

**Town of Southborough
Board of Appeals
Southborough, Massachusetts 01772
17 Common Street
P.O. Box 9109
Southborough, MA 01772-9109
508-485-0710**

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SOUTHBOROUGH, MA *BA*

Paul J. Berry
Town Clerk
Town House
Southborough, MA 01772

Assessors Map 51 Lot 3

***NOTICE OF DECISION
ON AN APPEAL***

DECISION OF BUILDING COMMISSIONER /ZONING OFFICER

*Dated November 18, 2014 regarding
Request for Enforcement Action
8 Lynbrook Road and 26 Lynbrook Road
Southborough, Massachusetts 01772*

Appellants:

*Karen and Peter Shimkus
Aman and Manpreet Khurana
James Carney*

The Board of Appeals of the Town of Southborough held a continued public hearing in the Public Meeting Room of the Southborough Town House on February 25, 2015 at 7:35 PM. The Appellants are requesting that the Southborough Zoning Board of Appeals reverse the November 18, 2014 Decision of the Building Commissioner /Zoning Officer. It is the position of the Building Commissioner /Zoning Officer that there is no zoning violation on the property and no zoning enforcement action will be taken.

Sitting as a Board:

Leo F. Bartolini, Jr., Chairman
Thomas Bhistkul
Lisa Cappello
David Eagle
Paul Depranos

For Appellants:

Marisa L. Pizzi, Esq.
Bowditch & Dewey
175 Crossing Boulevard, Suite 500
Framingham, MA 01702

Appeal of Building Commissioner's Decision
Dated November 18, 2014 – One Lynbrook Road
Appellants: Shimkus et al
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Evidence Presented and Findings of the Board

1. This is an appeal from the Decision of the Building Commissioner /Zoning Officer of the Town of Southborough, dated November 18, 2014. It is the position of the Building Commissioner /Zoning Officer that there is no zoning violation on the property located at 1 Lynbrook Road and no zoning enforcement action will be taken. The November 18, 2014 letter from Mark Robidoux, Building Commissioner /Zoning Officer, was read into the record of the continued public hearing and is attached herewith as Exhibit #1.
2. Letter and Notice of Appeal, dated December 16, 2014, from Marisa L. Pizzi, Esq. on behalf of Appellants Shimkus et al was read into the record of the public hearing opened on January 7, 2015. Appellants submit that grounds for appeal include, but are not limited to, the following: (i) there has been an unauthorized expansion of the landscaping business beyond the restricted activity allowed by the terms and conditions of the use variance granted by the Zoning Board of Appeals in 1983; (ii) the commercial landscaping and other business activities currently operating at the property are not permitted uses in the Residence A zoning district; (iii) the prohibited activities at the property are in violation of a previous order dated July 9, 2012 issued by a previous Building Commissioner; (iv) the prohibited activities include dumping and stockpiling of materials on the portion of the property known as "the Point;" parking of heavy equipment and vehicles used for the landscaping business in the open rather than being housed in the commercial garage on the property; business activity and parking of vehicles on the property by businesses other than Rocky's Landscaping; offensive noise, dust and heavy traffic at all hours; and bee hives being kept on the property; (v) the property has become unsightly and derogates from the neighborhood; and (vi) such prohibited activities endanger the health and safety of abutting residents. The listed grounds of appeal exceed the grounds of the original request for enforcement, made by Attorney Donald O'Neill on November 7, 2014.
3. The Building Commissioner /Zoning Officer reviewed the findings and decision of the 1983 Variance granted by the Board of Appeals and found that the Variance was granted for the entire 1.9 acre parcel including the section known as the "Point," and the Variance does not state that the applicant cannot stockpile materials or 'not use' certain portions of that land. It was therefore the position of the Building Commissioner /Zoning Officer that there is no zoning violation on the property and no zoning enforcement action should be taken.
4. Special Town Counsel Jason R. Talerman, Blatman, Bobrowski, Mead &

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Talerman, LLC, 730 Main Street, Suite 2B, Millis, MA, addressed the Board of Appeals. Special Town Counsel Talerman advised members that the Board possesses significant discretion in the Appeal procedure and counseled a review of the 1983 Variance and the specific three sections of the Variance – the Evidence, the Findings and the Decision. He further counseled that the Board is bound by the Variance, and in determining the scope of the Variance, the Board is bound by the unambiguous conditions set forth in the Variance rather than any facts or evidence. Other considerations include the Board's interpretation of the scope of a landscape businesses in the Town of Southborough and activities incidental to the use in Southborough.

5. Special Town Counsel Talerman advised that there are no formal Cease and Desist Orders on the property at 1 Lynbrook Road but rather a prior letter from the prior Building Commissioner. Said letter responded to an enforcement request by describing an arrangement with the property owner, so as to avoid enforcement action. He further advised that neither the Building Commissioner nor the Board of Appeals is bound by the former actions or the former decisions of the former Building Commissioner.
6. Board Member Bhistkul discussed the decision of Building Commissioner /Zoning Officer with Special Town Counsel and the binding nature of special permits, variances, building inspector letters and decisions and how they differ.
7. Marisa L. Pizzi, Esq., addressed the Board at length on behalf of the Appellants. It is the opinion of the abutters that the use of the property is not an evolution of the landscape business. She alleged that the objectionable uses are new and were not present in 1983. Appellants strongly object to the dumping and stockpiling of material on the property, uses associated with a dump and not a small landscape business. Attorney Pizzi submitted to the Board of Appeals a Memorandum in support of the Appeal, dated December 31, 2014.
8. After a thorough discussion of the issues and concerns regarding stockpiling, dumping and spreading of materials on the property at 1 Lynbrook Road, Board Member Eagle stated that the issue appears to be a moot point at this time and will not be a use that will continue. The Board discussed and found that the stockpiling, if any, appeared to be a historical and allowed accessory use to the Landscaping Business rather than a separate primary use, as alleged by Attorney Pizzi. The Board also discussed evidence that the materials may not have been stockpiling at all but, rather, were used for the purposes of filling at the site. Such activities are outside of the Board's purview.

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9. Upon extensive review and discussion of the Variance, the Board members concluded that it was unambiguous and placed no conditions on the landscaping business that related to the stockpiling. While the Variance did address noise at the Property, the Board concluded that the noise did not exceed the levels of noise that may be generated by a landscaping business. Furthermore, Chairman Bartolini stated that there is already a significant amount of noise emanating from Rte 495.
10. Whitney Beals, 10 Chestnut Hill Road, Southborough, addressed the Board stating that the former landowner had a landscape business for ten or so years without the proper approvals, coming before the Board to bless the operation, showing it was not a clean slate from the beginning. He continued that the Board in 1983 was trying to give the landowner permission to run the existing business. Mr. Beals stated there has been an increase in the use since that landowner died. Mr. Beals also submitted a letter to the Board of Appeals, dated January 6, 2015, in support of the Appeal.
11. Mrs. Shimkus of 8 Lynbrook Road addressed the Board of Appeals several times during the public hearing in support of the Appeal, describing activities taking place at 1 Lynbrook Road. She stressed her concern for the dumping of materials associated with roofing debris that was later spread over the property. She is concerned about hazardous materials that could be included in this type of debris. She described a fire at 1 Lynbrook Road that was beyond the scope of any type of fire allowed in the Town of Southborough. She stated that she was disappointed with the efforts of the Town and the Board, believing that the abutters' concerns are being ignored. She stated that the main point is dumping, with excessive noises and other offensive activities. She stated she has contacted other appropriate officers on these matters.
12. Peter Shimkus of 8 Lynbrook Road addressed the Board of Appeals in support of the Appeal.
13. Aman Khurana of 6 Lynbrook Road addressed the Board of Appeals in support of the appeal.
14. Bill Pollack of Flagg Road, Southborough, MA addressed the Board of Appeals stating that he worked for Mr. Rock, the former owner of the landscape company, describing piles of mulch used for the business. He stated that Mr. Rock maintained the property in a neat and clean appearance, and kept the area called "the point" on the property in an immaculate condition.

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15. Letters read into the record on January 7, 2015 include:
 - a. December 22, 2014 letter from Dr. and Mrs. Richard Hallisey, 10 General Henry Knox Road, in support of the Shimkus Appeal;
 - b. January 7, 2015 letter from David F. Crane, Director RREEF Management LLC, re: delivery of materials to Lynbrook Road;
 - c. January 7, 2015 letter from Marc R. Verreault, Sr. VP, Carruth Capital, LLC, 116 Flanders Road, Westborough, MA re: delivery of materials to Lynbrook Road.
 - d. November 7, 2014 letter from Donald J. O'Neil, Esq. to Mark Robidoux, Building Commissioner /Zoning Officer re: 1 Lynbrook Road, Assessors Map 51 Parcel 3.
16. The Public Hearing was closed at 8:51 PM.

Deliberations of the Board

The Board's deliberations included a discussion fo the above items. Additionally, the Board's deliberations included the following:

Board Member Depranos stated that a landscape business is being operated on the site. Permits for other activities such as earth removal are under the jurisdiction of the Board of Selectmen. If hazardous materials are involved, the Board of Health should address. Stockpiling of material could reasonably occur with the operation of a landscape company. Mr. Depranos stated that he is seeing this as a landscape company.

Board Member Eagle stated that he was very sensitive to the neighbors' concerns, to the homes built after the landscape company was in operation but did not interpret any prohibitions in the 1983 variance. Mr. Eagle stated that he was comfortable interpreting the issues at hand.

Ms. Cappello addressed the storage of vehicles on the property, stating that the storage of vehicles in the barn would mean that company vehicles used for the landscape business would be stored in the barn at the end of the day, not employee vehicles. She did not interpret any violations of the variance in this regard.

Mr. Bhistkul stated that he believes the business may be operating as a bad neighbor but not in violation of the 1983 Variance. He stated that he cannot conclude that activity is at a level that has exceeded the normal operation of a landscape business.

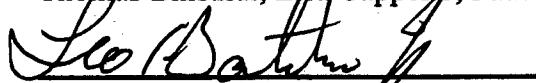
Mr. Bartolini stated that increasing the size of the stockpiles is not a major issue. Stockpiling materials has been historically done on the property. The materials issue is not the jurisdiction of the Board of Appeals. Nor would the Board of Appeals normally regulate whether a person is using materials to level their property.

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Therefore, based on the evidence presented at the public hearing, including but not limited to the facts and findings presented above, on a motion by Mr. Bhistkul, seconded by Ms. Cappello, by a vote of 5-0, the Board of Appeals voted to UPHOLD THE NOVEMBER 18, 2014 DECISION OF THE BUILDING COMMISSIONER /ZONING ENFORCER.

To Uphold:

Thomas Bhistkul, Lisa Cappello, Paul Depranos, David Eagle, Leo Bartolini, Jr.


Leo F. Bartolini, Jr.

Notice: Appeals, if any, shall be made pursuant to MGL, C. 40A, s.17, and shall be filed within twenty (20) days after the filing of this notice in the Office of the Southborough Town Clerk.