



TOWN OF HINGHAM
Board of Appeals

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**ADMINISTRATIVE APPEAL
DECISION**

IN THE MATTER OF:

Petitioner/Owner: Penniman Hill Farm & Garden, Inc.
P.O. Box 206
Accord, MA 02018

**Petitioner's
Representative:** Thomas F. Patch, Esq.
P.O. Box 187
Hingham, MA 02043

Property: 266 Whiting Street

Title Reference: Plymouth County Registry of Deeds, Book 43665, Page 39

SUMMARY OF PROCEEDINGS:

This matter came before the Board of Appeals (the "Board") on the application of Penniman Hill Farm & Garden, Inc. (the "Petitioner") for an Administrative Appeal of the Building Commissioner's enforcement order, dated January 27, 2022, stating that property at 266 Whiting Street in Residence District C is being used as a "contractor's yard" in violation of §III-A, Schedule of Uses, of the Hingham Zoning By-Law (the "Enforcement Order").

The Board opened a hearing on the application at a duly advertised and noticed public hearing on April 12, 2022 via Zoom as an alternate means of public access pursuant to an Order issued by the Governor of Massachusetts, dated March 12, 2020, Suspending Certain Provisions of the Open Meeting Law. The Board panel consisted of members Robyn S. Maguire, Chair, and Jed Ruccio, and associate member Mario Romania. The Petitioner's Attorney, Mr. Thomas F. Patch, was in attendance to represent the Petitioner. Mr. Nessralla, principal of the Petitioner, was also in attendance. The Board was assisted in its review by Special Real Estate Counsel, Susan C. Murphy, Esq., of Dain, Torpy, Le Ray, Wiest & Garner, P.C. The Building Commissioner, Michael Clancy, also attended the hearing.

During the hearing, the Board heard testimony from neighbors in opposition to the appeal. Throughout its deliberations, the Board has been mindful of the statements of the Petitioner and the comments of the general public, all as made or received at the public hearing.

BACKGROUND:

The subject property presently consists of over six acres of land improved by a 7,000 SF building, a permitted greenhouse agricultural use and a Cellular Tower allowed by Special Permit in 2017. The current property is what is left of the Penniman Hill Farm that has been in business on this parcel dating back to the 1800s, running a farm stand and other agricultural businesses protected under MGL Chapter 40A, Sections 3.

In 2018, the Zoning Board heard and approved a Special Permit application to construct an assisted living facility on 5.13 acres of the original property. Today, the remaining 6 acres of property, numbered 266 Whiting Street, still has the commercial greenhouse on site that is said to house plants for the Isabella Stewart Gardner Museum. The greenhouse use continues to benefit from the protection of Ch. 40A, sec. 3.

As set forth in the Enforcement Order, in October of 2021, the Building Commissioner received a complaint from a neighbor of the property that commercial entities were conducting additional businesses at 266 Whiting Street. Upon making a site visit, the Building Commissioner met with the owner of *Tree Service of New England*, who was storing equipment and materials on the site. The owner agreed to leave the property, and was advised by the Commissioner that if he did not do so within 14 days, further action would be taken.

On or about January 26, 2022, the Building Commissioner received another complaint that contractors were using 266 Whiting Street to store large scale equipment, trucks, trailers and other equipment to process trees into firewood. The Building Commissioner once again made a site visit and confirmed that two commercial businesses, *Tree Service of New England* and *M&B Excavating Inc.*, were using the site to operate their businesses. The Building Commissioner issued the Enforcement Order and a fine of \$100 on January 27, 2022. This appeal of the Enforcement Order was filed on February 24, 2022.

HEARING / DISCUSSION:

The Petitioner represented in the application, as well as during the hearing, that both the activities of *Tree Service of New England* and *M&B Excavating, Inc.*, were related to agricultural uses on the property and therefore are protected under M.G. L. c. 40A §3. In response to questions from the Board regarding the nature of the activities that the Petitioner alleges supported the agricultural activities, the Petitioner cited to periodic services provided to the agricultural activities and that between such periodic activities both businesses stored materials, trucks and equipment at the property in a "barter"-type arrangement.

Evidence was presented that both of the cited businesses have primary places of business at other locations. No evidence was presented that these types of activities by these or other third-party businesses were regularly conducted on the property in alleged support of agricultural activities prior to the fall of 2021 when abutter complaints were received by the Building Commissioner.

Counsel for the Petitioner cited to M.G.L. c. 40A §3, but cited to no case law to support the Petitioner's interpretation that the activities of the cited businesses were protected by the statute. In addition to the provisions of M.G.L. c. 40A §3, the Board took note of the definitions of "Agriculture" under M.G.L. c. 128 § Attorney Murphy, on behalf of the Town, reviewed for the Board the facts and finding of existing case law, including five cases for the Board; *Henry v. Board of Appeals Dunstable*, 418 Mass. 841 (1994), *Town of Needham v. Winslow*, 330 Mass. 95 (1953), *Richardson-North Corp. v. Zoning Board of Uxbridge*, 97 Mass.App.Ct. 1128 (2020) (Rule 1:28), *Cotton Tree Service, Inc. v. Zoning Board of Appeals of Westhampton*, 89 Mass.App.Ct. 1136 (2016) (Rule 1:28), and *Skydell v. Tobin*, No. 04 MISC. 303324 (KCL), 2010 WL 1367288 (Mass. Land Ct., April 6, 2010). In all five of these cases, findings were made that uses similar to those cited by the Building Commissioner were not protected under Ch. 40A, sec. 3. In one case in particular, *Cotton Tree Service v. Zoning Board of Appeals of Westhampton*, the Court, referencing to the production of a product (mulch) from the activity of processing cut up trees, found that the activities did not involve the growing or harvesting of any forest products: "While the mulch produced may be a 'valuable agricultural product', the production process is not agricultural". *Cotton Tree Service* at *2.

The Board heard substantial public comment from direct abutters about the intensity of the uses by the cited businesses being operated at 266 Whiting Street and that these activities began recently. They shared photos with the Board, and many commented on the noise created by the Tree Service cutting trees into firewood.

FINDINGS:

As supported by the Building Commissioner via site visits and a subsequent enforcement order dated January 27, 2022, as well as abutter testimony taken at the public hearing, it is clear that the two businesses, *Tree Service of New England* and *M&B Excavating Inc.*, have been operating commercial entities at 266 Whiting Street. These types of uses, commonly referred to as "contractor yard" types of businesses, are not permitted in Residence District C of the Hingham Zoning By-law. The Town has consistently classified these types of uses as "light industrial uses" under Section III-A, 6.2 of the Zoning By-law. Such uses are only permitted or allowed in the Office Park, Industrial, Industrial Park and Limited Industrial Park zoning districts (except to the extent that they are pre-existing non-confirming uses in other zoning districts of the Town). Per the Hingham Zoning By-Law, in Section III-A Schedule of Uses, all commercial and industrial uses, are prohibited in the Residence C District.

The Chair proposed the following Finding:

That no commercial uses, other than the legal, pre-existing agricultural greenhouse use, are permitted in Residence District C. Therefore, the commercial "contractor yard" uses, including storage of equipment, trucks, trailers, materials and the processing of trees into firewood, by Tree Service of New England and M&B Excavating, identified in the Building Commissioner's notice of violation, dated January 27, 2022, are prohibited uses on the property at 266 Whiting Street.

DECISION:

Upon a motion made by Jed Ruccio and seconded by Mario Romania, and based upon the information submitted and received at the hearing, and the deliberations and discussions of members during the hearing, the Board voted unanimously to uphold the Building Commissioner's enforcement order, dated January 27, 2022, and to, thereby deny the Administrative Appeal.

For the Board of Appeals,



Robyn S. Maguire
April 22, 2022

This Decision shall not become effective until (i) the Town Clerk as certified on a copy of this decision that twenty (20) days have elapsed after the decision has been filed in the office of the Town Clerk and no appeal has been filed or that if such an appeal has been filed, that it has been dismissed or denied, and that (ii): a copy thereof has been duly recorded in the Plymouth County Registry of Deeds and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title.