

Case: #34-2013
Date Filed: 30 October 2013

RECORD OF PROCEEDINGS

I, Lisa C. Morrison, assistant to the Zoning Board of Appeals of the town of Edgartown, hereby certify that the following is a detailed record of proceedings pertaining to the application of Donna Kelly for special permits under sections 7.2 and 4.2(d) of the zoning bylaw to operate a landscape business with associated storage buildings on property located at 46 East Cape Poge Avenue, Assessor's Map 34 Lot 79 in the R-120 Residential District.

1. On 30 October 2013 the application, a true copy of which was marked "A," was presented to the Town Clerk.
2. In addition, an advertisement, a true copy of which is marked "B," was published in the Vineyard Gazette on November 1st and November 8th 2013.
3. Notice of the hearing, a copy of which is marked "C," was mailed, postage prepaid, to the petitioners; the abutters - owners of land adjacent to the subject property within 300 feet of the property lines - all as they appear on the most recent, applicable, certified tax list; and to all the proper town boards and departments.

On Wednesday, the 20 November 2013 at 7:00 p.m. the public hearing was held in the Town Hall. The following board members were sitting for this hearing: Martin Tomassian – Chairman, John Magnuson, Nancy Whipple, Carol Grant, and Richard Knight.

Mr. Tomassian opened the hearing and the notice was read. Sean Murphy, attorney, began the presentation for the applicant, Donna Kelly, who was also present. Mr. Murphy explained that the applicant is seeking two special permits: one for the storage buildings and the second to operate a landscaping business in the R-120 Residential District. Ms. Kelly has a small greenhouse and two canvas-covered temporary structures in addition to the house where she lives. Ms. Kelly has been operating the landscaping business from the site for the past 8 years, and purchased the property last year. The first complaints from the neighbors were this past summer, and the zoning inspector sent a letter informing Ms. Kelly that she needed to apply for a special permit if she wants to continue to operate her business.

Mr. Murphy said that - contrary to what the board will hear later - Ms. Kelly's business is a small landscape company that in peak season employs a maximum of four employees, who operate from 8 a.m. to 4:30 p.m. There is no retail taking place on the property. Ms. Kelly has 3 pick-up trucks in addition to her personal vehicle, which is a Subaru station wagon. Ninety-percent of her

work is on Chappy. Mr. Murphy said that Ms. Kelly has worked hard to improve the property and comply with the regulations for the operation of a business in a residential neighborhood. She has installed \$6000 worth of fencing to screen the operation and reduce some of the noise. She has stopped having debris delivered to her site: it goes directly to Keenes. She has stopped burning debris on her property. In short, she has tried to do everything she can to minimize the impact of her business.

Mr. Murphy said that some of the neighbors' complaints are legitimate and some are over the top. He noted that there were concerns about the compost pile on the property. Mr. Murphy said that it is Ms. Kelly's personal compost pile that she uses for her own gardening. Her landscaping company buys compost for her clients.

Mr. Murphy said that Ms. Kelly meets all the requirements for operating a business in a residential district as outlined in 11.6 (b) 1-9. There are no more than four employees and they do not even work on site. As far as traffic is concerned, it does not exceed that normally expected in a residential neighborhood. Mr. Murphy noted that there are approximately 35 homes that use the street, and this business generates an estimated additional four round-trips per day. As far as parking is concerned, Mr. Murphy said that Ms. Kelly is in the process of reconfiguring the driveway so that no backing out onto the street will be necessary. He said that Ms. Kelly is willing to plant additional trees for screening. He said that no offensive odors or pollution is produced by the operation. All fertilizers used are organic.

In an effort to compromise with the neighbors, Ms. Kelly has agreed to limit her hours from 8 a.m. to 4:30 p.m., no debris will be brought back to the property, no burning will take place, and landscape equipment and tools will be moved behind the fence. She has agreed to keep the noise of morning meetings with her employees down. Mr. Murphy said that a long-term goal is to put up a barn-like structure and get rid of temporary structures.

Mr. Murphy said that these compromises are a genuine attempt to strike a balance between a hard working woman who provides a service to many residents and her neighbors. He said Ms. Kelly's goal is not to disturb the neighbors. He said that Ms. Kelly has not ignored the cease and desist order as some will suggest. He said that the building inspector told her to get a special permit and that is why she is here.

Mr. Tomassian then asked for letters from town boards or departments. There were none. He then asked for letters supporting the project. A letter from immediate abutters Steven & Robin Angelilli was read. The Angelillis' expressed the hope that all the neighbors could work together to find a solution that would allow Ms. Kelly to continue her business.

A letter from Chappaquiddick resident Edo Potter was read attesting to the value of Ms. Kelly's business on Chappaquiddick and her skill as a landscaper. She said that she believed that this sort of small business should be encouraged.

A letter from Bob Fynbo & Felicia Cheney supporting the business was also read. They said that they have never seen any heavy equipment parked or stored near the property and that her operation is always quiet and respectful of the neighborhood. It was noted in the letter that Ms. Kelly has operated for many years without issue.

Nancy Hugger read a letter signed by her and Skip Bettencourt. She said that Ms. Kelly provides a valuable service to Chappy residents and contributes to the island's sufficiency without adding to the ferry line. Ms. Hugger said that the Chappaquiddick Island Association hired two master

planners some years ago who found that one of the goals of the community was to create a climate that favored small businesses that provided necessary services to Chappaquiddick residents without burdening the infrastructure. Ms. Hugger said that if these opportunities are not encouraged, “Chappy will become a gated community where few can survive.” Ms. Hugger applauded the efforts Ms. Kelly is making to meet the demands of her neighbors. She said that she was very disappointed that the neighbors have not come together “to work out their differences with a sense of community and kindness but instead are using bullying tactics.”

Mr. Tomassian then asked for letters from those who are opposed to the project. Mr. Sullivan, a direct abutter, read a letter signed by him and Barbara Sullivan. Mr. Sullivan said that he wished to register his strong concerns and opposition to the issuance of the special permits. He said that Ms. Kelly’s operation does not meet any of the regulations set forth in 11.6. Among the negative aspects, Mr. Sullivan said, is when the employees arrive for work at 8:00 a.m they are given instruction in a “loud manner with many voices talking at once.” He said that some of the employees arrive in their own vehicles, which are then parked at 46 Cape Poge Ave all day. He noted that some of Ms. Kelly’s vehicles are left parked on Chappy Point overnight. He noted that at least one of those vehicles has a commercial plate, attesting to the fact that this is a commercial operation, operating illegally.

He said that employees regularly return to the property during the day to pick up tools and drop off debris. He said that heavy equipment has been used to clear land for storage of debris and other materials. He said that brush is regularly burned on the site, in close proximity to a large propane tank and a number of wells.

He suggested that water and pesticide use should be examined. He was concerned that these activities have the potential for drying up or contaminating neighboring wells. He noted that the buildings were constructed without permits and were therefore in violation of zoning.

Mr. Sullivan was also concerned about the amount of traffic generated by the business and the effect on the road surface. Mr. Sullivan urged the board to take into account the possible precedent-setting action that may result from the granting of special permits for this commercial enterprise and the far-reaching impact this could have on Chappaquiddick for generations to come.

A letter from abutters Jeffrey & Herta Gould was read. The Goulds said that Ms. Kelly is a victim of her own success and that her business has vastly outgrown the property. The Goulds noted that the employees gather, loudly, at an early hour and return multiple times during the day. Mr. Gould said that he personally witnessed ten truckloads of debris being dropped off at the Kelly property. He said that Ms. Kelly regularly burns debris and that the police and fire officials have been to the site many times.

Mr. Gould said that Ms. Kelly is conducting a commercial composting operation, which he is concerned could negatively impact the aquifer. He cited a number of state regulations, which require that such an operation be located a minimum of 250-feet from any well or water supply.

Mr. Gould also took exception with the accessory structures that are not “incidental to the building trades” and are being used for gain, not as accessory structures to the residence.

The letter went on to enumerate the adverse effects on the neighborhood and the lack of compliance with the regulations outlined in 11.6. He said that he has frequently witnessed more than four employees. He said that Ms. Kelly's business generates more traffic than all the other homes on the street put together. He said that there is not sufficient room on the property to allow the vehicles not to back out onto the street. He said that the operation is not screened and that "the token effort made in anticipation of the hearing is totally inadequate." He said that the trucks generate dust and the burning of debris is a source of noxious odor. He said that the large piles of debris and Ms. Kelly's illegal construction of buildings has "significantly reduced the previous absorptive capacity of the property" and thus increases the likelihood of runoff and erosion. He said that the burning and the composting operation are significant sources of both air and water pollution. He noted that Ms. Kelly has cleared trees from her property in order to make more room for her commercial activities. He also commented that the array of trailers, sheds, and tents are not residential structures. Mr. Gould concluded his letter saying that Ms. Kelly is operating an illegal solid-waste operation and that her efforts to improve the situation do not address the underlying issues.

Additional letters of opposition from Rosemary McNulty, Molly Pickett, Tracy Schaller, Jay & Jean Hunter, Linda Talbott, Virginia Murray, Michael & Natalie Thompson, Ed Trider, Dave Cron, Debra Cron, Laura & Garrett Platek, and Jessica Wojtukiewicz were read. Concerns listed include: the possibility of setting a precedent that would allow for the proliferation of similar businesses in the neighborhood, the negative effect on property values and quality of life, increase in traffic, noise and pollution, doubts regarding the likelihood of enforcing conditions, and the incompatibility of trucks on dirt roads used by children.

Mr. Tomassian then asked Mr. Jason, the zoning inspector, for his comments. Mr. Jason said that he spoke with Mr. Sullivan in July, who said that an illegal business was being run. He went to the property to inspect and there was no one there. He did see the greenhouses and temporary structures and noted that they had been built without permits. He said he saw no evidence that commercial sales were being transacted on the property. He said he visited the property four times in ensuing months and never saw any activity on the property. He said he received additional complaints from Mr. Sullivan when Ms. Kelly was installing the fence, as there was dirt and heavy equipment on the property. Mr. Jason said when he went out to the property he saw that Ms. Kelly was putting the fence up in a swale and was using the dirt to fill in the swale. He said he saw brush, but he also saw recently cut stumps and piles of branches and concluded that the brush was from those recently cut trees.

He said that he also received a call from Jeff Gould who said that there was burning on the property. He said that the only calls he received were from Mr. Sullivan and Mr. Gould.

Mr. Tomassian then asked if there was anyone who wished to speak in favor of the proposal. – Pat Rose, a direct abutter and year-round resident said she was very happy to have Ms. Kelly as a neighbor, and that she was very glad when she bought the property. She said she has not found the business to be noisy at all, and has not noticed any increase in traffic. She said she regularly sits in her hammock directly across the street from Ms. Kelly's property and is not disturbed at all. She said she has never noticed smoke coming from the property. She said she hears more noise from machinery in downtown Edgartown than she does at her house.

John Ortman said he was surprised by the content of the letters of opposition and said that what they portray has not been his experience at all. He noted that he lives across the street with Ms. Rose. He said that Ms. Kelly has built elaborate fencing in order to comply with the regulations

and cooperate with the neighbors. He said that Ms. Kelly has met the neighbors more than half-way. He also commented that her employees are people of character.

Skip Bettencourt commented that Ms. Kelly takes care of some of his clients, and that debris is composted on the clients' site - not taken away.

Richard Dimond said that he has never had any problems with Ms. Kelly and that she keeps her property clean. He said that he would like to see her make a go of it.

Mr. Tomassian then asked for comments from the opposition. Mr. Sullivan thanked the board for their time and noted that he too was a municipal employee, the mayor of Braintree. He said that he takes no pleasure in speaking out against a neighbor but that the situation has become disruptive. Mr. Sullivan submitted a number of photographs of Ms. Kelly's property. He said that the operation has grown too large for the site. He questioned the level of enforcement and said he doubted that any conditions would be enforced. He said that Ms. Kelly all but ignored the cease and desist order. He commented that the direct abutter who wrote in favor of the operation had two sons who were once employed by Ms. Kelly. He said that there is a backhoe working most evenings and that he has witnessed people picking out plants on the property. He said that he has tried to be a good neighbor, but that he has seen his quality of life negatively impacted. He noted that his property has been in the family for 40 years and asked the board to do the right thing and deny the special permit.

Michelle Casavant, an abutter herself and a representative of the Goulds, said that she does not believe that the operation meets the zoning requirements. She said she has observed 8 to 10 employees on the property. She said that there are always trucks backing out of the property. The excess weight of the vehicles has necessitated more frequent road repairs and an increased financial burden on the neighbors. She said there is not sufficient off-street parking. She said the burning of debris is a great concern and a hazard. She said that there is just too much activity for a small lot. She said that Ms. Kelly is manufacturing fertilizer on the property, which must be affecting the aquifer. She said that the location is not appropriate and that Ms. Kelly has ignored the law for 8 years.

Bill Jenkins of 2 Wasque Ave said that he was concerned about the use of chemicals. He said that he bought his property in 2010 and has witnessed the growth of Ms. Kelly's business. He said that the level of noise and visual clutter is unacceptable. He said that he and his wife are intending to move to the island year-round and that one of the reasons for the move is to enjoy the solitude of Chappy. He urged the board to deny the application.

Linda Talbott said that she has a lot of respect for Ms. Kelly, who is a wonderful human being. She said she believes Ms. Kelly would be more successful in a different location. She said she was very concerned about small children riding their bicycles on rutted dirt roads.

Mr. Tomassian then asked for the applicant's rebuttal. Mr. Murphy said that Ms. Kelly did not receive the cease and desist order for some time because it had been returned to the building inspector's office by the post office. Mr. Murphy noted that no complaints regarding this business had been received before this past summer. He said that he has never attended a hearing where the experiences of neighbors were so diametrically opposed. He said that he knows a political campaign when he sees one. Mr. Murphy said that typically zoning boards do not receive comment letters from people who are so far away from the subject property. He submitted an annotated photograph of the neighborhood showing the location of the residences of

various neighbors who had written in opposition. He noted that there were considerable similarities among these letters.

Mr. Murphy said that many of those in opposition had said that Ms. Kelly should buy a bigger lot, he said that she would probably love to but can't afford it. He reiterated that Ms. Kelly has been operating for seven years with no complaints whatever.

Mr. Murphy said that Ms. Kelly does not own a backhoe. She rented one to grade the road.

Mr. Murphy said that he contacted the fire department and the police. The fire department said that they had two reports of fires on the property. Mr. Murphy said that Ms. Kelly was told to stop, and she has not done it since and will not do it in the future.

Ms. Kelly has four employees, maximum, not 8 or 10. Ms. Kelly is not operating a solid-waste disposal facility, it is her own compost pile.

Mr. Murphy said that he believes that 'landscaping' is included as one of the building trades for the purposes of interpreting the bylaw.

As far as the issue of enforcement is concerned, Mr. Murphy commented that Mr. Jason attempts to work with people before shutting them down.

As far as manufacturing fertilizers, Ms. Kelly once brought some seaweed back to her property. Ms. Kelly does not use chemicals and there has not been, nor will there be, any contamination of the groundwater.

Mr. Murphy said that Ms. Kelly used every penny of her savings to buy the property, and urged the board to – at the very least – give Ms. Kelly a year to show that she can comply with the conditions of the bylaw.

Mr. Tomassian then closed the public portion of the hearing for deliberation by the board. Mr. Magnuson wondered how it was possible that the two sides have such different experiences. He said that he appreciates that the business needs some kind of enforcement and that it may have gotten too big. Magnuson said it was interesting that this is the first year that there have been any complaints. Magnuson said that if the board decides to grant the permit, it should come with conditions that would address noise and traffic, as well as a review in a year.

Ms. Grant noted that Ms. Kelly has been operating for 8 years. She asked how many vehicles Ms. Kelly had when she first started. Ms. Kelly said that she has gone from three vehicles to four. Ms. Grant, who lives downtown, commented that there is the noise of lawnmowers and trimmers all the time. She said that builders in her neighborhood arrive at 8 a.m. She said she would like to see some kind of compromise.

Ms. Whipple, who also lives in downtown Edgartown, said that the builders arrive at 6 a.m. in her neighborhood. She said that she visited the site and found the operation to be very much in keeping with what is in the area. She said she applauds Ms. Kelly for what she is doing and believes she is working hard to address the neighbors' concerns.

Mr. Knight said that he is also a small-business owner on Chappy. He said he appreciates the benefits of having diversity on the island and that year-round businesses are a really important component of that diversity. He said he also appreciates that the abutters have valid concerns

about vehicles and safety, noise, and the fact that the business puts a strain on the neighborhood roads. He said it is especially important to be aware of noise in a seasonal residential neighborhood. He said that the business needs to be conditioned so as not to negatively impact the neighborhood.

Mr. Tomassian agreed that a balance must be struck. He said he believes that many of the issues raised by the abutters, such as the number of employees, debris on site, screening, and burning have been addressed by the applicant. He suggested that Ms. Kelly conduct business meetings inside her residence or in the greenhouse. He said that if the board decides to grant the permit, he has no doubt that the abutters will be on the look out for violations. He said he believes that the applicant has been a victim of her own success.

Mr. Tomassian asked if any of the members had any concerns about the greenhouse or the temporary structures. No one did. Ms. Whipple said that she would like to see the temporary structures replaced by a barn at some point.

Mr. Tomassian made a motion to approve the special permit for the greenhouse and the two temporary structures and for the operation of a landscape business in a residential neighborhood with the following conditions:

1. In order to cut down on traffic, employees will be driven to and from the site from the ferry in one trip. Applicant will try to ensure that, whenever possible, employees are not making trips back and forth to the property during the day.
2. Hours of operation are from 8:00 a.m. to 4:30 p.m., six days a week.
3. There are to be no more than four employees.
4. In order to minimize noise, employee meetings are to be held indoors. Every attempt will be made by the applicant and her employees to keep the noise at a level no higher than that which is to be expected in a residential neighborhood.
5. No debris is to be brought to the property and commercial composting is not permitted.
6. No burning of debris is permitted.
7. There are to be no retail sales on the property.
8. Driveway is to be reconfigured so that vehicles do not need to back out onto East Cape Poge Avenue.
9. Fencing and screening is to be maintained and extended if necessary.
10. Applicant, at her own expense, will grade from Chappaquiddick Road to her property on an annual basis.
11. Heavy equipment should not be stored or utilized on the property on a regular basis.
12. A review will be scheduled in one year, or sooner if necessary.
13. These special permits are not transferable.

Mr. Tomassian urged the applicant to make every effort to comply. He said that if these conditions are followed, the project should be in harmony with the general purpose and intent of the bylaw. He said he hoped the neighbors would talk with each another. He told the abutters not to wait a year if they had complaints: they should let the board or the building inspector know right away.

Ms. Whipple seconded the motion and voted to grant the special permits with the same conditions.

Ms. Grant voted to grant the special permits with the same conditions.

Mr. Knight voted to grant the special permits with the same conditions.

Mr. Magnuson also voted to grant the special permits with the same conditions.

Respectfully submitted,

Lisa C. Morrison, Assistant