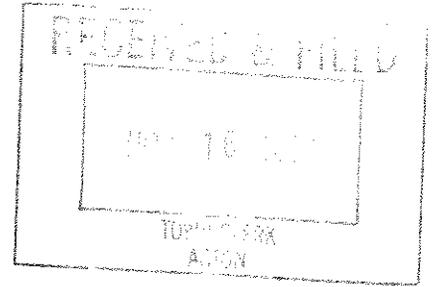


FYI Planning



Hearing #06-06

**HEARING ON THE APPEAL BY CAROL HOLLEY, 39 POPE RD., TO OVERTURN A DECISION OF THE BUILDING COMMISSIONER**

A public hearing of the Acton Board of Appeals (the "Board") was held on Monday, October 2, 2006 at 7:45 at the Town Hall on the petition by Carol Holley and Charles Abraham (the "Petitioners") under Section 10.1.1 of the Zoning Bylaw. The Petitioners appeal the decision of the Building Commissioner contained in a letter dated July 12, 2006 that the parking of a logging truck on the Petitioners' property constitutes a violation of Sections 3.1 and 3.7 of the Acton Zoning Bylaw. The property is located at 39 Pope Rd., Map G5/Parcel 11.

Present at the hearing were Jonathan Wagner, Chairman; Ken Kozik, Member; Cara Voutselas, Member; Garry Rhodes, Building Commissioner; and Cheryl Frazier, Board of Appeals Secretary. Also present were Thomas Falwell, attorney for the Petitioner, the Petitioners themselves as well as numerous abutters.

Jonathan Wagner opened the hearing and read the contents of the file into the record. Included in the file were the Building Commissioner's July 12, 2006 letter, the original complaint notifying the Building Commissioner of the presence of the logging truck, a brief prepared by the Petitioners rebutting the July 12 decision, a letter from a neighbor supporting the Petitioners, and a petition signed by 42 neighbors in support of the Petitioners.

**I. THE HEARING**

Upon request by Mr. Wagner, Building Commissioner, Garry Rhodes, presented the sequence of events leading to the hearing and the rationale for his decision to issue a Cease and Desist order. Mr. Rhodes stated that in June of this year he received a

complaint from developer James Fenton who is working on a project nearby the property in question. The June 29, 2006 letter from Mr. Fenton claimed that a Brabrook Rd. neighborhood resident was operating a logging business from his residence. Upon investigation Mr. Rhodes found that the Petitioners were storing logging trucks at their 39 Pope Rd. residence. In his July 12, 2006 letter to the Petitioners, he found the storage of logging trucks to be prohibited as a contractor's yard in under Sections 3.1 and 3.7 of the Zoning Bylaw and ordered the Petitioners to remove the trucks in question. The Petitioners have appealed that decision to the Zoning Board of Appeals under Section 10.1.1.

Thomas Falwell, attorney for the Petitioners, rebutted the rationale for the Building Commissioner's decision on several grounds. As detailed in his brief submitted to the Board, the Petitioners argue that the parking of vehicles, including commercially registered vehicles, in a residential zoning district is not prohibited by any provision of the Acton Zoning Bylaw. The Petitioners also objected to the Building Commissioner's description of the parking of trucks as "storage of logging trucks" in a "contractor's yard." They state that neither the term "storage" nor "contractor's yard" is defined by the Bylaw and that reasonable interpretations of both terms would not include the mere parking of a truck overnight at a residence. Furthermore, the Petitioners asserted that they have been parking their logging truck at their residence for over 20 years and that in fact, rather than being detrimental or injurious, have actually benefited the town by being a local resource in emergency situations.

Following the presentations by the Building Commissioner and the Petitioners, the Board heard comments from the numerous residents appearing at the hearing. All those appearing before the Board expressed support for the Petitioners, noting that the Petitioners have been parking their trucks without any neighborhood opposition for over 20 years. They emphasized that the complaint was submitted, not by a neighborhood resident, but by a local developer.

## **II. DECISION**

Upon consideration of the evidence presented, the Board voted on the appeal. Two members voted to overturn the decision of the Building Commissioner and one member voted to uphold the decision. Since a vote to overturn a decision of the Building Commissioner must be unanimous, the motion to overturn the Building Commissioner's decision failed.

## **III. DISCUSSION**

### **A. Section 3.1 Residential Uses**

This case was a close decision with Board members holding differing views. One member of the Board voted to uphold the Building Commissioner's decision. This member agreed with the Building Commissioner that under Section 3.1, in residential districts, uses that are residential in nature are allowed and uses not residential in nature

are not allowed. This member did not agree with the Petitioner's position that the parking of the logging truck should be allowed because the Zoning Bylaw does not specifically prohibit it.

The parking of commercial trucks by their owners in residential districts is not uncommon. When faced with a complaint, or in cases acting on his own initiative, the Building Commissioner decides whether the truck in question is residential in nature. He uses the "grocery store" test. If the vehicle is one that the owner would use for errands around town, to go to the grocery store so to speak, then it is impliedly allowed as a residential use. If, on the other hand, the truck is one not likely to be used for local errands, then it falls outside the implied residential use. The Building Commissioner noted that this test has been persuasive to courts in situations where a Petitioner has appealed a Board decision to superior court.

The Building Commissioner also noted that were the Board to vote to overturn his decision, he would then be required to take the position that the Bylaw is silent on the parking of trucks and therefore not the subject of enforcement action. He recounted a number of situations involving the parking of trucks in residential districts and noted that the "grocery store" test interpreting residential uses allows him to take enforcement action.

Two members of the Board, on the other hand, were persuaded by the Petitioners' argument that the Acton Zoning Bylaw does not prohibit the parking of commercially registered trucks in a residential district. The Bylaw is silent on the subject and provides no guidance to the Building Commissioner as the zoning enforcement officer acting on complaints such as the one in this case. It furthermore provides no guidance to a resident contemplating parking his/her truck at a residence. The Bylaw is very specific in a great number of areas and yet totally silent in this very common situation. The truck in question had been parked at the Petitioners' residence for over 20 years without complaint. It was parked entirely on the Petitioners' property, not on the street and relatively out of view. Using the "grocery store" test imposes a view not necessarily expressed in the Bylaw.

#### B. Section 3.7 Contractor's Yard

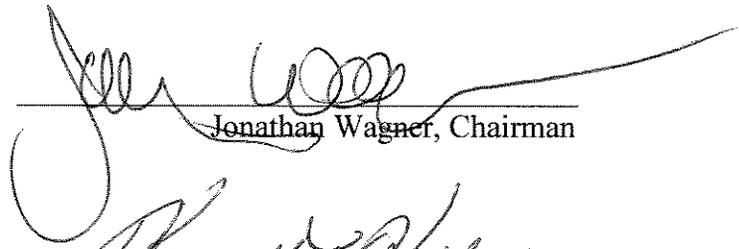
The Board also considered the Building Commissioner's argument that the parking of the logging truck constituted a "storing of trucks" in a "contractor's yard." Again, the Board members held differing views on this issue with one member agreeing with the Building Commissioner that the parking of the logging truck was a contractor's yard since the logging business contracts its services and the truck is stored on the property for this purpose. The other two members disagreed that merely parking the logging truck rose to the level of storing construction equipment and materials customarily associated with a contractor's yard.

#### IV. CONCLUSION

For the reasons stated herein, this appeal of the Building Commissioner's decision contained in his letter to the Petitioners dated July 12, 2006 is denied.

Any person aggrieved by the decision may appeal pursuant to Massachusetts General Laws, Chapter 40A, Section 17 within twenty (20) days after this decision is filed with the Acton Town Clerk.

#### THE ACTON ZONING BOARD OF APPEALS



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Jonathan Wagner, Chairman



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Kenneth F. Kozik, Member



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Cara Voutselas, Member

DATED:

I certify that copies of this decision have been filed with the Acton Town Clerk and Planning Board on November 16, 2006.



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Cheryl Frazier, Secretary  
Board of Appeals