

**DECISION OF THE ZONING BOARD OF APPEALS
FOR THE TOWN OF MILTON**

I. Background

By application dated February 25, 2010, Philip F. Laing and Margaret T. Oldfield, as owners of 237 Hillside Street in Milton, Hanna (Oldfield) Ricciardi, Joshua Oldfield and Margaret T. Oldfield, Trustees of the JHM Nominee Trust, as owners of 217 Hillside Street in Milton, and the Thayer Nursery Corporation ("Thayer") appealed from a cease and desist order issued by the Milton Building Commissioner with respect to a nursery and landscape use at the properties. The applicants alleged that (i) because portions of the two properties were leased to Thayer, which operated an agribusiness at 270 Hillside Street, and (ii) the Thayer property was adjacent to their properties, the uses were protected as agricultural uses under G.L. c.40A, §3.

At a public hearing held on April 14, 2010, the Board of Appeals voted to affirm the decision of the Milton Building Commissioner. On May 12, 2010, the Board issued a written decision confirming that vote. On May 28, 2010, the applicants filed an appeal of the Board's decision in the Massachusetts Land Court under G.L. c.40A, §17.

On August 5, 2010, G.L. c.40A, §3 was amended by Section 79 of Chapter 240 of the Acts of 2010. The amendment added an additional category of protected agricultural uses by including a parcel of 2 acres or more if the sale of products from the agricultural use generates \$1,000 per acre or more of gross sales.

After the statutory amendment, the Land Court (Scheier, C.J.) remanded the matter to the Board for the purpose of considering whether the proposed use was protected under the amendment. The Land Court retained jurisdiction over the matter.

Pursuant to the Land Court remand order and after giving the required statutory notice, the Board held a public hearing on November 3, 2010.

2. Additional Information

At the November 3, 2010 hearing, several of the applicants (members of the Oldfield family) were present and responded to specific questions posed by the Board. Also present were attorneys Francis A. DiLuna and Kathleen Connolly, counsel to the applicants, who presented the applicants' position and responded to questions from the Board. Counsel submitted a Memorandum on Remand Hearing dated November 3, 2010.

At the outset, it was agreed that the applicants no longer relied on the argument that their properties should be considered as abutting the property owned by Thayer at 270 Hillside Street. Rather, the applicants argued that the two properties known and numbered as 237 Hillside Street and 217 Hillside Street taken together were entitled to the 2 acre statutory exemption. In response to specific questions, counsel and/or the applicants reiterated that (i) 217 Hillside Street consisted of approximately 2.68 acres of which approximately 2 acres was leased to Thayer for the purpose of composting, storage of nursery stock and other agricultural uses associated with the agriculture use at 270 Hillside Street (ii) 237 Hillside Street consisted of approximately 1 acre of which approximately 14,000 square feet was leased to Thayer for growing produce,

display and signage related to the Thayer operation; and (iii) members of the Oldfield family owned and controlled the properties at 237 Hillside Street and 217 Hillside Street as well as Thayer. In response to a specific question by Joseph Prondak, the Building Commissioner, the applicants acknowledged that if 237 Hillside Street were sold to an unrelated party, the parcel, even with the actual and proposed "agricultural" uses, would not qualify for protection under G.L. c.40A, §3 (as amended). This was a significant factor in the Board's decision. The applicants also indicated that the combined properties would annually generate at least \$1,000 per acre based on gross sales dollars.

The Board received no opposition at or before the remand hearing. It did receive one e-mail in support of the application from Melissa Walter, a longtime resident of 292 Hillside Street. Consistent with testimony and correspondence received by the Board in connection with the original public hearing, Ms. Walters noted that Thayer and the Oldfield family had always been considerate neighbors and responsive to the requests and concerns of the neighborhood.

3. Board Findings

Based on all of the evidence in the record of the original public hearing and the remand hearing, the Board found that:

- (i) it was appropriate to consider 237 Hillside Street and 217 Hillside Street as a single parcel for purposes of the application;
- (ii) the parcel, as combined, consisted of 2 acres or more;
- (iii) the parcel, as combined, was being used for the primary purpose of commercial agriculture, aquaculture, silviculture, horticulture, floriculture or viticulture by the owner or lessee of the land; and
- (iv) the parcel, as combined, would annually generate at least \$1,000 per acre based on gross sales dollars.

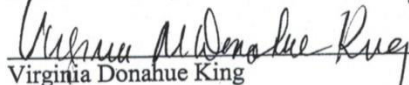
In view of the statutory amendment and these specific facts, the Board overturns the decision and order of the Building Commissioner dated June 12, 2009 denying the issuance of an occupancy permit and ordering Thayer to cease all agriculture or commercial use. The proposed use is protected under G.L. c.40A, §3.

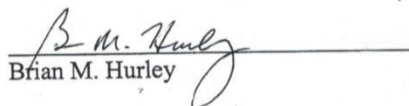
Dated this 22 day of November, 2010.

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John S. Leonard, Chairman


Virginia Donahue King


Brian M. Hurley