasterly corner of Locus and will relocate these items to the westerly side of Locus. Any boulders or stones brought to the site thereafter will be deposited in the northwesterly corner of Locus.

Additionally, All Cape Recycling seeks permission to process and sell materials Monday through Friday from 7:30 AM to 4:00 PM and to sell materials on Saturday from 8:00 AM to 2:00 PM except between September 15 and the Saturday next before Memorial Day Weekend during which time All Cape Recycling proposes to be open from 8:00 am to 4 pm. When open until 4 pm on Saturdays, All Cape Recycling will sell only mulch between 2 pm and 4 pm. All Cape Recycling additionally is requesting permission to accept grass clippings and brush from small landscapers as hereinafter defined beginning at 7:00 AM. Currently, all Cape recycling parks some of its trucks on Lot 3B where the cell tower is located and also stores processed material on portions of Lot 3D where Davey Tree Service is located.

No changes are requested with respect to the operations on Lot 3B, the cell tower Lot nor on Lot 3D, the Davey Tree Service parcel.

Findings Pursuant to §240 – 216

This Board finds that the proposed changes to Locus and the associated request for relief in connection with the wood waste recycling operation will not have adverse effects upon either the neighborhood or the Town of Falmouth. By way of the prior special permits granted with respect to the Locus, the Board has previously determined that the various uses on-site as originally allowed and as modified over the years did not have an adverse impact upon the neighborhood. In this current application, the Applicants propose changes that will further insulate and protect the immediate abutters from any effects of the wood waste recycling operation. Therefore, the proposed changes of the site and of its operational aspects will improve conditions insofar as the neighborhood is concerned. Accordingly, the Board finds that the proposed modifications will be in harmony with the general purpose and intent of Chapter 240. Specifically, the Board finds that the Locus is adequate in size for the proposed use and is suitable to the proposed use. The proposed changes on Locus and the operational changes will not have any impact upon traffic flow

or safety. The Board has previously found that the operations on the Locus had no or minimal impact on the neighborhood visual character. Under the current propose changes including in particular the relocation of stone and concrete products to the northwesterly corner of Lot 3E, the expansion and vegetation of the easterly berm, and the planting of trees along the easterly line of the berms located on Lot 3B will help to insulate against noise and dust. Because part of the operational change provides for allowing All Cape Recycling to maintain a retention basin located on Lot 3B, drainage on-site will be controlled. Finally, the Board finds that there are no impacts or issues with respect to sewage disposal, water sources, or the adequacy of utilities or other public services.

Relief Granted

The Board hereby grants the following relief or modifications to Special Permits #205 – 81, 141 – 95, and 63 – 09:

1. The Recorded Plan, specifically the plan entitled "Plan of Land Prepared for Allenby Tree & Landscaping, Inc. in Waquoit, Falmouth, MA" Scale: 1" = 40', dated December 17, 2009, prepared by Holmes & McGrath, Inc. and recorded in the Barnstable County Registry of Deeds in Plan Book 638, Page 98 is hereby approved and the subdivision of Locus into the three lots shown thereon, namely Lots 3B, 3D, and 3E is hereby approved. Subject to the permission and conditions set forth below the arboriculture and landscaping operation granted in special permit #205 – 81 shall be located on Lot 3D shown on said plan. The cell tower shall be located on Lot 3B. The wood recycling operation granted in Special Permit #141 – 95 shall be located on Lot 3E as shown on said recorded Plan. Approval of the recorded plan referenced above, recorded in Barnstable County Registry of Deeds in Plan Book 638, Page 98.

2. The site changes as proposed and shown on the 2016 Site Plan, a plan entitled "Proposed Site Plan Prepared for All Cape Recycling in Waquoit, Falmouth, MA" Scale: 1" = 40', Dated September 28, 2016, prepared by Holmes & McGrath, Inc. are hereby approved and all changes to the Locus as shown on the 2016 Site Plan shall be made in accordance with said plan.

3. Lot 3B contains an existing berm with existing vegetation. The Applicant, All Cape Recycling will remove any stored material from Lot 3B and will extend the existing berm on Lot 3B to be of a width that will extend to the easterly sideline of the existing road at the top of or behind the existing berm so as to eliminate such road. Such extended new berm and new vegetation shall be no lower

than the existing berm and vegetation. The extended new berm is shown on the 2016 Site Plan submitted herewith.

4. All Cape Recycling may park trucks in the area of Lot 3B designated as Truck Parking Area on the 2016 Site Plan and may access Lot 3B for the purpose of maintaining the retention basin located on Lot 3B, provided that any machinery used in such maintenance work shall work only in the immediate area of the basin as necessary to maintain it. Otherwise, with the exception of the use of equipment needed to complete the extension, vegetation and planting of the extended new berm, no trucks or equipment of any kind shall be operated, located or stored on any portion of Lot 3B. All Cape Recycling shall not obstruct or interfere with access to Lot 3B by the operators of the cell Telephone tower located thereon and shall keep any access way through or from Lot 3E to Lot 3B clear and unobstructed.

5. All Cape Recycling shall remove any and all material, including but not limited to Stone, rock, and concrete from the northeast corner at the common boundary line between Lot 3B and Lot 3E. All such material shall be moved to the northwest corner of Lot 3E.

6. All Cape Recycling may store processed material on Lot 3D. The use of Lot 3D shall be limited to the operations of Davey Tree and Landscape and the passive storage of material processed by All Cape Recycling.

7. All Cape Recycling shall create a new Internal Berm centering on the midpoint of the northerly property line of Lot 3E and extending in a southerly direction to be between 75 and 100 feet in length, 20 feet wide, and 25 feet high and to be composed of processed material such as mulch or wood waste material or a combination thereof. The Internal Berm shall be located as shown on the 2016 Site Plan. The location of the Internal Berm may be moved southerly or northerly from time to time within the area designated on the 2016 Site Plan.

8. All use and operation of the tub grinder and the small mobile screener shall take place only on Lot 3E and only behind, and on the westerly side of the Internal Berm. The large screener may remain in its current location. The days and hours of operation of the tub grinder shall be limited to Monday through Friday from 8:00 AM to 4:00 PM, subject to the further provision set forth below in Paragraph 9.

9. In the event of a hurricane (as categorized by the National Weather Service) with the result that All Cape Recycling is unable to process the wood product

brought to the site as a result of damage caused by the hurricane within the limitations imposed by this special permit, and All Cape recycling so notifies in writing Attorney Edward Kirk or some other party designated for such notice, the days and hours of operation of the tub grinder in the required location may be extended to four (4) consecutive Saturdays following the hurricane event, between the hours of 9:00 AM and 1:00 PM. Upon agreement with the abutters, the dates may be further extended.

10. With the exception of the limitations on the operation of the tub grinder, in addition to the receipt and processing of wood waste material such as stumps, branches, and leaves, the Applicant, All Cape Recycling may continue to receive, process, store and sell the following material Monday through Friday from 7:30 AM to 4:00 PM, and on Saturday from 8:00 AM to 2:00 PM (a) Stone (b) mulch (c) compost (d) loam (e) sand (f) solid fill (g) boulders (h) wood chips and wood shavings and (i) firewood. Beginning on September 15 of each year and through the Saturday next prior to the Memorial Day Weekend, All Cape Recycling may remain open on such Saturdays until 4 p.m. The only activity that may take place between 2- 4 pm on such Saturdays is the sale of mulch. On all other Saturdays, All Cape Recycling will close at 2 p.m. There shall be no processing or screening before 8:00 AM. The Applicant, All Cape Recycling may receive grass clippings and brush to be deposited by small landscapers in the southwesterly corner of Lot 3E beginning at 7:00 AM. For purposes of this provision, a small landscaper shall be defined as any person operating a pickup truck, a small dump truck or stake bed truck having no more than six wheels, and may include a trailer. The Applicant, All Cape Recycling shall post signage stating that small landscapers only may enter the site and deposit material beginning at 7:00 AM. The Applicant, All Cape Recycling shall also erect signage stating the hours of operation.

Conditions

This modified special permit shall be conditioned upon the following:

1. Lot 3B will not be used by All Cape Recycling or Davey Tree for any purpose except as allowed by this decision. Lot 3B will not be used by any other person or entity other than for the passive use and location of the cell communication tower presently located on Lot 3B, without relief from the Falmouth Zoning Board of Appeals. The cement storage bins shown on the plan are no longer present, but the area formerly occupied by such bins may be used for parking as shown on the 2016 Site Plan. The material storage bins located on Lot 3E set at an angle

adjacent to Lot 3B may continue to be used for the storage of mulch, wood chips and firewood.

2. In addition to the extension of the new vegetated berm to be constructed on Lot 3B as described above, the Applicant, All Cape Recycling will plant evergreen trees along the easterly side of the existing and proposed new vegetated berm.

3. The Applicant, All Cape Recycling will no longer drop, process, store, or place Stone, rock, concrete or similar material in the northeast corner adjoining Lot 3B and Lot 3E. Any and all such material shall be dropped, processed, stored and placed in the northwest corner of Lot 3E adjacent to the property line of the property occupied by Mahoney's Too.

4. In order to minimize the disbursement of any dust generated by the tub grinder, All Cape Recycling will install a water spray system on the tub grinder and will not operate the tub grinder in the absence of the water spray system, and will keep the water spray system in good working order.

5. All Cape recycling will remove existing backup alarms on all of its equipment and trucks operated on the site and to the extent practicable will replace the backup alarms with OSHA approved so-called "white noise" or the equivalent. All Cape Recycling will instruct truck drivers not to "slam" tailgate's when operating on site and will post signs of adequate size in appropriate locations containing such directive.

6. As discussed above, in connection with the pending litigation in the Land Court, the parties are expected to file stipulations of dismissal dismissing such pending litigation. The Board has determined that the proposed site changes and other operational changes shall occur in accordance with a defined schedule. In view of the fact that the litigation will not be concluded until such time as stipulations of dismissal are filed, any deadlines in the schedule set forth herein shall commence from the date of the filing of such stipulations of dismissal with the Land Court. All Cape recycling shall complete the proposed site changes and implement the other modifications set forth above within these Conditions in accordance with the following schedule:

A. Install new backup alarms – 1 month from filing of Stipulation of Dismissal;

B. Move the tub grinder to the westerly side of Lot 3E – 1 month from filing of Stipulation of Dismissal;

C. Install water spray system on grinder – 2 months from filing of Stipulation of Dismissal;

D. Erect signs instructing drivers not to slam tailgates – 2 months from filing of Stipulation of Dismissal;

E. Erect a sign with hours of operation and signage regarding small landscapers – 2 months from filing of Stipulation of Dismissal;

F. Construct the new internal berm – 3 months from filing of Stipulation of Dismissal;

G. Relocate stone and concrete to Northwest Corner of Lot 3E – 3 months from filing of Stipulation of Dismissal;;


H. Remove material from Lot 3B – 6 months from filing of Stipulation of Dismissal;;

I. Extend and vegetate the easterly berm and close off the road located on Lot 3B – 8 months from filing of Stipulation of Dismissal;

J. Plant evergreen trees along the easterly side of the easterly berm – commence planting 9 months from filing of Stipulation of Dismissal and complete planting by December 1, 2018;

At any time after the issuance of this Special Permit the Applicants may request an extension of any portion of the above schedule by submitting a letter to the Zoning Administrator requesting that the matter be placed upon the hearing agenda with notice to Attorney Edward Kirk. The matter shall be set down for hearing before the Board at which time the Applicants may appear and make their request for an extension to the Board.

The Falmouth Zoning Board of Appeals
by its Chairman:


Kimberly Bielan

Dated May 4, 2017

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