

Board Members
Brian White, Chair
Gibb Phenegar, Vice Chair
Christina Oster, Member
Tom Emero, Member
Rori Stumpf, Member
Carol Gould, Associate Member



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TOWN OF MEDWAY
COMMONWEALTH OF MASSACHUSETTS
ZONING BOARD OF APPEALS

RECEIVED TOWN CLERK
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20 Day Appeal
October 21, 2021

DECISION
APPEAL - DENIED
25 WINTHROP STREET

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

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

Approval Requested: The application is for an **appeal** under M.G.L. chapter 40A section 8 seeking to reverse a Cease and Desist order issued July 1, 2021 by the Building Commissioner acting as Zoning Enforcement Officer, which prohibits the applicant from operating at the site.

Members Participating: Brian White (Chair), Gibb Phenegar (Vice Chair), Christina Oster (Clerk), Tom Emero (Member), Rori Stumpf (Member)

Members Voting: Brian White (Chair), Gibb Phenegar (Vice Chair), Christina Oster (Clerk), Tom Emero (Member), Rori Stumpf (Member)

Date of Decision: September 22, 2021

Decision: **Appeal denied**

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Date of Decision: September 22, 2021

Decision: **Appeal denied**

I. PROCEDURAL HISTORY

1. On July 20, 2021, the Applicant filed an appeal from a cease and desist order issued July 1, 2021 by the Building Commissioner acting as Zoning Enforcement Officer, prohibiting the applicant from operating at the site.
2. Notice of the public hearing was published in the Milford Daily News on August 4, 2021 and August 11, 2021 and notice sent by mail to all interested parties and posted in Town Hall as required by G.L. c. 40A, §11.
3. The public hearing was opened on August 18, 2021, and continued to September 1, 2021. No testimony was taken at the September 1st public hearing; the hearing was continued to September 22, 2021. The hearing was closed September 22, 2021.
4. The property, 25 Winthrop Street (the “Property” or the “Briggs property”), is located in the Agricultural Residential I (AR-I) Zoning District. The front setback requirement is 35 feet and the side and rear setback requirements are 15 feet. The minimum lot area requirement is 44,000 sq. ft. and the minimum frontage requirement is 180 feet.
5. The Board notified Town departments, boards and committees of this application.
6. All documents and exhibits received during the public hearing are contained in the Zoning Board of Appeal’s files and listed in Section V. of this Decision.

II. SUMMARY OF TESTIMONY

Summary of August 18, 2021, Public Hearing: Attorney John Maciolek and Paul Doherty were present on behalf of the applicant, D & D Mulch and Landscaping (D & D). Mr. Doherty did not offer any testimony. Mr. Maciolek stated their position that D & D uses the property to cultivate soil, which he stated is an allowed agricultural use under the definition of “agriculture” in the Zoning Bylaw, which incorporates the definition in G.L. c. 128, §1A.

Mr. Maciolek stated that D & D uses about 5 acres of the Briggs property (the “Site”) for its operation, the remainder of the Briggs property he claimed is used for the farming of hay by the Property owner. Further, he claimed that D & D has been on the Site since 2016 with the Town’s knowledge. Mr. Maciolek explained the operations at the Site: Materials are brought to the Site from other D & D locations. The screener has to be warmed up before it is used, and it is operational by about 7:15 or 7:30 a.m. Material that has been composting in piles is brought by front end loader to the screener, which uses a rotating drum with a grid that allows smaller pieces to pass through it. The larger pieces of debris are separated out, the end result is a useable loam. Product such as grass clippings and leaves need to be brought onsite in order to mix in and decompose. He stated that the useable loam augments the fertilization of the hay for Mr. Briggs’ farm, but the majority of the product is brought to other properties owned by D & D for retail sales. On the property there are piles of composting material, material that has been brought in, usable loam, and material to be brought out. He also stated that the hours of operation are 7 a.m. to 5 p.m. on weekdays and 7 a.m. to 2 p.m. on Saturdays. He stated D & D does not operate there all year, specifically not in the winter months.

He was asked if D & D is aware of the noise and odor complaints and if they had done anything to mitigate the problem. Mr. Maciolek stated that they were aware of the complaints but was adamant that there was no odor issue. He also stated that riprap was added near the end of the driveway to cut down on

noise, as well as moving the screening machine back from the road and instructing drivers on how to operate. Mr. Maciolek claimed the use, which involves screening compost to produce loam, has not changed or intensified since D & D first began using the Site. Mr. Maciolek stated his belief that there has been no violation of the Zoning Bylaw and, therefore, there is no basis for a Cease and Desist.

Questions were asked of Mr. Maciolek as to how many loads of material are brought to and taken off the Site daily, where the offsite material comes from, and the percent that is sold versus used by the farm, and whether there are limitations on the number of days per year D & D is allowed to operate by the Department of Environmental Protection (DEP). Mr. Maciolek did not have the information available. It was noted that DEP paperwork shows that 3,100 tons of material was brought onto the Site last year, and he was asked how much of that is used on the property by Mr. Briggs. Mr. Maciolek did not have that breakdown. He was also asked to provide the Board with the records he kept pursuant to his DEP permit. The Applicant was asked to find out how many days per week the operation is running and how often the equipment is running throughout the day. He was also asked whether Mr. Briggs' haying operation was dependent upon the compost operation, the percentage of material used on the farm, and if operational plans and records could be provided.

When asked to explain how the composting is an accessory use, Mr. Maciolek stated that it is an agricultural use, so it does not matter whether it is accessory. However, he added that it is accessory to the farm use because a portion of the finished product is used in the hayfield. The Board also asked to see paperwork associated with the purchase of materials that are brought to the Site.

Building Commissioner Jack Mee stated that he first visited the Site in 2017 with the Conservation Agent and Health Agent to inspect for violations. At that time, he observed various materials around the Site, including concrete, asphalt, bricks, and a boat. Mr. Doherty at that time stated that he would be taking over the composting operation run by Mr. Briggs' son, would clean up the property, and would acquire all the necessary DEP permits. Mr. Mee stated that he returned to the Site months later, and it had been cleaned up. There were no complaints from neighbors at the time.

Mr. Mee visited the Site at a later time, when a screener was operating by the front of the property, near Winthrop Street. He had concerns over the level of noise that was created; Mr. Doherty informed him that he had already ordered a new screener that would be quieter. Mr. Mee went back to the property and confirmed that the new screener was much quieter. Over time, neighbors continued complain about the noise of rocks tumbling in the screener, the volume of trucks driving in and out, and other noise. Mr. Mee believes that when only decomposing material is passed through the screener, there is very little noise. He stated that it appears that what is going through the screener is not just organic materials. He stated his belief that the materials brought in to be mixed are what is causing the problem. Mr. Mee claimed that the use is not the same as it had been the first three years of operation because the screener can now be heard running all day long, and the sound of the rocks tumbling in the screener can be heard throughout the neighborhood. Mr. Mee stated his belief that the operation has become more of a commercial operation. Mr. Mee also provided photographs of the equipment on the property. There are several piles of materials, which include a pile of large rocks. He noted that there have been 27 citations issued to D & D since the cease and desist order was issued, with no stop in activity.

Tom Gay, a resident at 23 Maple Street, expressed concern over what seems to be a commercial operation rather than an agricultural one. He also stated that while living across from the Briggs' hayfield, he has never seen loam spread. The Board also received testimony from David Linardy of 28 Winthrop Street, Gregory Bayse of 3 Maple Street, Arthur Bergeron of 3 Wild Turkey Run, and Ronald Brossi of 7 Maple

Street. Concern was expressed over the large number of trucks, some with capacity up to 33 tons, in and out of the property daily, pervasive smell, ground shaking, and early start times. All stated that the noise of rocks tumbling is constant. Several abutters echoed the belief that no loam has been spread on the hayfield. They also stated that any outdoor use of their properties has been restricted due to the noise and odor. Mr. Bergeron stated that the screening machine is now located next to his property and the noise is unbearable. Mr. Brossi stated that some of the trucks going into and out of the site are from paving companies and excavating companies. He stated that the operation is like a construction site that will never end.

The Board continued the public hearing to September 1, 2021, in order to provide the applicant time to submit the additional information requested by the Board members. No testimony was received at the September 1st public hearing; the hearing was continued to September 22nd.

Summary of September 22, 2021, Public Hearing: Attorney John Maciolek and Paul Doherty were present on behalf of D & D. Mr. Doherty did not offer any testimony. Amy Kwesell of KP Law, Town Counsel, reminded the Board that there are two items to focus the discussion around: what the use of the land is, and whether that use is agricultural. Ms. Kwesell informed the Board that the preliminary injunction motion in the Norfolk Court was denied, and that the ruling by the court was a preliminary ruling, based on what was before the judge at the time of the hearing. The case will now move forward on the merits. Ms. Kwesell clarified that the definition of agriculture that Mr. Maciolek referenced was not complete and read the entire statutory definition into the record. The courts have consistently held that materials sold commercially must be grown, raised, or otherwise produced on site to be agricultural. So, the materials that go into the loam which D & D produces must originate from this Site in order to be considered an agricultural use, which they do not. This is from a Peabody case decided by the Supreme Judicial Court. There are also cases from the Land Court, which make it clear that cultivation or tillage of “the soil” refers to the soil on the site.

Mr. Maciolek stated he disagreed with Ms. Kwesell’s interpretation of the statute. Mr. Maciolek reiterated his position that the cease and desist is incorrect and should not be upheld. He stated that the court was correct in allowing the use when it denied the preliminary injunction. Mr. Maciolek stated that the use of the property by the Applicant matches the definition of agricultural use as cultivation of soil. Mr. Maciolek noted the applicant had supplied answers to the questions that were asked of the Applicant at the prior hearing. He stated that the statute does not place limits on the volume of materials or number of trucks for an agricultural use.

Members of the Board commented on the information that had been supplied by the applicant in response to its questions from the last hearing. The Board noted the volume of 20-30 trucks going in and out of the Site daily, six days a week, as stated by the applicant, seemed inconsistent with an agricultural use and consistent with a commercial operation. It was noted that the answer to number 4 on the document provided by the Applicant states that the same amount of material that is brought into the Site is brought out of the Site, but the answer to number 3 states that some of the material is used on the Briggs’ farm, which seemed contradictory. Mr. Maciolek stated that he would have to check on the information and certainly most of the material is brought off the Site, but claimed that some is used on the Briggs’ farm.

Dave Linaryd of 28 Winthrop Street stated that 90% of the material on the property does go offsite. Further, he does not believe that Mr. Briggs uses any of the materials. Mr. Linaryd has never seen the trucks go towards the farm and has never seen a truck dump product at the farm.

Arthur Bergeron of 3 Wild Turkey Run provided multiple definitions of the word cultivation, which were provided to the Board to be added to the record. These definitions refer to cultivation as working the existing soil on a property by breaking the crust, turning the weeds and preparing a planting bed for seeds. It is not accepting truckloads of excavated soil from elsewhere and manufacturing a product by combining it with other organic materials, putting it through a screener, and providing a finished product. He noted that the D&D website twice refers to its process as manufacturing. He referred to the case of Jackson v. Building Inspector of Brockton where the court stated that the product has to be used primarily for the farm or it is manufacturing. Based on the amount of product, and the price quoted on the D & D website, he stated that D & D is making over \$200,000 per week from this operation. This product is being sent to D & D's retail outlets for sale to homeowners and landscape contractors, not the farm. Mr. Bergeron also stated that he contacted local farms so ask how much screened, processed loam they purchase from companies to grow produce – the farms responded that they would not use this sort of manufactured loam because it would not enhance their land. Any compost that included grass clippings from lawns could have pesticides and herbicides that are commonly applied to lawns.

Ronald Brossi of 7 Maple Street reiterated that he rarely sees trucks heading towards Brigg's farm, and if they do, he has not seen loam or product distributed to the farm. He also stated that the answer to Question #8 provided to the Board states that tailings leave the site, which consists of stone, and therefore is not biodegradable material.

Board members commented on the application. Mr. Emero stated his layman's understanding of the definition of cultivation is the tilling, or the sowing, of seeds or products into the soil to grow a crop and is not the aggregation of various products that come from another location including leaves, yard waste, and other products, composting them, mixing them, grinding them, and taking them off site. That might be the creation of soil, but cultivation is using soil that already exists on the property. Mr. Stumpf stated that taking materials from off site and processing them and sending them out is not agriculture. Other members expressed similar sentiments.

The Board then reviewed draft proposed findings of fact that had prepared by staff, and voted to include the following findings of fact.

III. FINDINGS

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

1. The Shady Oaks Realty Trust, Robert A. Briggs, Trustee, is the owner of the premises at 25 Winthrop Street, which consists of approximately 47 acres (the Briggs Property). The Briggs Property is classified as agricultural land under G.L. c. 61A.
2. D & D Mulch and Landscape, Inc. (D & D) entered into a lease for a portion of the Briggs Property by a "Commercial Lease Agreement" that was effective January 1, 2018 and ended on December 21, 2020, with D & D having the option to extend for three additional terms of one year each.
3. The lease provides for a rent payment that escalated from \$30,000 in year one to \$32,400 in year three. The lease provides that D & D may use the premises for "the purpose or [sic] storage and manufacturing of compost and loam. Collecting landscape debris and materials and parking of vehicles and/or equipment

necessary to operate.” The lease requires D & D to provide Mr. Briggs with 100 yards of compost per year.

4. D & D uses approximately 5 acres of the land at 25 Winthrop Street for its operation (the Site).

5. The Site is located in the AR-1 zoning district, which allows “agriculture” by right. The Town’s zoning bylaw further provides in Section 5.2.A that “any use not listed in Section 5.4, Schedule of Uses, or otherwise allowable under the provisions of this Zoning Bylaw is prohibited.”

6. The town’s zoning bylaw defines “agriculture” as defined in G.L. c. 128, §1A, which provides:

"Farming" or "agriculture" shall include farming in all of its branches and the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural, aquacultural, floricultural or horticultural commodities, the growing and harvesting of forest products upon forest land, the raising of livestock including horses, the keeping of horses as a commercial enterprise, the keeping and raising of poultry, swine, cattle and other domesticated animals used for food purposes, bees, fur-bearing animals, and any forestry or lumbering operations, performed by a farmer, who is hereby defined as one engaged in agriculture or farming as herein defined, or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market.

7. On July 1, 2021, the Building Commissioner, Jack Mee, delivered a cease and desist order to D & D, finding that D & D’s operation of the Site was not allowed in the AR-1 zoning district, and ordering it to cease operations at the Site.

8. Despite the cease and desist order, D & D continued its operations at the Site. On July 30, 2021, the Town filed an action in the Norfolk Superior Court against D & D, seeking among other things, a preliminary injunction to require D & D to comply with the cease and desist order.

9. By an order dated August 27, 2021, the Court denied the Town’s motion for a preliminary injunction.

10. In 2017, town officials, including Mr. Mee, first became aware of D & D’s proposed use of the site. Town officials met with Paul Doherty, the president of D & D, at the Site. At that time, the Site included a small composting operation conducted by Mr. Briggs for his farm. There was also considerable debris and trash on the Site. Mr. Doherty indicated that D & D would be taking over the composting operation and would be applying for a Department of Environmental Protection (DEP) permit.

11. D & D received a General Permit for Recycling, Composting or Digestion Operation for the Site from the DEP in 2018. According to reports filed by D & D with DEP, 3,100 tons of compost were brought to the Site in calendar year 2020.

12. The Building Commissioner received complaints from neighbors in 2020 regarding dust, noise, truck traffic, and odors emanating from the Site. At that time, D & D was using an older screener, located near Winthrop Street, that at times created constant, loud noise that could be heard from some distance off the Site, including neighboring properties and in nearby Choate Park.

13. A new screener was later installed and moved to the rear of the Site, but the noise is still audible off the Site, including at the end of Wild Turkey Run, a residential street.

14. D & D's current use of the site consists of trucking in quantities of materials from off-site, such as grass clippings and leaves, which are deposited on the ground. Materials are brought from other D & D locations, and from development sites such as new housing developments and golf courses. These materials are placed in large windrows on the site by front end loaders, and the windrows are turned on a regular basis to aid in decomposition. The materials at certain points are run through a large screener that is located on the site. The screener uses a rotating drum to sift the materials.

15. The screener is warmed up beginning at 7:00 a.m., Monday through Saturday. After it warms up for about 15 minutes, materials from the windrows are brought to the screener by front end loader and put in the screener to sift out any unsuitable materials. The end result is usable loam that is then loaded onto trucks and brought to other D & D sites for retail sale. Small rocks or "tailings" are also trucked off the Site.

16. Approximately 20 to 30 trucks of varying sizes enter and exit the site daily during the spring, about 10 to 20 during the summer, and a mix of trucks in the fall. Approximately 3,000 tons or 15,000 cubic yards of materials are brought on and off the Site each year.

17. Some of the materials are organic materials including leaves and grass clippings, but there are also numerous rocks. There are piles of discarded rocks located on the Site.

18. According to DEP reports, there are three to four windrows on the Site at any time, each about 15 feet high and of varying lengths from 180 to 375 feet approximately. In 2020, DEP estimated that the windrows contained about 16,449 cubic feet of materials.

19. The operation of the screener, including the tumbling of rocks inside the screener drum, the trucks entering and leaving, and the operation of up to three front end loaders, all contribute to the noise which emanates from the Site. This noise can be constant throughout the day, making it impossible for neighbors to enjoy their residential properties. The screener causes the ground to shake at times.

20. The operation has changed to the point where it is simply a commercial enterprise.

21. The Board has considered the court order on the motion for preliminary injunction. Based upon the evidence submitted to the Board, however, as well as the Board's interpretation of the Town Zoning Bylaw, the operation being conducted by D & D is not agricultural within the meaning of the Zoning Bylaw.

22. The Board finds that bringing organic materials onto the property from other locations, and then processing it into a usable material, does not constitute agriculture. As noted by the court in Cotton Tree Services, Inc. v. Zoning Board of Appeals of Westhampton, 89 Mass. App. Ct. 1136, 55 N.E. 3d 434 (Unpub. 2016), while the product produced in this manner "may be a 'valuable agriculture product', in that it 'can be used as a soil enhancer for growing horticultural products'", that "does not amount to agriculture or farming". Id. at p. 435.

23. Based on the definitions and common usage of "cultivation" and "cultivate" from dictionary and agricultural industry sources, D & D's activities at the Site do not constitute "cultivation of soil" within the meaning of G.L. c. 128, §1A and the Zoning Bylaw and are not a primary or accessory agricultural use. Cultivation of soil refers to turning and breaking up the existing, in-ground soil on a parcel of land by loosening it, removing weeds, etc. preparatory for planting. Cultivation of soil does not include bringing in materials from off the site, processing it, and then trucking it off-site to be used elsewhere.

24. Based on the above findings, the Board finds that the cease and desist order should be upheld.

IV. INDEX OF DOCUMENTS

A. The following materials were submitted by the applicant:

1. Appeal Form
2. Response to questions from the Board dated August 26, 2021
3. Compost tonnage summaries for Shady Oaks for years 2019, 2020, and 2021
4. Compost shipping receipts for Shady Oaks from D & D Mulch for years 2020 and 2021
5. Affidavit of Paul Doherty dated August 20, 2021, with attachments.
 - a. A letter from Mr. Mee to Mr. Linardy, dated February 8, 2021.
 - b. DEP reports dated May 4th, May 11th, and May 18th.
 - c. DEP General Permit for Recycling, Composting or Digestion Operation Renewal for calendar year 2019.
 - d. DEP General Permit Certification form for calendar year 2020.
 - e. Summary of the tons received for 2020.
 - f. Aerial photographs.

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

1. Email from Arthur Bergeron dated July 31, 2021
2. Documents related to meaning of cultivation submitted by Arthur Bergeron on September 22, 2021

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

1. Cease and desist order issued July 1, 2021 by the Building Commissioner acting as Zoning Enforcement Officer
2. Complaint Letters and Petitions from various abutters dated September 25, 2020, October 30, 2020, November 2, 2020, May 22, 2021
3. Email from Paul Harkey dated November 18, 2020
4. Letter addressed to Paul Doherty with questions from Jack Mee dated December 1, 2020 and D & D's responses
5. D & D General Permit Certification for Composting Operations pursuant to 310 CMR 160.4
6. Excerpts from the Medway Zoning Bylaw and Massachusetts Zoning Regulations
7. Department of Environmental Protection Site Assignment Regulations for Solid Waste Facilities, 310 CMR 16.00.
8. BWP Site Visit Report dated December 10, 2020
9. Email correspondence between Arthur Bergeron and James McQuade of Department of Environmental Protection dated April, 2021
10. Letters from Jack Mee dated February 8, 2021 to Arthur and Paulette Bergeron, and David Linardy
11. Robert Briggs agricultural income report to Donna Greenwood, Assessor, dated September 28, 2021 [sic] for fiscal year 2022
12. Commercial Lease Agreement between The Shady Oaks Realty Trust and D & D Mulch and Landscaping, Inc. dated March 25, 2018
13. Nancy E. Teti, as Trustee of Coolidge Street Realty Trust, and Jennifer Hawkins v. The Town of Sherborn dated December 6, 2013

14. Photographs of 25 Winthrop Street
15. Citations issued through July 21, 2021
16. Memo from the Planning and Economic Development Board dated August 17, 2021
17. Inspection Report from the Board of Health dated April 10, 2017
18. Cease and desist order issued September 23, 2020 by the Health Director
19. Decision and Order on Plaintiff's Motion for Injunctive Relief dated August 30, 2021
20. Draft Proposed Findings of Fact

VI. VOTE OF THE BOARD

By a vote of 5 to 0, on a motion made by Christina Oster and seconded by Tom Emero, the Zoning Board of Appeals hereby **DENIES** the Applicant, D & D Mulch, an **APPEAL** under M.G.L. chapter 40A section 8 seeking to reverse a Cease and Desist order issued July 1, 2021 by the Building Commissioner acting as Zoning Enforcement Officer, which prohibits the applicant from operating at the site.

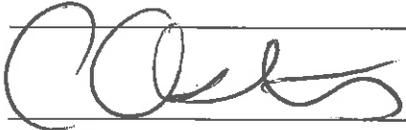
| Member: | Vote: | Signature: |
|-----------------|--------------|-------------------|
| Brian White | AYE | _____ |
| Gibb Phenegar | AYE | _____ |
| Christina Oster | AYE | _____ |
| Tom Emero | AYE | _____ |
| Rori Stumpf | AYE | _____ |

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

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

VI. VOTE OF THE BOARD

By a vote of 5 to 0, on a motion made by Christina Oster and seconded by Tom Emero, the Zoning Board of Appeals hereby **DENIES** the Applicant, D & D Mulch, an **APPEAL** under M.G.L. chapter 40A section 8 seeking to reverse a Cease and Desist order issued July 1, 2021 by the Building Commissioner acting as Zoning Enforcement Officer, which prohibits the applicant from operating at the site.

| Member: | Vote: | Signature: |
|-----------------|--------------|--|
| Brian White | AYE | _____ |
| Gibb Phenegar | AYE | _____ |
| Christina Oster | AYE |  _____ |
| Tom Emero | AYE | _____ |
| Rori Stumpf | AYE | _____ |

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