



City of Rochester, New Hampshire

Zoning Board of Adjustment

Appeal of Administrative Decision Application

TO: BOARD OF ADJUSTMENT
CITY OF ROCHESTER

DO NOT WRITE IN THIS SPACE

CASE NO. 2-21-65

DATE FILED 3/4/21

C. Di.
ZONING BOARD CLERK

Applicant: David Waleryszak

E-mail: LRAS66@yahoo.com

Phone: 603-918-9918

Applicant Address: 232 MILTON RD, Rochester, N.H. 03867 and 0 Milton RD
Tax map 204 LOT 71, 72

Property Owner: David Waleryszak

Property Owner Address: 232 MILTON RD, Rochester, N.H. 03867

Appeal Address: 107 BETTS RD, Rochester, N.H. 03867

Map Lot and Block No: map 204 LOT 12

Description of Property (give length of lot lines): Residential

Proposed use or existing use affected: Sawmill / Industrial uses

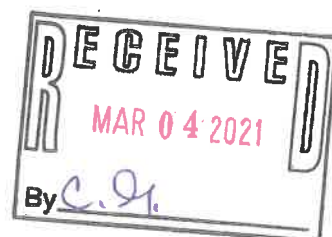
The undersigned alleges that an error has been made in the decision, determination, or requirement of:

Rob Lynch / Jim Grant on Feb 14, 2021 to Thomas Cantfield
Name of enforcement officer date decision

in relation to Article 275/30 Section 30.2 of the Vested Nonconforming property and hereby
ordinance

appeals said decision.

Signed: [Signature] Date: MAR 14 / 21



Hello,

This letter and associated documents (attachments) serves as part of my appeal to the administrative decision for 107 Betts Rd, Rochester, N.H by the zoning board of appeals (ZBA) administer on 02/04/21, which indicated that the activity currently occurring at the property (running of a sawmill and other industrial activity) can continue.

I have noticed in recent years that there has been a buildup activity at 107 Betts Rd. including the presence of large tree logs, earth materials, and other industrial/commercial activity. At some point within the last year or so, the property owner of 107 Betts Rd. began using a sawmill (wood processing machinery), which can be heard from inside my house (over 500 feet away) and produces industrial odors which can be smelled on both properties that I own. This activity has had an extremely negative impact on the quality of my life and that of my family members.

Over the past year I have tried to get information on why this activity is allowed in a residential/agriculture zoned part of Rochester. I called the planning department and talked to the previous planning director and was told that according to the city's records, the property lacks the appropriate permits to be operating multiple businesses and operating industrial machinery at the property. He recommended that I file an official complaint, which I did on 03/25/20 regarding the excessive noise and diesel smell coming from 107 Betts Rd during the week and on the weekend (including Sundays).

As you can see from the email exchanges seen on page 3, 4, and 5, I attempted to get clear information and updates on the issue at hand. I had talked with Rob Lynch and others at the city and was told that the ZBA administer, Jim Grant, was looking into the matter. I eventually got a hold of the town manager who helped get me some answers. I ended up with only one explanation why: Ordinance 275-30.2. I had talked with the planning director and asked for the timeline documentation that Rob told me Mr. Canfeild he was turning in (page 7) and only received a letter from Mr. Canfeild (page 8) I feel like the letter proves that there has been changes made to the property and by definition of 275-30.2 that planning and development would need to be involved.

As you can see in page 9 that when I moved to the property in 2002 nothing was in the location that the sawmill processing plant is except for a trailer. As you can see in 2020 (page 12) there are multiple changes and an industrial business on the edge of the property that is very loud and affects my family's quality of life and potentially could affect the property values of both properties we own in Rochester.

When I moved to my family's house about 18 years ago, I knew that there was equipment on the property and looked into it. I found that Mr. Canfeild was running a septic business and kept his equipment at his residential house. As shown in the tax card on page 15. The property is listed as a residential property with no commercial taxes. I figured with that in mind I purchased another lot with intentions to build a house on scene everything in the area is residential and the zoning laws would protect us from an industrial business moving in. Unfortunately, it has not. It has made the past year or so very hard on us with the noise. But I do feel that the zoning administrator didn't have all the facts and aerial photographs that I have provided to show that this shouldn't be allowed in this zone and wasn't going on when 275-30.2 went into effect.

Thank you very much for your time.

Sincerely,

David Waleryszak



Steve Waleryszak <swaleryszak@gmail.com>

Fw: [External] [Rochester NH] complaint filed over 9 months ago (Sent by DAVID WALERYSZAK, LRAS66@YAHOO.COM) p4

Dave W <lras66@yahoo.com>

Wed, Mar 3, 2021 at 1:33 PM

To: Steve Waleryszak <swaleryszak@gmail.com>

----- Forwarded Message -----

From: Jim Grant <jim.grant@rochesternh.net>**To:** Robert Lynch <robert.lynch@rochesternh.net>**Cc:** LRAS66@YAHOO.COM <lras66@yahoo.com>**Sent:** Wednesday, December 9, 2020, 01:33:14 PM EST**Subject:** RE: [External] [Rochester NH] complaint filed over 9 months ago (Sent by DAVID WALERYSZAK, LRAS66@YAHOO.COM)

Rob,

Please explain to David, in writing, of the steps that you/I have taken so far.

I am afraid that there may be some miscommunication.

Jim Grant

-----Original Message-----

From: cmsmailer@civicplus.com <cmsmailer@civicplus.com>**Sent:** Wednesday, December 9, 2020 10:07 AM**To:** Jim Grant <jim.grant@rochesternh.net>**Subject:** [External] [Rochester NH] complaint filed over 9 months ago (Sent by DAVID WALERYSZAK, LRAS66@YAHOO.COM)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello jgrant,

DAVID WALERYSZAK (LRAS66@YAHOO.COM) has sent you a message via your contact form (https://urldefense.proofpoint.com/v2/url?u=https-3A__www.rochesternh.net_users_jgrant_contact&d=DwIDaQ&c=euGZstcaTDIlvimEN8b7jXrwqOf-v5A_CdpnVfiiMM&r=uEXNKrjCwZj0elBljgdJKtUJtHBGihRh_dU74rWO_Pk&m=PAqfgCTU-cMBP9edpfs6bmFYCY5aBmHk8KhVQMZ00jc&s=xcp0C3rU8ga7rTe4CSe2uUtkWVsZVTRKskKiTrJD8Ro&e=) at Rochester NH.

If you don't want to receive such e-mails, you can change your settings at https://urldefense.proofpoint.com/v2/url?u=https-3A__www.rochesternh.net_user_86_edit&d=DwIDaQ&c=euGZstcaTDIlvimEN8b7jXrwqOf-v5A_CdpnVfiiMM&r=uEXNKrjCwZj0elBljgdJKtUJtHBGihRh_dU74rWO_Pk&m=PAqfgCTU-cMBP9edpfs6bmFYCY5aBmHk8KhVQMZ00jc&s=ISlaP7XdrDU-oBK8Y75H8hEWImqVI6RT__IM6lvvCU&e=.

Message:

Hi, I filled a complaint over 9 months ago about the activity going on at 107 betts rd. I have been trying to contact you on the matter for the past four weeks. I left four messages on your answering machine. Rob was dealing with this and he said now you are. I have been very patient in waiting for a resolution. This is very frustrating to me being a resident for the past 18 years and I cant get a return phone call from you on the matter. I'm not sure why this activity at the property can continue. I would really like to hear back from you on this matter. If you are not the correct contact I would like to know who is. My number is 603-918-9918 Thank you, Dave



Steve Waleryszak <swaleryszak@gmail.com>

Fw: Wood splitting. p6

Dave W <lr66@yahoo.com>

Wed, Mar 3, 2021 at 1:30 PM

To: Steve Waleryszak <swaleryszak@gmail.com>

----- Forwarded Message -----

From: Robert Lynch <robert.lynch@rochesternh.net>**To:** lr66@yahoo.com <lr66@yahoo.com>**Cc:** Jim Grant <jim.grant@rochesternh.net>**Sent:** Thursday, December 10, 2020, 08:32:31 AM EST**Subject:** Wood splitting.

Dave,

I just wanted to bring you up to speed, to this point I have had Mr. Canfield respond to the Zoning Administrator to deliver a time line documentation of his operation, including the wood splitting at 107 Betts Rd. The issue is in the process of being reviewed for Mr. Canfield's existing nonconforming use, aka - grandfathered. When I receive the decision on this I will forward it to you asap. In the interim, as an existing nonconforming use, I will only address the time that he can operate his wood splitter.

Sincerely,

Rob Lynch

Rob Lynch

Compliance Officer

City of Rochester - Building, Zoning, & Licensing Services

[33 Wakefield Street](#)[Rochester, NH 03867](#)

Tel: (603) 332-3508

robert.lynch@rochesternh.net<http://www.rochesternh.net/building-zoning-and-licensing-services>



Steve Waleryszak <swaleryszak@gmail.com>

Fw: [External] Re: Wood splitting. p3

Dave W <lras66@yahoo.com>

To: Steve Waleryszak <swaleryszak@gmail.com>

Wed, Mar 3, 2021 at 1:23 PM

----- Forwarded Message -----

From: Robert Lynch <robert.lynch@rochesternh.net>**To:** Dave W <lras66@yahoo.com>**Sent:** Monday, December 28, 2020, 12:01:26 PM EST**Subject:** RE: [External] Re: Wood splitting.

Dave, I have not received any info yet, but I will get back to you as soon as I do.

Rob Lynch

Compliance Officer

City of Rochester - Building, Zoning, & Licensing Services

33 Wakefield Street

Rochester, NH 03867

Tel: (603) 332-3508

robert.lynch@rochesternh.net<http://www.rochesternh.net/building-zoning-and-licensing-services>**From:** Dave W <lras66@yahoo.com>**Sent:** Monday, December 28, 2020 11:57 AM**To:** Robert Lynch <robert.lynch@rochesternh.net>**Subject:** Re: [External] Re: Wood splitting.

Rob just checking to see when you would be able to get back to me on the questions I had from two weeks ago? I would really like to know who to talk to about a resolution date and why this can continue. Dave.

On Monday, December 14, 2020, 01:47:38 PM EST, Robert Lynch <robert.lynch@rochesternh.net> wrote:

Dave, I will get back to you once I have answers for you. Rob.

Rob Lynch

Compliance Officer

City of Rochester - Building, Zoning, & Licensing Services

33 Wakefield Street

Rochester, NH 03867

Tel: (603) 332-3508

robert.lynch@rochesternh.net

<http://www.rochesternh.net/building-zoning-and-licensing-services>

From: Dave W <lras66@yahoo.com>

Sent: Monday, December 14, 2020 1:43 PM

To: Robert Lynch <robert.lynch@rochesternh.net>; Jim Grant <jim.grant@rochesternh.net>

Subject: [External] Re: Wood splitting.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hi i'm still waiting on the the questions i asked about last week. I know everyone is real busy but if you could please let me know I would appreciate it. Also one one other question is how does the tax card show only residential and no commercial use on this property. This really doesn't make scene to me that it was being used as commercial property but taxes are only paid on residential and not commercial plus their is more then one building on the property and only shows one mobile home listed? I would really like to have a resolution soon. i have been dealing with this commercial wood processing plant for almost a year and hope it will end soon. Thanks again, Dave

(From last week)

Thank you for your response. I guess i don't understand how anything could be grandfathered when he told you he just started doing this activity? Also could you please tell me what year did it start that you need a permit from the town to operate a business? Who should I contact at the zoning depart to talk to about this? Thank you for your time. Dave

On Thursday, December 10, 2020, 08:32:31 AM EST, Robert Lynch <robert.lynch@rochesternh.net> wrote:

Dave,

I just wanted to bring you up to speed, to this point I have had Mr. Canfield respond to the Zoning Administrator to deliver a time line documentation of his operation, including the wood splitting at 107 Betts Rd. The issue is in the process of being reviewed for Mr. Canfield's existing nonconforming use, aka - grandfathered. When I receive the decision on this I will forward it to you asap. In the interim, as an existing nonconforming use, I will only address the time that he can operate his wood splitter.

Sincerely,

Rob Lynch

Rob Lynch

Compliance Officer

City of Rochester - Building, Zoning, & Licensing Services

33 Wakefield Street

Rochester, NH 03867

Tel: (603) 332-3508

robert.lynch@rochesternh.net

<http://www.rochesternh.net/building-zoning-and-licensing-services>

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This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.

THOMAS CANFIELD
107 BETTS ROAD
ROCHESTER, NH 03867-1347
Email: tcanfield107@gmail.com

PHONE: (603) 332-1413
FAX: (603) 335-0363
CELL 603-535453
DATE 11-13-2020

:
James Grant
City of Rochester Code Enforcement

Dear Mr. Grant:

Per our conversation I am detailing the relevant history of our property at 107 Betts Road, Rochester, Map 204 Lot 12.

This property was purchased by myself and my wife, Sandra Canfield on 11-29-1977. It was intended to move my young but growing construction business to that property, as well as to move to the property.

Checking with City officials I was directed to the City Clerk, as the previous code enforcement officer had died and a new one had not been chosen. I was told that, being in the Agricultural zone, I could basically do what I intended. Work to access the property proceeded in early 1978, and the move from several other properties began.

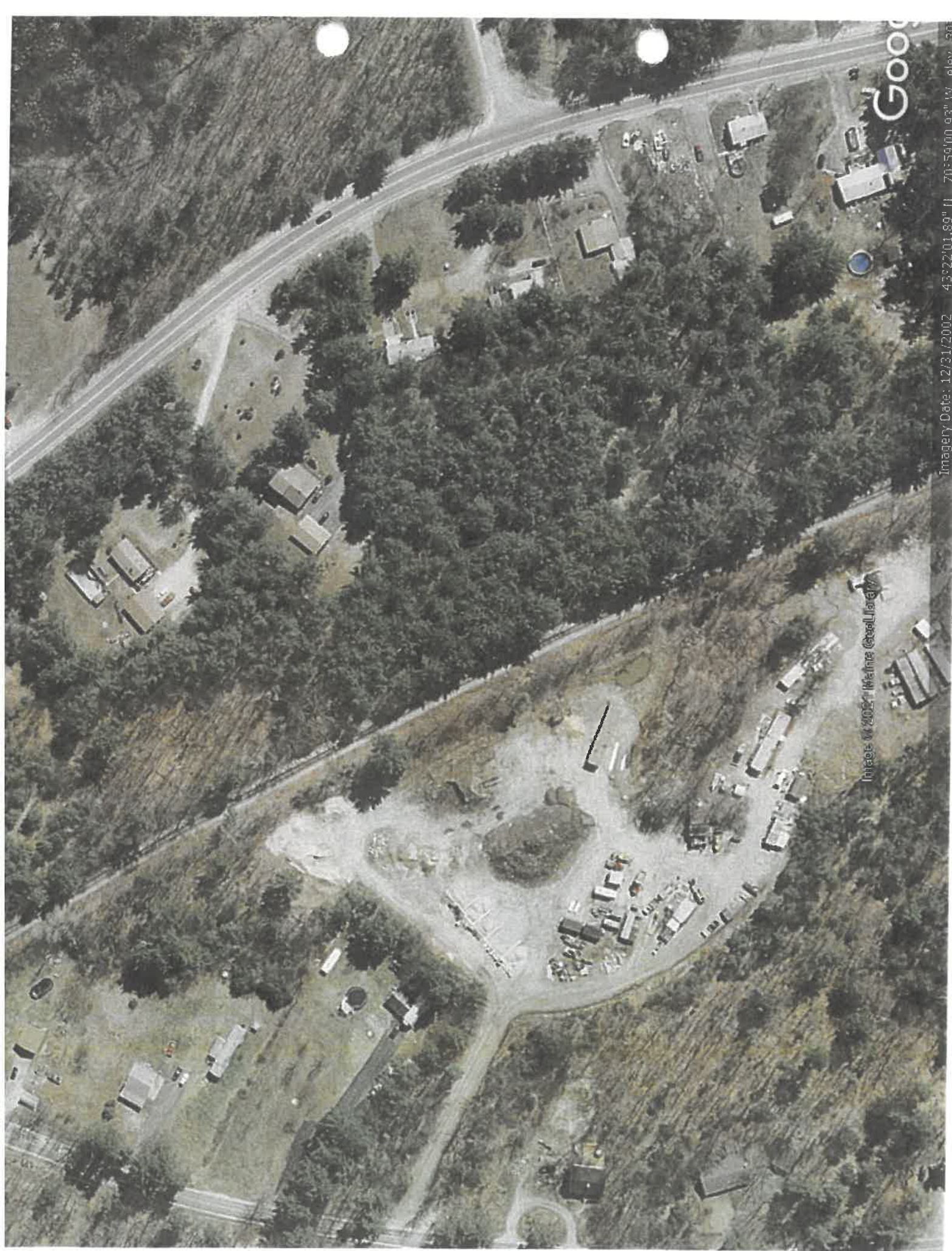
My business at that time included excavation, site work, septic systems, and snow removal/plowing and sanding. As part of the site work business we often cleared lots, bringing logs and firewood to the property for processing. Earth materials would be brought in, stored and processed, and moved to work sites. Concrete products would be brought in and stored, as well as other construction materials. Part of this mix has always been some firewood and log processing.

The recession of 2008 together with a reassessment of business trends saw my exit from all but the septic system portion of the excavation business. Currently, we store and process earth materials including topsoil screening and general earth and stone materials. Topsoil and fill/gravel screening take place on occasion.

Seeking other opportunities, the firewood business began to grow, from a minor portion to a more major component. Land previously used for other purposes became dedicated to firewood logs, a portable wood processing sawmill, and cut and split wood seasoning and storage. This work takes place at intervals during the week and on Saturdays. (In the early days, early 2010s, processing work would take place on both Saturdays and Sundays, but this has not been the case for several years.)

To summarize: We have been in business here since 1978, with a varied mix of operations.

Sincerely,
Thomas Canfield



Images: W 20251 Maine (Satellite)

Google

Imagery Date: 12/31/2002 43°22'01.89" N 70°59'00.93" W elev 30





Go

ZONING

275 Attachment 4

City of Rochester

Table 18-D Industrial-Storage-Transport-Utility Uses

LEGEND

P = Permitted Use

C = Conditional Use

E = Use Allowed by Special Exception

Industrial-Storage- Transport-Utility-Uses	Residential Districts				Commercial Districts				Industrial Districts			Special		Criteria/Conditions Reference
	R1	R2	NMU	AG	DC	OC	GR	HC	GI	RI	HS	AS		
Airport	—	—	—	E	—	—	—	—	—	—	—	—	P	Article 21
Contractor's storage yard	—	—	—	E	—	—	—	E	P	P	—	—	—	Articles 20 and 22
Distribution center	—	—	—	—	—	—	P	C	P	—	—	—	—	Article 21
Emergency services facility	—	—	—	—	C	C	—	C	C	—	P	—	—	Article 21
Fuel storage	—	—	—	—	—	—	P	E	E	—	—	—	—	Article 21
Helipad (accessory use)	—	—	—	E	—	E	P	E	P	P	P	P	P	Article 21
Industry, heavy	—	—	—	—	—	—	P	E	P	E	—	—	—	Article 21
Industry, light	—	—	—	—	—	—	P	P	P	—	—	—	—	Article 21
Industry, recycling	—	—	—	—	—	—	—	—	—	P	—	—	—	Articles 20 and 22
Junkyard	—	—	—	—	—	—	—	E	E	P	—	—	—	Articles 20 and 22
Laundry establishment-3	—	—	—	—	—	—	—	p	P	—	—	—	—	
Mini-warehouse	—	—	—	—	—	—	P	C	P	—	—	—	—	Articles 20 and 21
Monument production	—	—	C	—	—	C	—	P	P	P	—	—	—	Article 21
Parking lot	—	C	C	C	C	C	—	P	C	P	C	P	P	Article 21
Printing facility	—	—	C	—	—	P	P	P	P	—	—	—	—	
Recycling facility	—	—	—	—	—	—	—	E	E	P	—	—	—	Articles 20 and 22
Research and development	—	—	—	—	E	P	P	P	P	—	—	—	—	Article 21
Sawmill	—	—	—	—	—	—	—	—	E	—	—	—	—	Article 21
Sawmill, temporary (accessory use)	—	—	—	P	—	P	—	P	P	P	—	P	P	Article 23
Solid waste facility	—	—	—	—	—	—	—	—	—	—	—	—	—	
Tank farm	—	—	—	—	—	—	P	C	P	—	—	—	—	Articles 20 and 22



Steve Waleryszak <swaleryszak@gmail.com>

Fw: appeal 107 betts rd

Dave W <lras66@yahoo.com>

Wed, Mar 3, 2021 at 5:38 PM

To: Steve Waleryszak <swaleryszak@gmail.com>

----- Forwarded Message -----

From: Dave W <lras66@yahoo.com>

To: hoganlaw@comcast.net <hoganlaw@comcast.net>

Sent: Friday, February 19, 2021, 06:23:43 PM EST

Subject: appeal 107 betts rd

Card 1 of 1

Location 107 BETTS RD	Property Account Number 6270	Parcel ID 0204-0012-0000
		Old Parcel ID

Current Property Mailing Address

Owner CANFIELD THOMAS S & SANDRA E	City ROCHESTER
Address 107 BETTS RD	State NH
	Zip 03867-1347
	Zoning A

Current Property Sales Information

Sale Date 1/25/1978	Legal Reference 1010-245
Sale Price 0	Grantor(Seller) ALLEN ROGER & MARGUERITE

Current Property Assessment

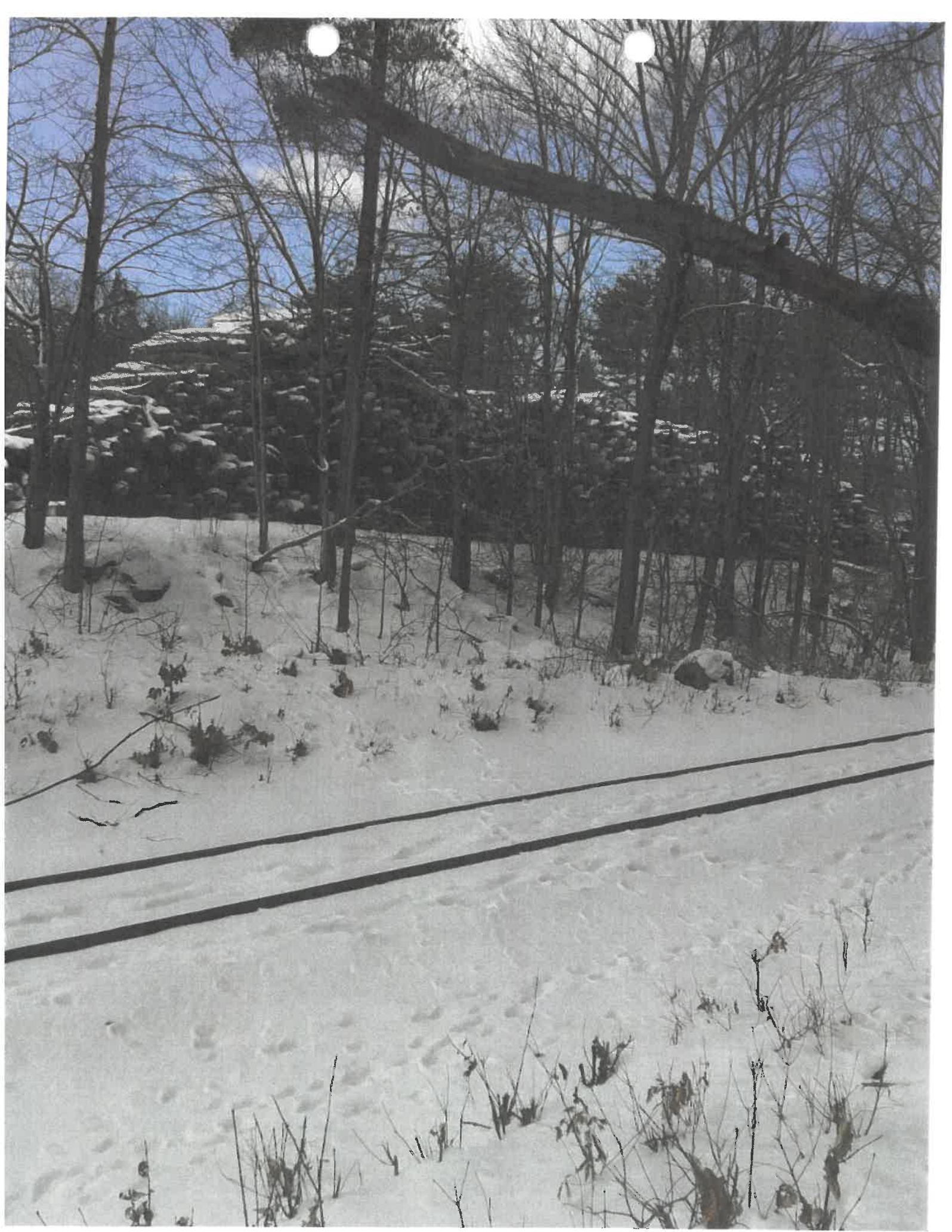
Year 2020	Card 1 Value
	Building Value 28,700
	Xtra Features Value 42,000
Land Area 9.3 - AC	Land Value 81,800
	Total Value 152,500

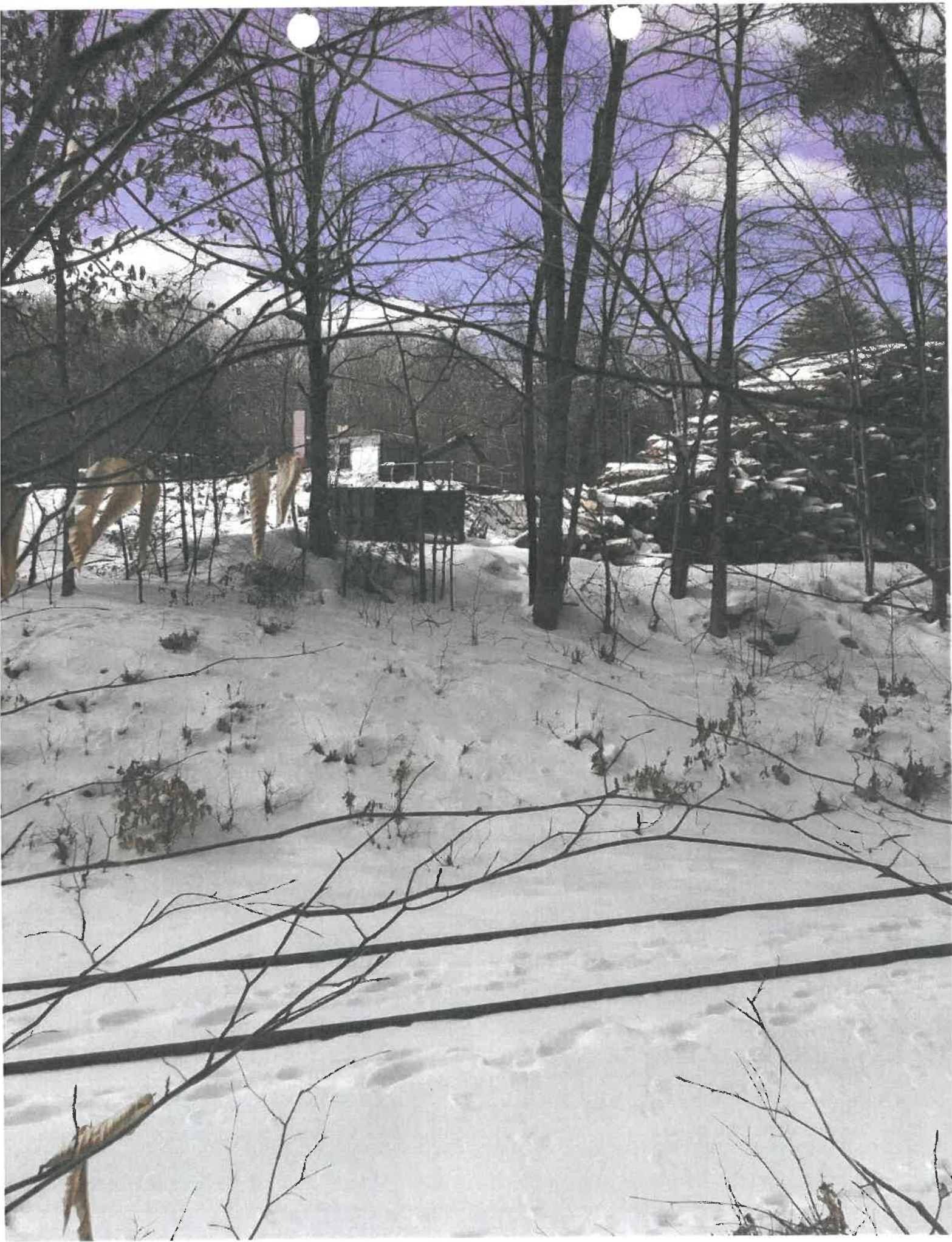
Narrative Description

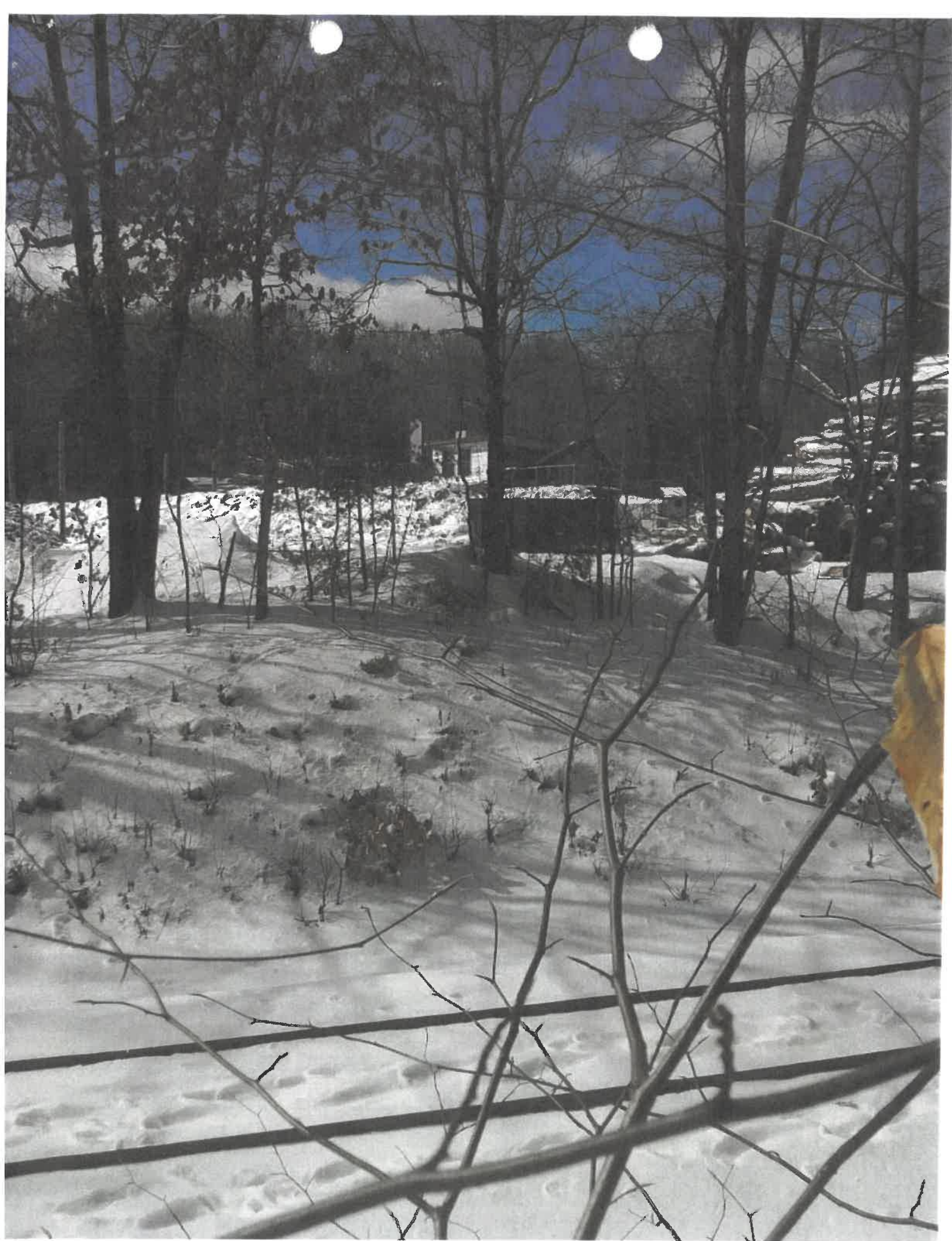
This property contains 9.3 - AC of land mainly classified as MFG OWN LAND with a(n) MFD SINGLEWIDE style building, built about 1974 , having ALUMINUM exterior and ASPH SHINGLE roof cover, with 0 commercial unit(s) and 1 residential unit(s), 4 total room(s), 2 total bedroom(s), 1 total bath(s), 1 total half bath(s), 0 total 3/4 bath(s).

Legal Description**Property Images**

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City of Rochester, NH
Monday, March 8, 2021

Chapter 275. Zoning

Article 30. Nonconforming Property

§ 275-30.2. Vested nonconforming property.

- A. Continuation. A nonconforming property/condition may be continued as it existed at the time of passage of this chapter or as it existed at the time it was made nonconforming by passage of any amendment to this chapter, except as otherwise provided in this section.
- B. Permit issued. In any case where a building permit has been issued prior to the effective date of any amendment to this chapter, for a structure or use which would not be permitted under that amendment, the structure may be built or altered or the use established as a nonconforming structure or use as permitted under the building permit, provided that construction or alteration is commenced within six months after issuance of the permit and is diligently prosecuted to completion.
- C. Vested application. Pursuant to RSA 676:12, VI, proposed changes in these ordinances or other land use regulations shall not apply to any plat or application which has been the subject of notice by the Planning Board pursuant to RSA 676:4, I(d), prior to the first legal notice of a proposed change in a building code or zoning ordinance or any amendment thereto. No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the Planning Board pursuant to RSA 676:4, I(d), so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this subsection shall also apply to proposals submitted to Planning Board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the Planning Board within 12 months of the end of the design review process.

§ 275-30.3. Changes to nonconforming property.

- A. Nonconforming property or a nonconforming condition may not be expanded, enlarged, extended, or intensified except as specifically provided for in this article and not without appropriate approvals from the Historic District Commission, Conservation Commission, ZBA and Planning Board.
- B. A reduction in the nonconformity of a nonconforming use, structure or condition must be approved by the Planning and Development Department and the Director of Building, Zoning, and Licensing Services and may also be required to obtain Historic District Commission, ZBA and Planning Board approvals if the Director of Building, Zoning, and Licensing Services determines that issues associated with the changes are problematic and fall within the jurisdiction of these boards or commission.

§ 275-30.4. Nonconforming uses.

- A. Abandonment. If a nonconforming use has been discontinued for a period of at least one year it shall be considered abandoned by the owner and may not be resumed nor shall any other nonconforming use be established. Abandonment shall be construed as cessation of operations during that year where the circumstances around the cessation of operations are reasonably indicative of:
- (1) An intention to cease or relinquish the use; or
 - (2) An overt act or failure to act which carries the implication that the owner neither claims nor retains any interest in the use.
- B. Conversion to conforming use. If a nonconforming use is converted to a conforming use, the nonconforming use shall be considered abandoned and may not be converted back again into a nonconforming use.
- C. Special exception/conditional use. Any existing use which is not a permitted use but which was allowed as a special exception or a conditional use in a district shall continue to be allowed as long as it shall comply with all of its original requirements of approval.
- D. Single-family homes. Existing single-family homes located in a zoning district which does not permit single-family use may be expanded or enlarged without limitation, by right, subject only to the setbacks, height, and maximum lot coverage within that district and other applicable provisions of this chapter.



107 Betts Road

Rochester, NH

1 inch = 150 Feet



March 8, 2021



Data shown on this map is provided for planning and informational purposes only. The municipality and CAI Technologies are not responsible for any use for other purposes or misuse or misrepresentation of this map.

Unofficial Property Record Card - Rochester, NH

General Property Data

Parcel ID 0204-0012-0000
Prior Parcel ID
Property Owner CANFIELD THOMAS S & SANDRA E
Mailing Address 107 BETTS RD
City ROCHESTER
Mailing State NH
Parcel/Zoning A

Account Number 6270
Property Location 107 BETTS RD
Property Use MFG OWN LAND
Most Recent Sale Date 1/25/1978
Legal Reference 1010-245
Grantor ALLEN ROGER & MARGUERITE
Sale Price 0
Land Area 9.300 acres

Zip 03867-1347

Current Property Assessment

Card 1 Value	Building Value 28,700	Xtra Features Value 42,000	Land Value 81,800	Total Value 152,500
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Building Description

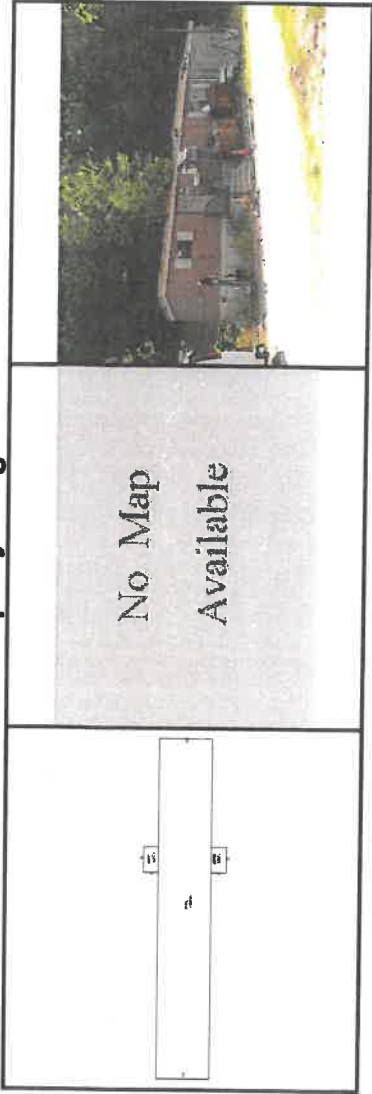
Building Style MFD SINGLEWIDE # of Living Units 1 Year Built 1974 Building Grade FAIR Building Condition Fair-Avg Finished Area (SF) 924 Number Rooms 4 # of 3/4 Baths 0	Foundation Type PIER/SLAB Frame Type WOOD Roof Structure GABLE Roof Cover ASPH SHINGLE Siding ALUMINUM Interior Wallis PANELING # of Bedrooms 2 # of 1/2 Baths 1	Flooring Type AVERAGE Basement Floor N/A Heating Type FORCED W/A Heating Fuel OIL Air Conditioning 0% # of Bsmt Garages 0 # of Full Baths 1 # of Other Fixtures 0
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Legal Description

Narrative Description of Property

This property contains 9.300 acres of land mainly classified as MFG OWN LAND with a(n) MFD SINGLEWIDE style building, built about 1974 , having ALUMINUM exterior and ASPH SHINGLE roof cover, with 0 commercial unit(s) and 1 residential unit(s), 4 room(s), 2 bedroom(s), 1 bath(s), 1 half bath(s).

Property Images



Disclaimer: This information is believed to be correct but is subject to change and is not warranted.

THOMAS CANFIELD
107 BETTS ROAD
ROCHESTER, NH 03867-1347
Email: tcanfield107@gmail.com

PHONE: (603) 332-1413
FAX: (603) 335-0363
CELL 603-535453
DATE 11-13-2020

James Grant
City of Rochester Code Enforcement

Dear Mr. Grant:

Per our conversation I am detailing the relevant history of our property at 107 Betts Road, Rochester, Map 204 Lot 12.

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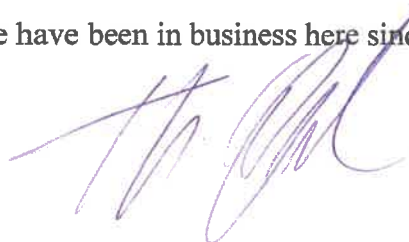
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To summarize: We have been in business here since 1978, with a varied mix of operations.

Sincerely,
Thomas Canfield



Shanna Saunders

From: Crystal Galloway
Sent: Friday, February 12, 2021 4:55 PM
To: Shanna Saunders
Subject: FW: 107 Betts Road

Crystal Galloway,

*Planning & Development Administrative Assistant II
City Hall Annex, 33 Wakefield Street
Rochester, NH 03867
Phone: (603) 335-1338*



From: Robert Lynch <robert.lynch@rochesternh.net>
Sent: Friday, February 12, 2021 4:48 PM
To: Crystal Galloway <crystal.galloway@rochesternh.net>
Subject: Fwd: 107 Betts Road

Sent from my iPhone

Begin forwarded message:

From: Robert Lynch <robert.lynch@rochesternh.net>
Date: February 4, 2021 at 12:38:00 PM EST
To: LRAS66@yahoo.com
Cc: Jim Grant <jim.grant@rochesternh.net>, Blaine Cox <blaine.cox@rochesternh.net>
Subject: 107 Betts Road

Dave, I wish to inform you that it has been determined by the Administrator of Zoning that the wood chopping operation being conducted at 107 Betts Road, is covered under our current ordinance, 275-30.2 as an existing non-conforming property/condition, and as such it is allowed to continue.

This will close the Non-compliance enforcement complaint lodged by you against 107 Betts Road for the Wood chopping activity.

Rob Lynch

Compliance Officer

City of Rochester - Building, Zoning, & Licensing Services

33 Wakefield Street

Rochester, NH 03867

Tel: (603) 332-3508

robert.lynch@rochesternh.net

<http://www.rochesternh.net/building-zoning-and-licensing-services>

Rob Lynch

Compliance Officer

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<http://www.rochesternh.net/building-zoning-and-licensing-services>

Shanna Saunders

From: Contact form at Rochester NH <cmsmailer@civicplus.com>
Sent: Wednesday, February 17, 2021 1:11 PM
To: Shanna Saunders
Subject: [External] [Rochester NH] ordinance clarification (Sent by DAVID WALERYSZAK, LRAS66@YAHOO.COM)

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Hello ssaunders,

DAVID WALERYSZAK (LRAS66@YAHOO.COM) has sent you a message via your contact form (<https://www.rochesternh.net/user/5001/contact>) at Rochester NH.

If you don't want to receive such e-mails, you can change your settings at <https://www.rochesternh.net/user/5001/edit>.

Message:

Hi I was wondering if I could set up a phone call with you to clarify a couple ordinances. Thank you Dave 603-918-9918

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June 4, 2021

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MICHAEL J. DONAHUE
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ROBERT D. CIANDELLA
NICHOLAS R. AESCHLIMAN

VIA EMAIL ONLY AND FIRST CLASS MAIL:
crystal.galloway@rochesternh.net

Zoning Board of Adjustment
City of Rochester
c/o Crystal Galloway
Zoning/Planning Input
31 Wakefield Street
Rochester, NH 03867

Re: Appeal of Administrative Decision, 107 Betts Road
In Re: David Waleryszak – Z-21-05

Dear Board Members:

This office serves as counsel to Tom Canfield and Sandra Canfield in connection with the above-captioned matter. I write to memorialize our position in connection with the hearing currently scheduled for June 9, 2021 at 7:00 p.m. By way of summary, the City of Rochester, through James Grant, the Director of Building, Zoning and Licensing Services, correctly determined following an investigation that Mr. Canfield's use of the subject property is a pre-existing, non-conforming property/condition, and thus my clients enjoy a right to continue said use. To that end, we respectfully request that you deny the application filed by the complainant David Waleryszak (hereinafter "the Complainant").

Threshold Procedural Issues

Counsel for Mr. Canfield respectfully objects to any further evidence being submitted by the Complainant at this juncture. By way of procedural history, the Complainant filed the instant appeal on March 4, 2021 ("the Appeal"). The Appeal appeared to be focused on Mr. Canfield's firewood splitting operation, but the Appeal documents were somewhat unclear: the Appeal

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referenced other “industrial” uses, and seemed primarily focused on the Complainant’s dissatisfaction with the City’s response.¹

In light of the opaqueness of the Complainant’s Appeal, in advance of the April 12, 2021 ZBA hearing, counsel for Mr. Canfield discussed with City officials his preference that the Complainant, as the movant who bears the burden of proof and production, be given a full opportunity to present his case at the April 12, 2021 appeal, and Mr. Canfield be afforded an opportunity to respond at the *next* ZBA hearing. By fashioning the proceedings this way, 1) the nature of any ambiguity in the Appeal could be clarified and informed by the Complainant’s presentation, and 2) Mr. Canfield would not be prejudiced by any ambiguity associated with the Appeal documents, and instead would be given a fair opportunity to marshal any evidence he felt was appropriate to fairly meet the Complainant’s Appeal. This framework was adopted: the Complainant was given a full opportunity to present his Appeal on April 12, 2021, and the matter was continued to a later date such that Mr. Canfield could meet the allegations of the Complainant, which are now informed by the Complainant’s presentation.

Counsel for Mr. Canfield is concerned that the Complainant is now advancing that he should have an *additional* opportunity to present evidence and argue his appeal, notwithstanding his full and fair opportunity (which he exercised) to present his case at the April 12, 2021 ZBA hearing. This is an unfair advantage to the Complainant, who has already had his opportunity to present before this tribunal: he will be afforded a second “bite at the apple” if allowed to present again.

By its nature, this proceeding is adversarial: the Complainant is seeking to overturn the City’s administrative decision, while Mr. Canfield is defending same (in the course of defending his vested nonconforming use/condition). In adversarial proceedings, the movant puts on their case, followed by the objecting party: the plaintiff/movant is not afforded an opportunity to “try again” or put on a second case after its first opportunity to meet its burden of proof.

To that end, Mr. Canfield respectfully objects to affording the Complainant any further opportunity to put on additional evidence: he took advantage of the opportunity to present his case on April 12, 2021, ably arguing his position. The upcoming hearing is correctly devoted to Mr. Canfield putting on such evidence and arguments as he feels is appropriate to rebut the arguments of the Complainant that were advanced at the April 12, 2021 hearing. To that end, Mr. Canfield respectfully requests a preliminary ruling by the Chair confirming that the June 9, 2021 meeting is devoted to a presentation by Mr. Canfield and deliberation by the Board.

Factual History

Mr. Canfield purchased the subject property at 107 Betts Road, Rochester, NH (“the Property”) in 1978. Mr. Canfield has run his site work and septic installation business at the Property since at least 1979. As some of you may be aware, Mr. Canfield is an extraordinarily experienced septic system design and installation contractor, and had a hand in writing the regulations governing subsurface septic disposal systems in New Hampshire.

¹ Mr. Canfield states the foregoing not to criticize the Complainant; instead, this merely informs the conduct of the hearing on April 12, 2021.

The Property is over 9 acres in size, located in Rochester's Agricultural Zoning District. It abuts the Northcoast railroad tracks, which are currently used for hauling sand, gravel and other freight through the neighborhood on a regular basis. The Complainant's property is located across the Northcoast railroad tracks from the Property.

As a site work contractor and septic design and installation specialist, Mr. Canfield's work typically involves the clearing of forested areas and other initial site work associated with the development of real estate and the installation of subsurface septic disposal systems. As part of this work, Mr. Canfield (like other site work contractors and septic installation contractors) often removes significant earthen materials from a subject site. Similarly, the first step in much of his work is to clear a subject area of all existing timber.

To that end, and beginning at latest in 1979, Mr. Canfield began bringing earthen products and harvested timber onto the Property. He was expressly advised by City officials that he was permitted to do so under the City of Rochester's then-existing regulations. Once on site, the earthen materials are historically (and continuing to the present day) screened and otherwise processed with heavy machinery; typically, Mr. Canfield uses a screening plant that is admittedly very noisy, and can be heard from a mile away. This use has been ongoing since the late 1970's or early 1980's. The processed earthen products would then be used on future jobs in connection with Mr. Canfield's site work and subsurface septic disposal system contracts. Similarly, harvested timber would be seasoned on-site, then cut and split for firewood as an ancillary operation to Mr. Canfield's site work and septic system installation business. This was all done with the knowledge and consent of the City of Rochester, and was done openly consistent with said authorization.

These activities have continued regularly since at least 1979. Consistent with the 40+ years of continuous operation, other than the Complainant, no neighbors or abutters are known to have complaints concerning the ongoing operation: for example, John Weismantel, a direct abutter, submits under oath that the ongoing operations are not objectionable and do not disturb the use of his property. See, Affidavit of John Weismantel, submitted herewith. Similarly, Mr. Weismantel also confirms that, being a resident at his abutting property since 1973, that Mr. Canfield's operations have been consistently ongoing at the Property since at least 1979.

Mr. Weismantel's observations are borne out by the historical aerial photographs of the Property. Enclosed for the Board's consideration are the historical aerial photographs of the Property that the undersigned was able to collect as of the date of this submission. The aerial photographs, Exhibit A through Exhibit I, span 1992 through 2020. As the Board can observe, the aerial photographs reflect a static footprint of Mr. Canfield's operations. That said, and

consistent with Mr. Canfield's prior letter to the City, the machinery and materials on site are changing positions and visibly being moved over time, consistent with Mr. Canfield's ongoing operations. To be clear, however, the aerial pictures confirm that the area of Mr. Canfield's operation has remained the same size since at least 1992.²

Further enclosed for your review and consideration is an Affidavit from Ronald Boucher. Mr. Boucher, another abutter, has sworn under oath that Mr. Canfield's operations have been regularly conducted at the Property since the late 1970's or early 1980's. Mr. Boucher is in a special position to provide such evidence: he and his son use the Property pursuant to an arrangement with Mr. Canfield to split the firewood at the Property.

To be very clear, given the natural ebb and flow of Mr. Canfield's business, at times significant materials and timber could be at the Property, while at other times less materials and timber would be present. Historically, the volume of materials and timber stored on-site was a product of happenstance, depending on the nature and volume of the site work and septic system jobs that Mr. Canfield may have had at the moment: and at some times, there would be modest amounts of material and timber at the site; at other times, however, very large amounts of material and timber would be stored on the site, with processing and splitting ongoing associated with same. In sum, however, material storage and processing of timber storage and splitting was always an element of Mr. Canfield's business, beginning as far back as 1979. Further, the footprint of the business never expanded beyond its historical location/position.

The foregoing is borne out by two additional affidavits provided by abutters, Randy Levallee and Stephen Kerlee. Randy Levallee, a former ZBA member, resides at his home located at 234 Milton Ave., Rochester, NH, close to Mr. Canfield's firewood operation, and has resided at the property since 1983. As set out in Mr. Levallee's affidavit, his home is closer to Mr. Canfield's firewood operation than the home of the Complainant. In contrast to the Complainant's allegations, Mr. Levallee confirms that the noise associated with Mr. Canfield's operations is not intrusive, nor can he smell any fumes associated with diesel fuel or diesel exhaust. Mr. Levallee also confirms no expansion in the scope or nature of Mr. Canfield's business: in Mr. Levallee's opinion as a former ZBA member, Mr. Canfield's operations fall squarely within provisions governing vested grandfathered status found in Rochester's zoning ordinance and state statute.

Similarly, Stephen Kerlee, who resides at the abutting property at 105 Betts Road, Rochester, NH, confirms that he observes no appreciable difference in Mr. Canfield's operations over time. Mr. Kerlee has resided in his home since 1993. He confirms that neither he nor his wife have observed noise that bothers them, nor smelled diesel fuel or exhaust. Beyond that, Mr. Kerlee was effusive in his praise of Mr. Canfield and expresses how fine a neighbor Mr. Canfield has been over the decades.

² Mr. Canfield acknowledges that the aerial photographs only provide confirmation of no expansion since 1992, the date of the earliest aerial photograph the undersigned could find online. That said, the aerial photographs clearly rebut the suggestion of the Complainant, who suggests that the scope of Mr. Canfield's operation has changed over the last few years.

More recently, Mr. Canfield understands that the City took decibel readings in early May, 2021 of Mr. Canfield's operations, including his firewood splitting operation. Mr. Robert Lynch, Rochester's Compliance Officer, confirmed that no excessive decibel levels were registered, even in connection with the firewood splitting. Mr. Lynch confirmed to undersigned counsel that the firewood splitting registered decibel levels in the 50's, which is below normal conversation decibel levels of about 60. Given the objective evidence collected by the City, which is consistent with the sworn statements of the neighbors, the Complainant's bald complaints concerning the noise of Mr. Canfield's operations cannot be sustained.

Legal Analysis

i. The zoning complaint.

The instant appeal was initiated by the Complainant alleging that James Grant, Rochester's Director of Building, Zoning and Licensing Services, made an erroneous determination in his February 4, 2021 memorandum that determined that Mr. Canfield had "an existing non-conforming property/condition, and as such is allowed to continue." The Complainant's initial complaint appears primarily concerned with (and motivated by) the Complainant's own denial of an application (or inquiry into same) to site a business at a lot owned by the Complainant in the area of the Property.

Dissatisfied with the disposition of his inquiry into placing a commercial enterprise on his property, the Complainant complains of Mr. Canfield's business given its overt commercial nature. The Appellant complains of Mr. Canfield's use of the Property as "a processing plant/yard," and complains about noise from Mr. Canfield's operations, as well as diesel exhaust.

James Grant, the City's Director of Building, Zoning and Licensing Services, investigated the complaint and correctly identified that Mr. Canfield's business, which had been present at the Property for over 40 years, represented an existing, non-conforming property/condition.

ii. Mr. Canfield's vested, grandfathered non-conforming use.

Mr. Canfield understands that in 1986, the City of Rochester enacted the current version of the City of Rochester's Zoning Ordinance. As such, non-conforming uses, dimensions, etc. that pre-dated 1986 constitute a grandfathered, vested, non-conforming use. Non-conforming uses are protected in New Hampshire by statute as well as the N.H. Constitution: RSA 674:19 provides that zoning ordinances "shall not apply to...existing use[s]." See, RSA 674:19.

Furthermore, vested, non-conforming uses are a protected property right of the owner, and cannot be halted without committing an unconstitutional taking. See, e.g., Loundsbury v. City of Keene, 122 N.H. 1006 (1982).³

Even where uses are changed, the vested, non-conforming use status protects the landowner unless it is "substantially different" from the use to which the land was put before its alteration. See, e.g., Ray's Stateline Market v. Town of Pelham, 140 N.H. 139, 143 (1995). "[I]n order to determine how much a nonconforming use may be expanded or changed, we must look to the facts existing when the nonconforming use was created." Id. "In evaluating the extent of a nonconforming use, we may consider the following factors: the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different impact upon the neighborhood." Id. Where "there is no substantial change in the use's effect on the neighborhood, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use." Id. at 144.

The City of Rochester, recognizing the statutory and constitutional protection of vested, grandfathered non-conforming uses, provides in its zoning ordinance that "a non-conforming property/condition may be continued as it existed at the time of passage in this chapter or as it existed at the time it was made non-conforming by passage of any amendment to this chapter, except as the Board has provided by this section." Rochester Zoning Ordinance, Section 275-30.2(A). Although the undersigned sees no difference between the Rochester grandfathering ordinance and the case law governing vested nonconforming statuses, the case law is very clear: a municipality's grandfathering ordinance cannot be stricter (i.e., less permissive) than state statute, and therefore a municipality's grandfathering ordinance will be construed consistent with state statute, notwithstanding the verbiage in the local ordinance. Ray's Stateline Mkt. v. Town of Pelham, 140 N.H. 139, 144 (1995).

As set forth in great length above, Mr. Canfield and his historical neighbors have all confirmed, some under oath, that his use of the Property in an industrial manner, and for material processing and firewood splitting, have been ongoing for at least 40 years. Mr. Canfield and his abutters also confirm that his material processing/industrial use and firewood splitting operations have been regularly conducted at the Property during this time. To that end, the City of Rochester correctly found that Mr. Canfield enjoys a non-conforming, pre-existing use of the subject property and the City's determination should not be disturbed.

Further, even if the Complainant's arguments concerning an increase in the non-conforming use are accepted in spite of the historical evidence showing, 1) no change in the footprint of Mr. Canfield's business; and, 2) the sworn affidavits from historical abutters reflecting consistent use, any change in the firewood splitting operation is not a "substantial

³ "The State Constitution provides that all persons have the right of acquiring, possessing and protecting their property. N.H. Constitution, Part I, Articles 2, and 12. These provisions also apply to non-conforming uses...as a result, we have held that a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a non-conforming use." Loundsbury v. City of Keene, 122 N.H. 1006 (1982)

change” such as to fall outside the vested grandfathered status. The un rebutted evidence is that Mr. Canfield, at all times, has used heavy machinery and soil processing equipment to haul material onto and out of the Property. Mr. Canfield’s sporadic earth-screening operations have historically been noisy, albeit relatively short in duration. The noise and effect on the neighborhood from Mr. Canfield’s historical activities, which are undoubtedly grandfathered, is certainly the equal to or greater than the noise and effect of the current firewood aspect of the operations on the Property.⁴ Further it cannot be ignored that both the Appellant’s and Mr. Canfield’s properties abut the Northcoast railway, which regularly hauls freight through the neighborhood. Finally, the City collected objective data, recording the decibel levels of Mr. Canfield’s operations: this testing confirmed that the noise of Mr. Canfield’s operation is no greater than a normal conversation. Given the nature of the neighborhood (bisected by an industrial railway), the historical use of heavy machinery, and the objective data reflecting modest noise levels, any change in the firewood splitting operation (if the Complainant’s position on same is accepted) does not constitute a “significant” change in the non-conforming, grandfathered use of the property enjoyed by Mr. Canfield.

iii. Conclusion

For all the reasons set forth above, Mr. Canfield’s use of the property presents a clear non-conforming use/property as contemplated by the Rochester Zoning Ordinance and RSA 674:19. Further, the disconnect between the complaints of the Complainant and the sworn statements of abutters of the Property is stark: whereas the Complainant suggests that Mr. Canfield’s use of the Property is unbearable and presents a significant increase in its effects on the neighborhood, the Complainant’s neighbors have sworn, under oath, that Mr. Canfield’s uses of the property, 1) are not bothersome; 2) are consistent with Mr. Canfield’s historical use; and, 3) do not present any material change over Mr. Canfield’s historic operations. Given that the Complainant has the burden of proof and persuasion on the record before the Board, (which contains multiple consistent sworn statements of abutters rebutting the Complainant’s allegations), the Complainant cannot sustain his burden of proof, and the complaint should be dismissed. At bottom, Jim Grant’s findings, following his investigation, were well-founded and should not be countermanded by this Board.

Very truly yours,

DONAHUE, TUCKER & CIANDELLA, PLLC



Christopher T. Hilson
chilson@dtclawyers.com

CTH:nes
Enclosure

cc: Tom and Sandra Canfield
Scott Hogan, Esq. (Counsel for Complainant)

⁴ Indeed, the Complainant does not distinguish the source of the alleged noise and fumes he complains of: that is, whether they come from the hauling and processing of earthen materials, or whether they are the product of the firewood splitting aspect of the business.

AFFIDAVIT OF JOHN WEISMANTEL

The Affiant, being duly sworn, does depose and state as follows:

1. My name is John Weismantel. I make this affidavit at my own first-hand knowledge.
2. I reside at 115 Betts Road, Rochester, New Hampshire, which abuts the subject property owned by Thomas Canfield at 107 Betts Road, Rochester, N.H.
3. I first began living at my home in the early 1970's. I have lived at my property ever since.
4. Furthermore, I rented the garage located next door to my property, and ran said automotive garage from 1982 to 1988. During that period, I worked on Tom Canfield's commercial vehicles, inspecting same and providing other work as necessary.
5. As such, I have had consistent and ample opportunity to observe Mr. Canfield's operations at 107 Betts Road, Rochester, New Hampshire.
6. Tom's commercial operations at 107 Betts Road have been consistent since the late 1970's or very early 1980's. That is, Tom installs septic systems and does other site work. 107 Betts Road serves as the base of his operations. He brings in earth material from his site work and septic installation jobs, screening and otherwise processing the materials on-site. He then takes materials out to use them in connection with his operations.
7. Tom also has always brought in timber from his site work and septic installation business; that is, the first step of Tom's operation is to clear a parcel or standing timber. Since he first began using his property in the late 1970's, he would bring timber back to his property to cut and split same. His firewood operation was always a consistent part of Tom's business throughout the decades.

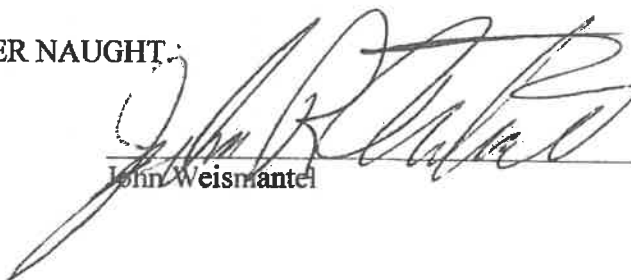
8. Indeed, Tom's firewood operation continued through the economic downturn in 2008. That is, all site work and septic installation (and presumably all building trades) suffered as a result of the economic downturn. That said, I can clearly recall Tom continuing to cut firewood at the site during this period.

9. In sum, Tom always consistently used the subject property as a site for his commercial operations, which include material processing and firewood splitting. While the amount of material or timber on site may change from time to time depending on the jobs he may be doing at the moment, I haven't observed any increase to the footprint of his operation at the site beyond what was historically present.

10. Beyond the foregoing, I have lived on the abutting property for the entirety of Tom's use of 107 Betts Road for commercial purposes. I can clearly and unequivocally state that Tom's operations, from the late 1970's to today, do not disturb or bother me, and I have no objection to same.

THE AFFIANT SAYETH FURTHER NAUGHT:


Date 04/13/2021


John Weismantel

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, John Weismantel, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this 13 day of April, 2021.

Before me,



Notary Public/Justice of the Peace
My commission expires:

ASHLEY M. LANGLAIS
Notary Public - New Hampshire
My Commission Expires September 23, 2025

AFFIDAVIT OF RONALD BOUCHER

The Affiant, being duly sworn, does depose and state as follows:

1. My name is Ronald Boucher. I make this affidavit at my own first-hand knowledge.
2. I reside at 99 Betts Road, Rochester, New Hampshire, which abuts the subject property owned by Thomas Canfield at 107 Betts Road, Rochester, N.H.
3. I first began living at my home in 1980.
4. Since that time, I have had consistent and ample opportunity to observe the operations at 107 Betts Road.
5. Indeed, Tom Canfield and I have cut firewood at 107 Betts Road consistently since 1980.
6. At the outset, Tom Canfield, in connection with his site development and septic installation business, would log properties where he was installing septic systems. He would bring the timber back to 107 Betts Road and either he and/or I would cut the timber into firewood. Given the number of septic systems Mr. Canfield has installed over the years, the firewood operation was a consistent element of his site development and septic system installation business.
7. I have also used the property, consistent with my arrangement with Mr. Canfield, to cut firewood, since the 1980s.
8. The timber for my firewood operation has historically come from both Mr. Canfield and from other sources.

9. I can unequivocally state that firewood splitting has been a regular and ongoing operation at 107 Betts Road since at least 1980. Firewood cutting and splitting continues to the present time as part of the ongoing operations at the property.

10. I have spoken with my neighbors concerning the zoning complaint, and all my neighbors confirm that, (a) the firewood cutting and splitting at the subject property has been ongoing for at least 40 years; and, (b) they have no complaints concerning the operation.

THE AFFIANT SAYETH FURTHER NAUGHT.

Date

4/12/21

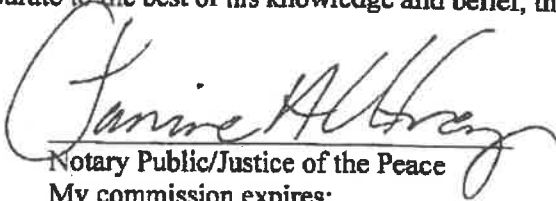

Ronald Boucher

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, Ronald Boucher, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this 12 day of April, 2021.

Before me,

JANINE M. ALLFREY
NOTARY PUBLIC
State of New Hampshire
My Commission Expires
November 6, 2022


Notary Public/Justice of the Peace
My commission expires:

11/6/2022

AFFIDAVIT OF RANDY LAVALLEE

The Affiant, being duly sworn, does depose and state as follows:

1. My name is Randy Lavallee. I make this Affidavit of my own first-hand knowledge. I reside at 234 Milton Road, Rochester, New Hampshire. My home is directly across the North Coast Corp. railroad tracks from Mr. Canfield's commercial operation.
2. My property also abuts that of David Waleryszak. My home is located closer than that of Mr. Waleryszak to the firewood cutting operation on Mr. Canfield's property at 107 Betts Road, Rochester, New Hampshire.
3. I purchased my property in 1983, and have been residing there ever since. I have had an ample opportunity to observe Mr. Canfield's ongoing operation since 1983.
4. I was also a member of the City of Rochester's Zoning Board of Adjustment for many years, and thus, I am familiar with the City of Rochester's Zoning Ordinance and "grandfathering" provisions of the ordinance.
5. I observe no expansion of Mr. Canfield's commercial operation at his property throughout the decades I have resided in the neighborhood. The nature and scope of his operation have remained substantially the same since I moved to the neighborhood in 1983. In my opinion, Mr. Canfield's current operations fall squarely within the nonconforming property grandfathering provisions of Rochester's Zoning Ordinance, as well as RSA 674:19, which provides for vested rights in nonconforming uses that predate the enactment of a zoning provision.
6. The commercial operation on Mr. Canfield's property do not disturb me or my family. Despite being closer to Mr. Canfield's commercial operation than the complainant, I can report no smell of diesel fumes, nor any significant noise disturbances to the neighborhood.

THE AFFIANT SAYETH FURTHER NAUGHT.

Dated:

May 10, 2021

Randy Lavallee
RANDY LAVALLEE

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, Randy Lavallee, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this ____ day of May, 2021.

Before me,

Stephanie A. Carty
Notary Public/Justice of the Peace



AFFIDAVIT OF STEPHEN KERLEE

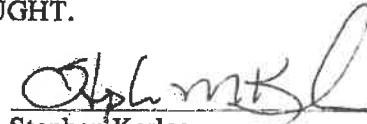
The Affiant, being duly sworn, does depose and state as follows:

1. My name is Stephen Kerlee. I make this affidavit as to my own first-hand knowledge.
2. I reside at 105 Betts Road, Rochester, New Hampshire. I have resided at this property since 1993.
3. My property abuts 107 Betts Road, Rochester, New Hampshire, where Tom Canfield has an ongoing industrial operation.
4. My wife, Dorothea, and I have had ample opportunity to observe Mr. Canfield's operations over the decades that we have lived at the abutting property.
5. I can identify no appreciable difference in the intensity of the ongoing industrial uses that Tom makes of his property. Tom is a septic system installation and site work contractor, and regularly drives trucks, equipment and heavy machinery in and out of his property; this has been ongoing since we moved to the neighborhood.
6. As part of his operations, he brings in materials from his worksites, including earth materials and timber that was cut in connection with his site excavation operations. Historically, he cuts same for firewood.
7. In sum, we can identify no change in scope or intensity of the uses that Mr. Canfield uses of his property throughout the time that we have resided in the neighborhood.
8. Beyond the foregoing, Mr. Canfield's use of his property does not bother us. We have not smelled any diesel fumes or diesel exhaust, nor is the noise from his ongoing operations bothersome.

9. We found Tom to be an extraordinarily courteous neighbor. To the extent that he anticipates any unusually loud noise, he has contacted us in the past. My wife and I can say in all earnestness that Tom has been a great neighbor over the years.

THE AFFIANT SAYETH FURTHER NAUGHT.

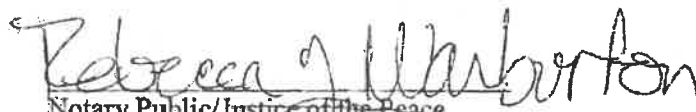
Date 5-12-2021


Stephen Kerlee

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, Stephen Kerlee, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this 12 day of May, 2021.

Before me,


Notary Public/Justice of the Peace
My commission expires: 8/26/25

Map by NH GRANIT

EXHIBIT

1992/1998
 A



Map Scale

1: 3,247



© NH GRANIT, www.granit.unh.edu

Map Generated: 4/13/2021

Notes

NH DOQs 1992/98



Map by NH GRANIT

EXHIBIT

tabular

B
(2003)



Map Scale

1:3,247



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Map Generated: 4/13/2021

Notes

2003



Map by NH GRANIT

EXHIBIT

2004

(2005)



Map Scale

1: 3,247



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Notes

2005

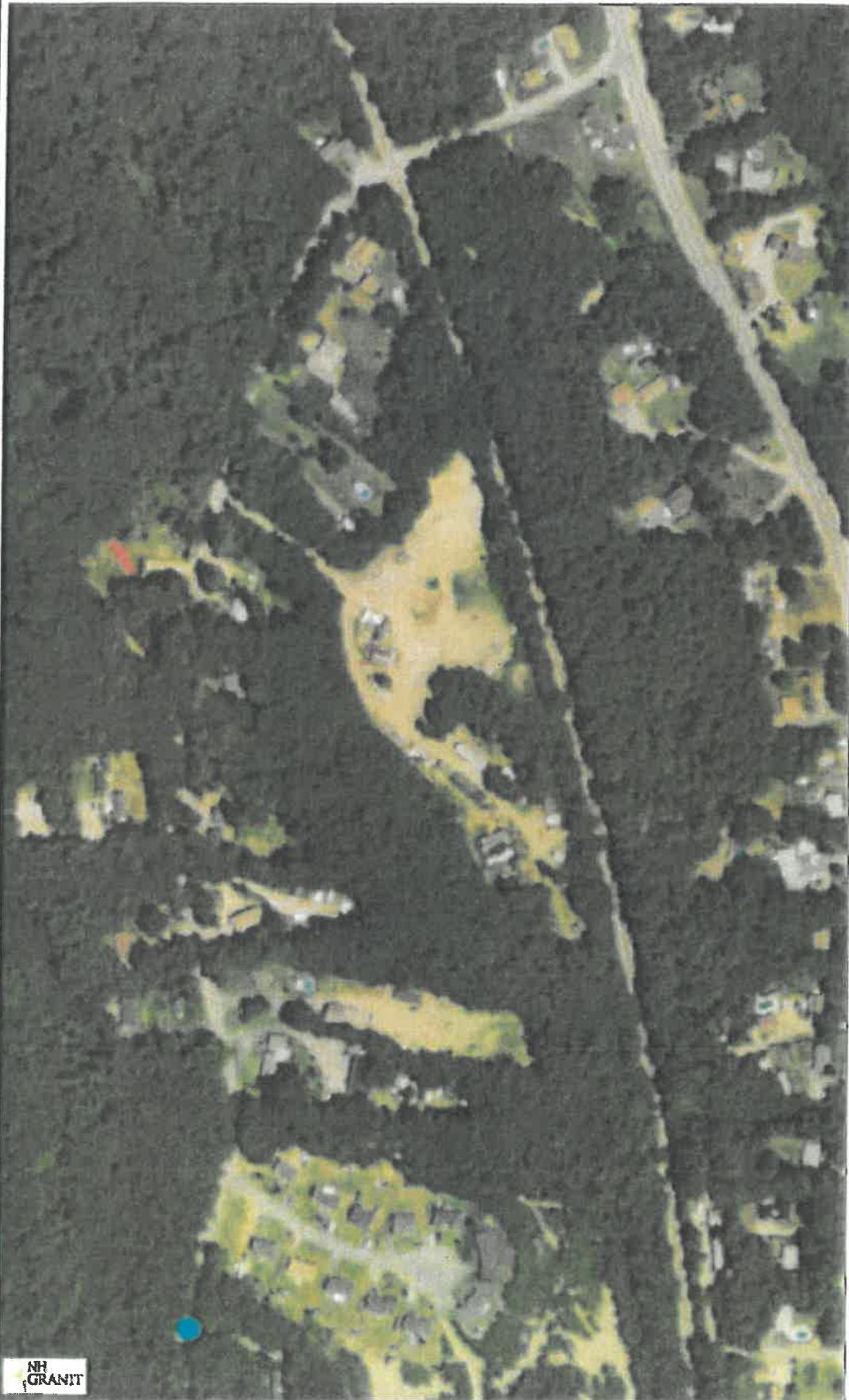


Map by NH GRANIT

EXHIBIT

2000

D
(2008)



Map Scale

1: 3,247



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Map Generated: 4/13/2021

Notes

2008



Map by NH GRANIT

EXHIBIT

tabbies

E
(2009)



NH
GRANIT

Map Scale

1:3,247



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Map Generated: 4/13/2021

Notes

2009

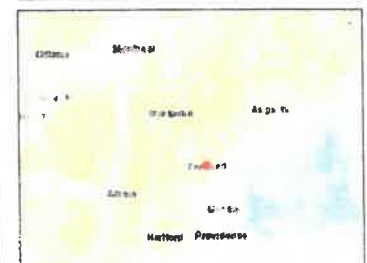


EXHIBIT
F
(2010)



EXHIBIT
G
(2015)



EXHIBIT
H
(2017)



EXHIBIT
I
(2020)



The Law Office of Scott E. Hogan

AUG 13 2021

MM

P.O. Box 57

Lyndeborough, New Hampshire 03082

Phone: 603-969-1183

hoganlaw@comcast.net

MOTION FOR REHEARING PURSUANT TO RSA 677:2

TO: Rochester Zoning Board of Adjustment (Zoning Board, Board, or ZBA)

FROM: David Waleryszak
232 Milton Rd.
Rochester, NH 03867

BY: Scott E. Hogan, Esq.

RE: ZBA Decision of July 14, 2021, Denying Appeal of Administrative Decision
(Case Z-21-05) relating to property at 107 Betts Rd., Rochester, NH

DATE: August 13, 2021

INTRODUCTION

Mr. Waleryszak is the owner of residential property directly abutting the property in question, and is directly affected by the uses of it.

He respectfully requests that the Board grant this Motion, and allow another hearing on this matter, for the reasons stated below.

STANDARD OF REVIEW/ ZBA JURISDICTION

RSA 677:2 states,

“Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, **may grant such rehearing if in its opinion good reason therefor is stated in the motion...**” (Emphasis added).

On the purpose of Motions for Rehearing, the New Hampshire Supreme Court has stated,

“By requiring an aggrieved party to first file a motion for rehearing from an adverse zoning board decision before allowing an appeal to the superior court, RSA 677:2 is designed to give the ZBA an opportunity to correct any errors it may have made.”

McDonald V. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171, 175 (2005). (Emphasis added).

THE BOARD SHOULD GRANT THIS MOTION FOR REHEARING

Whether or not the Board ultimately changes its decision on the subject Appeal of Administrative Decision, it should grant rehearing of the application for the following reasons, based on fatal procedural errors, and that the evidence before the Board supports granting the Appeal.

Precluding the Appellant's Own Testimony

The Board conducted a public hearing on April 14, 2021 on Mr. Waleryszak's Appeal of Administrative Decision. *That Hearing was continued at the request of the City, after consultation with counsel for Mr. Canfield, Attorney Hilson.* Thereafter, Mr. Waleryszak requested his own continuance, so that he could gather relevant evidence and communicate with his abutting property owner directly. (It should be noted that Counsel for Mr. Waleryszak's neighbor, Attorney Chris Hilson agreed that Mr. Waleryszak did not make the request to continue the first hearing. That was communicated to the City Planning Director by email of 5-12-21 when Mr. Waleryszak made his request to continue).

When the public hearing was continued on July 14th, the Board precluded Mr. Waleryszak from continuing his testimony in support of his own Appeal.

That position obviously has no basis in the law or common sense, and is fatal procedural error. *Mr. Waleryszak, an abutting property owner who is subject to daily nuisance impacts from the subject property has clear legal standing to present his Appeal to this Board, and this Board is obligated to hear his testimony, as well as the abutter and members of the public throughout the course of the public hearing process. RSA 676:7.I.*

The Board's decision to preclude the Appellant from submitting testimony and evidence during the continued public hearing process would be the first issue presented for judicial review, which would result in a time-consuming and expensive remand back to this Board simply to allow such required participation.

For this reason alone the Board must grant this Motion for Rehearing.

The “Evidence”

The Record is clear that the evidence before the Board (at the time it precluded the Appellant from continuing his testimony and responding to the information presented by the abutter’s counsel) supports granting the Appeal of Administrative Decision.

IT SHOULD BE FIRST NOTED that in the letter submitted by Attorney Chris Hilson on behalf of Tom and Sandra Canfield dated June 4, 2021, Attorney Hilson acknowledges to the Board that:

“...MR. CANFIELD USES A SCREENING PLANT THAT IS ADMITTEDLY VERY NOISY, AND CAN BE HEARD FROM A MILE AWAY.” Hilson letter, p.3. (Emphasis added).

Despite that admission, Attorney Hilson goes on to state, “...*Complaintant’s bald complaints concerning the noise of Mr. Canfield’s operations cannot be sustained.*” (Emphasis added).

Attorney Hilson then references and attaches Affidavits from “direct abutters” and “neighbors” who state that the “very noisy” operations, which “can be heard from a mile away” are not “bothersome”. Several of the Affiants at the same time testify to their past business relationships with Mr. Canfield, including business arrangements with and permissions from Mr. Canfield involving the use of the Canfield property itself.

In his Appeal and in the testimony that he was allowed to give before he was precluded from participating in the continued public hearing on his own Appeal, *Mr. Waleryszak established that the uses of the subject property have changed and increased, and present an unreasonable daily interference with the use, enjoyment, value and marketability of his properties.*

As to the “evidence” before the Board at the time it made its decision, *Attorney Hilson’s letter confirms that there are no City Records to support the position that the current uses are grandfathered in any way. In fact, Attorney Hilson’s letter actually confirms the lack of evidence/records to support that position, and confirms the numerous changes in uses over the relevant time period.*

CONCLUSION

For all of the reasons stated above, there is “good cause shown” for the Board to grant this Motion for Rehearing, so that all parties can have an opportunity to properly review and comment on the issues raised in this Motion, and in the underlying Appeal.

By his attorney,
THE LAW OFFICE OF SCOTT E. HOGAN

/Scott E. Hogan, Esq./

Scott E. Hogan, Esq.

P.O. Box 57
Lyndeborough, NH 03082
603-969-1183
hoganlaw@comcast.net
NH Bar ID#: 10542

Crystal Galloway

From: Dave W <lr66@yahoo.com>
Sent: Tuesday, July 6, 2021 1:52 PM
To: Crystal Galloway
Subject: Fw: 107 betts rd appeal
Attachments: app.jpg

----- Forwarded Message -----

From: Dave W <lr66@yahoo.com>
To: Shanna Saunders <shanna.saunders@rochesternh.net>
Sent: Tuesday, July 6, 2021, 01:44:35 PM EDT
Subject: Fw: 107 betts rd appeal

Hi Shanna can you please add this to my packet. Thank You Dave

----- Forwarded Message -----

From: Dave W <lr66@yahoo.com>
To: Shanna Saunders <shanna.saunders@rochesternh.net>; SCOTT HOGAN <hoganlaw@comcast.net>
Sent: Friday, June 4, 2021, 02:43:32 PM EDT
Subject: 107 betts rd appeal

Hi Shanna I would like to add to my packet a copy that I pulled off the state of NH website. It will be attached in this email. I also received the 24 page packet from Cristopher Hilson and I am in the process of reviewing it. I would also like to note that I have yet to be provided any actual evidence from the city or Mr. Canfield on how this case would be grandfathered. I will looking forward to discussing this with the board at the up coming zoning board meeting. Thank you again for adding the attachment in the packet

David Waleryszak
603-918-

9918

AFFIDAVIT OF RANDY LAVALLEE

The Affiant, being duly sworn, does depose and state as follows:

1. My name is Randy Lavallee. I make this Affidavit of my own first-hand knowledge. I reside at 234 Milton Road, Rochester, New Hampshire. My home is directly across the North Coast Corp. railroad tracks from Mr. Canfield's commercial operation.
2. My property also abuts that of David Waleryszak. My home is located closer than that of Mr. Waleryszak to the firewood cutting operation on Mr. Canfield's property at 107 Betts Road, Rochester, New Hampshire.
3. I purchased my property in 1983, and have been residing there ever since. I have had an ample opportunity to observe Mr. Canfield's ongoing operation since 1983.
4. I was also a member of the City of Rochester's Zoning Board of Adjustment for many years, and thus, I am familiar with the City of Rochester's Zoning Ordinance and "grandfathering" provisions of the ordinance.
5. I observe no expansion of Mr. Canfield's commercial operation at his property throughout the decades I have resided in the neighborhood. The nature and scope of his operation have remained substantially the same since I moved to the neighborhood in 1983. In my opinion, Mr. Canfield's current operations fall squarely within the nonconforming property grandfathering provisions of Rochester's Zoning Ordinance, as well as RSA 674:19, which provides for vested rights in nonconforming uses that predate the enactment of a zoning provision.
6. The commercial operation on Mr. Canfield's property do not disturb me or my family. Despite being closer to Mr. Canfield's commercial operation than the complainant, I can report no smell of diesel fumes, nor any significant noise disturbances to the neighborhood.

THE AFFIANT SAYETH FURTHER NAUGHT.

Dated:

May 12 2021

Randy Lavallee
RANDY LAVALLEE

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, Randy Lavallee, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this _____ day of May, 2021.

Before me,

Stephanie A. Carty
Notary Public/Justice of the Peace



AFFIDAVIT OF STEPHEN KERLEE

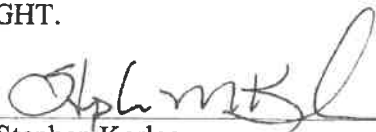
The Affiant, being duly sworn, does depose and state as follows:

1. My name is Stephen Kerlee. I make this affidavit as to my own first-hand knowledge.
2. I reside at 105 Betts Road, Rochester, New Hampshire. I have resided at this property since 1993.
3. My property abuts 107 Betts Road, Rochester, New Hampshire, where Tom Canfield has an ongoing industrial operation.
4. My wife, Dorothea, and I have had ample opportunity to observe Mr. Canfield's operations over the decades that we have lived at the abutting property.
5. I can identify no appreciable difference in the intensity of the ongoing industrial uses that Tom makes of his property. Tom is a septic system installation and site work contractor, and regularly drives trucks, equipment and heavy machinery in and out of his property; this has been ongoing since we moved to the neighborhood.
6. As part of his operations, he brings in materials from his worksites, including earth materials and timber that was cut in connection with his site excavation operations. Historically, he cuts same for firewood.
7. In sum, we can identify no change in scope or intensity of the uses that Mr. Canfield uses of his property throughout the time that we have resided in the neighborhood.
8. Beyond the foregoing, Mr. Canfield's use of his property does not bother us. We have not smelled any diesel fumes or diesel exhaust, nor is the noise from his ongoing operations bothersome.

9. We found Tom to be an extraordinarily courteous neighbor. To the extent that he anticipates any unusually loud noise, he has contacted us in the past. My wife and I can say in all earnestness that Tom has been a great neighbor over the years.

THE AFFIANT SAYETH FURTHER NAUGHT.

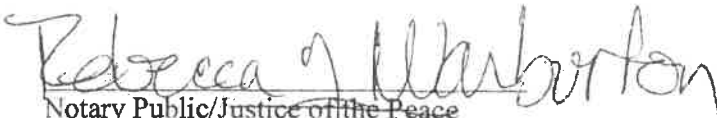
Date 5-12-2021


Stephen Kerlee

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, Stephen Kerlee, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this 12 day of May, 2021.

Before me,


Notary Public/Justice of the Peace
My commission expires: 5/26/25

Business Details

Business Name: RAB FIRE WOOD	Business ID: 738332
Business Type: Trade Name	Business Status: Active
Expiration Date: 1/29/2026	Last Renewal Date: 10/26/2020
Business Creation Date: 01/29/2016	Name in State of Formation: Not Available
Date of Formation in Jurisdiction: 01/29/2016	
Principal Office Address: 113 Betts Road, Rochester, NH, 03867, USA	Mailing Address: PO Box 158, Rochester, NH, 03866, USA
Business Email: NONE	Phone #: NONE
Notification Email: NONE	Fiscal Year End Date: NONE

Principal Purpose

S.No	NAICS Code	NAICS Subcode
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1	OTHER / Firewood	
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Page 1 of 1, records 1 to 1 of 1

Trade Name Information

No Trade Name(s) associated to this business.

Trade Name Owned By

Name	Title	Address
Brandon Boucher	Applicant	113 Betts Road, Rochester, NH, 03867, USA

Trademark Information

Trademark Number	Trademark Name	Business Address	Mailing Address
------------------	----------------	------------------	-----------------

No records to view.

Crystal Galloway

From: SCOTT HOGAN <hoganlaw@comcast.net>
Sent: Wednesday, June 9, 2021 3:23 PM
To: Shanna Saunders; Dave W
Cc: Crystal Galloway
Subject: RE: Appeal of David Waleryszak- Request for Continuance

Hello Shanna:

Thank you for that notice.

Given the issues and the process so far, the Applicant does request a full Board to make a final decision on his Appeal of Administrative Decision. Thus he does agree to continue tonight's hearing.

Best,

Scott Hogan

--

Scott E. Hogan
The Law Office of Scott E. Hogan
P.O. Box 57
Lyndeborough, NH 03082
603-969-1183 (Phone)
hoganlaw@comcast.net

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On 06/09/2021 2:34 PM Shanna Saunders <shanna.saunders@rochesternh.net> wrote:

Gentlemen –

I wanted to let you know that I only have 4 ZBA Members for tonight. What this means is that the case will be held before what is known as a "Short Board". In the case of a short board a 2-2 tie would result in a denial. For this reason you have the right to request a continuance to have the case heard before the whole 5 member board.

To: Shanna Saunders <shanna.saunders@rochesternh.net>
Cc: Crystal Galloway <crystal.galloway@rochesternh.net>; Christopher Hilson
<chilson@dtclawyers.com>
Subject: Appeal of David Waleryszak- Request for Continuance

Hello Shanna:

Regarding the Appeal of Administrative Decision of David Waleryszak, the Board conducted a hearing on April 14, 2021, which was continued at the request of the City.

David Waleryszak hereby makes his first request to continue the hearing scheduled for tonight, May 12, 2021, so that direct conversations with his neighbor can continue, and so he can confirm and review the relevant City records. Counsel for Mr. Waleryszak's neighbor, Attorney Chris Hilson, has been made aware of this request, and agrees that Mr. Waleryszak did not make the request to continue the first hearing. Attorney Hilson is copied on this request.

Planning staff confirmed that the parties do not need to attend the hearing, given this request.

Best,

Scott Hogan

--

Scott E. Hogan
The Law Office of Scott E. Hogan
P.O. Box 57
Lyndeborough, NH 03082
603-969-1183 (Phone)
hoganlaw@comcast.net

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CELEBRATING OVER 35 YEARS OF SERVICE TO OUR CLIENTS

Please respond to our Exeter office.

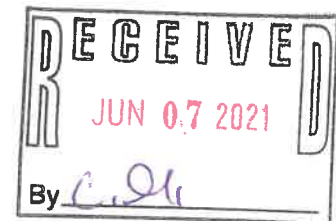
June 4, 2021

LIZABETH M. MACDONALD
JOHN J. RATIGAN
DENISE A. POULOS
ROBERT M. DEROSIER
CHRISTOPHER L. BOLDT
SHARON CUDDY SOMERS
DOUGLAS M. MANSFIELD
KATHERINE B. MILLER
CHRISTOPHER T. HILSON
HEIDI J. BARRETT-KITCHEN
JUSTIN L. PASAY
ERIC A. MAHER
CHRISTOPHER D. HAWKINS
BRENDAN A. O'DONNELL
ELAINA L. HOEPPNER
WILLIAM K. WARREN

RETIRED
MICHAEL J. DONAHUE
CHARLES F. TUCKER
ROBERT D. CIANDELLA
NICHOLAS R. AESCHLIMAN

VIA EMAIL ONLY AND FIRST CLASS MAIL:
crystal.galloway@rochesternh.net

Zoning Board of Adjustment
City of Rochester
c/o Crystal Galloway
Zoning/Planning Input
31 Wakefield Street
Rochester, NH 03867



Re: Appeal of Administrative Decision, 107 Betts Road
In Re: David Waleryszak – Z-21-05

Dear Board Members:

This office serves as counsel to Tom Canfield and Sandra Canfield in connection with the above-captioned matter. I write to memorialize our position in connection with the hearing currently scheduled for June 9, 2021 at 7:00 p.m. By way of summary, the City of Rochester, through James Grant, the Director of Building, Zoning and Licensing Services, correctly determined following an investigation that Mr. Canfield's use of the subject property is a pre-existing, non-conforming property/condition, and thus my clients enjoy a right to continue said use. To that end, we respectfully request that you deny the application filed by the complainant David Waleryszak (hereinafter "the Complainant").

Threshold Procedural Issues

Counsel for Mr. Canfield respectfully objects to any further evidence being submitted by the Complainant at this juncture. By way of procedural history, the Complainant filed the instant appeal on March 4, 2021 ("the Appeal"). The Appeal appeared to be focused on Mr. Canfield's firewood splitting operation, but the Appeal documents were somewhat unclear: the Appeal

DONAHUE, TUCKER & CIANDELLA, PLLC
16 Acadia Lane, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253
83 Clinton Street, Concord, NH 03301

referenced other “industrial” uses, and seemed primarily focused on the Complainant’s dissatisfaction with the City’s response.¹

In light of the opaqueness of the Complainant’s Appeal, in advance of the April 12, 2021 ZBA hearing, counsel for Mr. Canfield discussed with City officials his preference that the Complainant, as the movant who bears the burden of proof and production, be given a full opportunity to present his case at the April 12, 2021 appeal, and Mr. Canfield be afforded an opportunity to respond at the *next* ZBA hearing. By fashioning the proceedings this way, 1) the nature of any ambiguity in the Appeal could be clarified and informed by the Complainant’s presentation, and 2) Mr. Canfield would not be prejudiced by any ambiguity associated with the Appeal documents, and instead would be given a fair opportunity to marshal any evidence he felt was appropriate to fairly meet the Complainant’s Appeal. This framework was adopted: the Complainant was given a full opportunity to present his Appeal on April 12, 2021, and the matter was continued to a later date such that Mr. Canfield could meet the allegations of the Complainant, which are now informed by the Complainant’s presentation.

Counsel for Mr. Canfield is concerned that the Complainant is now advancing that he should have an *additional* opportunity to present evidence and argue his appeal, notwithstanding his full and fair opportunity (which he exercised) to present his case at the April 12, 2021 ZBA hearing. This is an unfair advantage to the Complainant, who has already had his opportunity to present before this tribunal: he will be afforded a second “bite at the apple” if allowed to present again.

By its nature, this proceeding is adversarial: the Complainant is seeking to overturn the City’s administrative decision, while Mr. Canfield is defending same (in the course of defending his vested nonconforming use/condition). In adversarial proceedings, the movant puts on their case, followed by the objecting party: the plaintiff/movant is not afforded an opportunity to “try again” or put on a second case after its first opportunity to meet its burden of proof.

To that end, Mr. Canfield respectfully objects to affording the Complainant any further opportunity to put on additional evidence: he took advantage of the opportunity to present his case on April 12, 2021, ably arguing his position. The upcoming hearing is correctly devoted to Mr. Canfield putting on such evidence and arguments as he feels is appropriate to rebut the arguments of the Complainant that were advanced at the April 12, 2021 hearing. To that end, Mr. Canfield respectfully requests a preliminary ruling by the Chair confirming that the June 9, 2021 meeting is devoted to a presentation by Mr. Canfield and deliberation by the Board.

Factual History

Mr. Canfield purchased the subject property at 107 Betts Road, Rochester, NH (“the Property”) in 1978. Mr. Canfield has run his site work and septic installation business at the Property since at least 1979. As some of you may be aware, Mr. Canfield is an extraordinarily experienced septic system design and installation contractor, and had a hand in writing the regulations governing subsurface septic disposal systems in New Hampshire.

¹ Mr. Canfield states the foregoing not to criticize the Complainant; instead, this merely informs the conduct of the hearing on April 12, 2021.

The Property is over 9 acres in size, located in Rochester's Agricultural Zoning District. It abuts the Northcoast railroad tracks, which are currently used for hauling sand, gravel and other freight through the neighborhood on a regular basis. The Complainant's property is located across the Northcoast railroad tracks from the Property.

As a site work contractor and septic design and installation specialist, Mr. Canfield's work typically involves the clearing of forested areas and other initial site work associated with the development of real estate and the installation of subsurface septic disposal systems. As part of this work, Mr. Canfield (like other site work contractors and septic installation contractors) often removes significant earthen materials from a subject site. Similarly, the first step in much of his work is to clear a subject area of all existing timber.

To that end, and beginning at latest in 1979, Mr. Canfield began bringing earthen products and harvested timber onto the Property. He was expressly advised by City officials that he was permitted to do so under the City of Rochester's then-existing regulations. Once on site, the earthen materials are historically (and continuing to the present day) screened and otherwise processed with heavy machinery; typically, Mr. Canfield uses a screening plant that is admittedly very noisy, and can be heard from a mile away. This use has been ongoing since the late 1970's or early 1980's. The processed earthen products would then be used on future jobs in connection with Mr. Canfield's site work and subsurface septic disposal system contracts. Similarly, harvested timber would be seasoned on-site, then cut and split for firewood as an ancillary operation to Mr. Canfield's site work and septic system installation business. This was all done with the knowledge and consent of the City of Rochester, and was done openly consistent with said authorization.

These activities have continued regularly since at least 1979. Consistent with the 40+ years of continuous operation, other than the Complainant, no neighbors or abutters are known to have complaints concerning the ongoing operation: for example, John Weismantel, a direct abutter, submits under oath that the ongoing operations are not objectionable and do not disturb the use of his property. See, Affidavit of John Weismantel, submitted herewith. Similarly, Mr. Weismantel also confirms that, being a resident at his abutting property since 1973, that Mr. Canfield's operations have been consistently ongoing at the Property since at least 1979.

Mr. Weismantel's observations are borne out by the historical aerial photographs of the Property. Enclosed for the Board's consideration are the historical aerial photographs of the Property that the undersigned was able to collect as of the date of this submission. The aerial photographs, Exhibit A through Exhibit I, span 1992 through 2020. As the Board can observe, the aerial photographs reflect a static footprint of Mr. Canfield's operations. That said, and

consistent with Mr. Canfield's prior letter to the City, the machinery and materials on site are changing positions and visibly being moved over time, consistent with Mr. Canfield's ongoing operations. To be clear, however, the aerial pictures confirm that the area of Mr. Canfield's operation has remained the same size since at least 1992.²

Further enclosed for your review and consideration is an Affidavit from Ronald Boucher. Mr. Boucher, another abutter, has sworn under oath that Mr. Canfield's operations have been regularly conducted at the Property since the late 1970's or early 1980's. Mr. Boucher is in a special position to provide such evidence: he and his son use the Property pursuant to an arrangement with Mr. Canfield to split the firewood at the Property.

To be very clear, given the natural ebb and flow of Mr. Canfield's business, at times significant materials and timber could be at the Property, while at other times less materials and timber would be present. Historically, the volume of materials and timber stored on-site was a product of happenstance, depending on the nature and volume of the site work and septic system jobs that Mr. Canfield may have had at the moment: and at some times, there would be modest amounts of material and timber at the site; at other times, however, very large amounts of material and timber would be stored on the site, with processing and splitting ongoing associated with same. In sum, however, material storage and processing of timber storage and splitting was always an element of Mr. Canfield's business, beginning as far back as 1979. Further, the footprint of the business never expanded beyond its historical location/position.

The foregoing is borne out by two additional affidavits provided by abutters, Randy Levalle and Stephen Kerlee. Randy Levallee, a former ZBA member, resides at his home located at 234 Milton Ave., Rochester, NH, close to Mr. Canfield's firewood operation, and has resided at the property since 1983. As set out in Mr. Levallee's affidavit, his home is closer to Mr. Canfield's firewood operation than the home of the Complainant. In contrast to the Complainant's allegations, Mr. Levallee confirms that the noise associated with Mr. Canfield's operations is not intrusive, nor can he smell any fumes associated with diesel fuel or diesel exhaust. Mr. Levallee also confirms no expansion in the scope or nature of Mr. Canfield's business: in Mr. Levallee's opinion as a former ZBA member, Mr. Canfield's operations fall squarely within provisions governing vested grandfathered status found in Rochester's zoning ordinance and state statute.

Similarly, Stephen Kerlee, who resides at the abutting property at 105 Betts Road, Rochester, NH, confirms that he observes no appreciable difference in Mr. Canfield's operations over time. Mr. Kerlee has resided in his home since 1993. He confirms that neither he nor his wife have observed noise that bothers them, nor smelled diesel fuel or exhaust. Beyond that, Mr. Kerlee was effusive in his praise of Mr. Canfield and expresses how fine a neighbor Mr. Canfield has been over the decades.

² Mr. Canfield acknowledges that the aerial photographs only provide confirmation of no expansion since 1992, the date of the earliest aerial photograph the undersigned could find online. That said, the aerial photographs clearly rebut the suggestion of the Complainant, who suggests that the scope of Mr. Canfield's operation has changed over the last few years.

More recently, Mr. Canfield understands that the City took decibel readings in early May, 2021 of Mr. Canfield's operations, including his firewood splitting operation. Mr. Robert Lynch, Rochester's Compliance Officer, confirmed that no excessive decibel levels were registered, even in connection with the firewood splitting. Mr. Lynch confirmed to undersigned counsel that the firewood splitting registered decibel levels in the 50's, which is below normal conversation decibel levels of about 60. Given the objective evidence collected by the City, which is consistent with the sworn statements of the neighbors, the Complainant's bald complaints concerning the noise of Mr. Canfield's operations cannot be sustained.

Legal Analysis

i. The zoning complaint.

The instant appeal was initiated by the Complainant alleging that James Grant, Rochester's Director of Building, Zoning and Licensing Services, made an erroneous determination in his February 4, 2021 memorandum that determined that Mr. Canfield had "an existing non-conforming property/condition, and as such is allowed to continue." The Complainant's initial complaint appears primarily concerned with (and motivated by) the Complainant's own denial of an application (or inquiry into same) to site a business at a lot owned by the Complainant in the area of the Property.

Dissatisfied with the disposition of his inquiry into placing a commercial enterprise on his property, the Complainant complains of Mr. Canfield's business given its overt commercial nature. The Appellant complains of Mr. Canfield's use of the Property as "a processing plant/yard," and complains about noise from Mr. Canfield's operations, as well as diesel exhaust.

James Grant, the City's Director of Building, Zoning and Licensing Services, investigated the complaint and correctly identified that Mr. Canfield's business, which had been present at the Property for over 40 years, represented an existing, non-conforming property/condition.

ii. Mr. Canfield's vested, grandfathered non-conforming use.

Mr. Canfield understands that in 1986, the City of Rochester enacted the current version of the City of Rochester's Zoning Ordinance. As such, non-conforming uses, dimensions, etc. that pre-dated 1986 constitute a grandfathered, vested, non-conforming use. Non-conforming uses are protected in New Hampshire by statute as well as the N.H. Constitution: RSA 674:19 provides that zoning ordinances "shall not apply to...existing use[s]." See, RSA 674:19.

Furthermore, vested, non-conforming uses are a protected property right of the owner, and cannot be halted without committing an unconstitutional taking. See, e.g., Loundsbury v. City of Keene, 122 N.H. 1006 (1982).³

Even where uses are changed, the vested, non-conforming use status protects the landowner unless it is “substantially different” from the use to which the land was put before its alteration. See, e.g., Ray’s Stateline Market v. Town of Pelham, 140 N.H. 139, 143 (1995). “[I]n order to determine how much a nonconforming use may be expanded or changed, we must look to the facts existing when the nonconforming use was created.” Id. “In evaluating the extent of a nonconforming use, we may consider the following factors: the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different impact upon the neighborhood.” Id. Where “there is no substantial change in the use’s effect on the neighborhood, the landowner will be allowed to increase the volume, intensity or frequency of the nonconforming use.” Id. at 144.

The City of Rochester, recognizing the statutory and constitutional protection of vested, grandfathered non-conforming uses, provides in its zoning ordinance that “a non-conforming property/condition may be continued as it existed at the time of passage in this chapter or as it existed at the time it was made non-conforming by passage of any amendment to this chapter, except as the Board has provided by this section.” Rochester Zoning Ordinance, Section 275-30.2(A). Although the undersigned sees no difference between the Rochester grandfathering ordinance and the case law governing vested nonconforming statuses, the case law is very clear: a municipality’s grandfathering ordinance cannot be stricter (i.e., less permissive) than state statute, and therefore a municipality’s grandfathering ordinance will be construed consistent with state statute, notwithstanding the verbiage in the local ordinance. Ray’s Stateline Mkt. v. Town of Pelham, 140 N.H. 139, 144 (1995).

As set forth in great length above, Mr. Canfield and his historical neighbors have all confirmed, some under oath, that his use of the Property in an industrial manner, and for material processing and firewood splitting, have been ongoing for at least 40 years. Mr. Canfield and his abutters also confirm that his material processing/industrial use and firewood splitting operations have been regularly conducted at the Property during this time. To that end, the City of Rochester correctly found that Mr. Canfield enjoys a non-conforming, pre-existing use of the subject property and the City’s determination should not be disturbed.

Further, even if the Complainant’s arguments concerning an increase in the non-conforming use are accepted in spite of the historical evidence showing, 1) no change in the footprint of Mr. Canfield’s business; and, 2) the sworn affidavits from historical abutters reflecting consistent use, any change in the firewood splitting operation is not a “substantial

³ “The State Constitution provides that all persons have the right of acquiring, possessing and protecting their property. N.H. Constitution, Part I, Articles 2, and 12. These provisions also apply to non-conforming uses...as a result, we have held that a past use of land may create vested rights to a similar future use, so that a town may not unreasonably require the discontinuance of a non-conforming use.” Loundsbury v. City of Keene, 122 N.H. 1006 (1982)

change” such as to fall outside the vested grandfathered status. The unrebutted evidence is that Mr. Canfield, at all times, has used heavy machinery and soil processing equipment to haul material onto and out of the Property. Mr. Canfield’s sporadic earth-screening operations have historically been noisy, albeit relatively short in duration. The noise and effect on the neighborhood from Mr. Canfield’s historical activities, which are undoubtedly grandfathered, is certainly the equal to or greater than the noise and effect of the current firewood aspect of the operations on the Property.⁴ Further it cannot be ignored that both the Appellant’s and Mr. Canfield’s properties abut the Northcoast railway, which regularly hauls freight through the neighborhood. Finally, the City collected objective data, recording the decibel levels of Mr. Canfield’s operations: this testing confirmed that the noise of Mr. Canfield’s operation is no greater than a normal conversation. Given the nature of the neighborhood (bisected by an industrial railway), the historical use of heavy machinery, and the objective data reflecting modest noise levels, any change in the firewood splitting operation (if the Complainant’s position on same is accepted) does not constitute a “significant” change in the non-conforming, grandfathered use of the property enjoyed by Mr. Canfield.

iii. Conclusion

For all the reasons set forth above, Mr. Canfield’s use of the property presents a clear non-conforming use/property as contemplated by the Rochester Zoning Ordinance and RSA 674:19. Further, the disconnect between the complaints of the Complainant and the sworn statements of abutters of the Property is stark: whereas the Complainant suggests that Mr. Canfield’s use of the Property is unbearable and presents a significant increase in its effects on the neighborhood, the Complainant’s neighbors have sworn, under oath, that Mr. Canfield’s uses of the property, 1) are not bothersome; 2) are consistent with Mr. Canfield’s historical use; and, 3) do not present any material change over Mr. Canfield’s historic operations. Given that the Complainant has the burden of proof and persuasion on the record before the Board, (which contains multiple consistent sworn statements of abutters rebutting the Complainant’s allegations), the Complainant cannot sustain his burden of proof, and the complaint should be dismissed. At bottom, Jim Grant’s findings, following his investigation, were well-founded and should not be countermanded by this Board.

Very truly yours,

DONAHUE, TUCKER & CIANDELLA, PLLC



Christopher T. Hilson
chilson@dtclawyers.com

CTH:nes
Enclosure

cc: Tom and Sandra Canfield
Scott Hogan, Esq. (Counsel for Complainant)

⁴ Indeed, the Complainant does not distinguish the source of the alleged noise and fumes he complains of: that is, whether they come from the hauling and processing of earthen materials, or whether they are the product of the firewood splitting aspect of the business.

AFFIDAVIT OF JOHN WEISMANTEL

The Affiant, being duly sworn, does depose and state as follows:

1. My name is John Weismantel. I make this affidavit at my own first-hand knowledge.
2. I reside at 115 Betts Road, Rochester, New Hampshire, which abuts the subject property owned by Thomas Canfield at 107 Betts Road, Rochester, N.H.
3. I first began living at my home in the early 1970's. I have lived at my property ever since.
4. Furthermore, I rented the garage located next door to my property, and ran said automotive garage from 1982 to 1988. During that period, I worked on Tom Canfield's commercial vehicles, inspecting same and providing other work as necessary.
5. As such, I have had consistent and ample opportunity to observe Mr. Canfield's operations at 107 Betts Road, Rochester, New Hampshire.
6. Tom's commercial operations at 107 Betts Road have been consistent since the late 1970's or very early 1980's. That is, Tom installs septic systems and does other site work. 107 Betts Road serves as the base of his operations. He brings in earth material from his site work and septic installation jobs, screening and otherwise processing the materials on-site. He then takes materials out to use them in connection with his operations.
7. Tom also has always brought in timber from his site work and septic installation business; that is, the first step of Tom's operation is to clear a parcel or standing timber. Since he first began using his property in the late 1970's, he would bring timber back to his property to cut and split same. His firewood operation was always a consistent part of Tom's business throughout the decades.

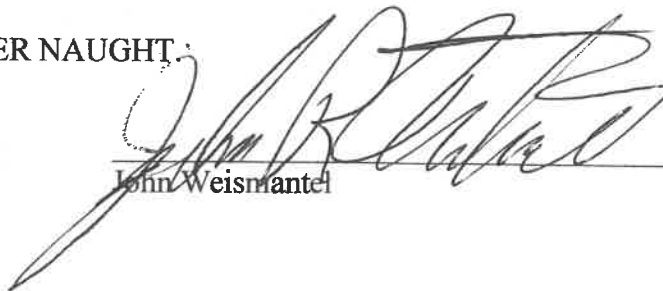
8. Indeed, Tom's firewood operation continued through the economic downturn in 2008. That is, all site work and septic installation (and presumably all building trades) suffered as a result of the economic downturn. That said, I can clearly recall Tom continuing to cut firewood at the site during this period.

9. In sum, Tom always consistently used the subject property as a site for his commercial operations, which include material processing and firewood splitting. While the amount of material or timber on site may change from time to time depending on the jobs he may be doing at the moment, I haven't observed any increase to the footprint of his operation at the site beyond what was historically present.

10. Beyond the foregoing, I have lived on the abutting property for the entirety of Tom's use of 107 Betts Road for commercial purposes. I can clearly and unequivocally state that Tom's operations, from the late 1970's to today, do not disturb or bother me, and I have no objection to same.

THE AFFIANT SAYETH FURTHER NAUGHT.


Date 04/13/2021


John Weismantel

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, John Weismantel, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this 13 day of April, 2021.

Before me,



Notary Public/Justice of the Peace
My commission expires:

ASHLEY M. LANGLAIS
Notary Public - New Hampshire
My Commission Expires September 23, 2025

Map by NH GRANIT

EXHIBIT

tabbles

A
(1992/1998)



Map Scale

1: 3,247

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Notes

NH DOAs 1992/98



Map by NH GRANIT

EXHIBIT

tabbies

B
(2003)



Map Scale

1: 3,247



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Notes

2003



Map by NH GRANIT

EXHIBIT

tabbles

C
(2005)



Map Scale

1: 3,247

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2005



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EXHIBIT

tabbles

D

(2008)



Map Scale

1: 3,247



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Notes

2008



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EXHIBIT

tabbles

E
(2009)



Map Scale

1: 3,247

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Notes

2009



EXHIBIT
F
(2010)



EXHIBIT

G

(2015)

tabbles



EXHIBIT
H
(2017)



EXHIBIT

I

(2020)



AFFIDAVIT OF RONALD BOUCHER

The Affiant, being duly sworn, does depose and state as follows:

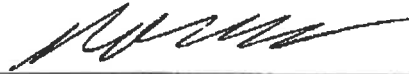
1. My name is Ronald Boucher. I make this affidavit at my own first-hand knowledge.
2. I reside at 99 Betts Road, Rochester, New Hampshire, which abuts the subject property owned by Thomas Canfield at 107 Betts Road, Rochester, N.H.
3. I first began living at my home in 1980.
4. Since that time, I have had consistent and ample opportunity to observe the operations at 107 Betts Road.
5. Indeed, Tom Canfield and I have cut firewood at 107 Betts Road consistently since 1980.
6. At the outset, Tom Canfield, in connection with his site development and septic installation business, would log properties where he was installing septic systems. He would bring the timber back to 107 Betts Road and either he and/or I would cut the timber into firewood. Given the number of septic systems Mr. Canfield has installed over the years, the firewood operation was a consistent element of his site development and septic system installation business.
7. I have also used the property, consistent with my arrangement with Mr. Canfield, to cut firewood, since the 1980s.
8. The timber for my firewood operation has historically come from both Mr. Canfield and from other sources.

9. I can unequivocally state that firewood splitting has been a regular and ongoing operation at 107 Betts Road since at least 1980. Firewood cutting and splitting continues to the present time as part of the ongoing operations at the property.

10. I have spoken with my neighbors concerning the zoning complaint, and all my neighbors confirm that, (a) the firewood cutting and splitting at the subject property has been ongoing for at least 40 years; and, (b) they have no complaints concerning the operation.

THE AFFLANT SAYETH FURTHER NAUGHT.

Date 4/12/21



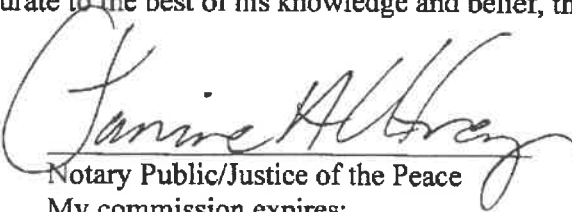
Ronald Boucher

STATE OF NEW HAMPSHIRE
COUNTY OF STRAFFORD

Personally appeared before me the aforementioned, Ronald Boucher, and made oath that the foregoing statements are true and accurate to the best of his knowledge and belief, this 12 day of April, 2021.

Before me,

JANINE M. ALLFREY
NOTARY PUBLIC
State of New Hampshire
My Commission Expires
November 6, 2022



Notary Public/Justice of the Peace
My commission expires:

11/6/2022