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February 28, 2022

VIA EMAIL (Karen Kelleher — kkelleher@stow-ma.gov)

Town of Stow
Board of Appeals
380 Great Road
Stow, MA 01775-2127

RE: Appeal from Unfavorable Action (dated January 6, 2022)
Applicant: Mark D. Forgues
Property: 84-102 Great Road
Owner: Presti Family Limited Partnership

Dear Chair and Members of the Stow Zoning Board of Appeals:

Please let this letter serve as notice that the undersigned Attorney Robert E. McLaughlin, Sr. and Attorney John G. Hofmann represent the Presti Family Limited Partnership (“Presti”) in the matter listed above, which is assigned for public hearing on Monday, March 7, 2022 at 7:10 P.M. Presti is the owner of the property at 84-102 Great Road.

Please also let this letter serve as Presti’s response and opposition to the January 6, 2022 Appeal filed by Mark D. Forgues (“Mr. Forgues”). Presti notes that the scope of Mr. Forgues’s present appeal is limited to what he submitted on January 6, 2022.

There are two prongs to Mr. Forgues’s current appeal. First, he appears to be challenging the number, or nature, of the Class II licenses in use at the Presti

property. With regard to this specific issue, Presti responds as follows. Initially, Presti objects to the characterization of the current Class II licensees as “dealerships.” These businesses are far from the large, full-scale entities suggested by the term “dealership.” Rather, these are small, local shops engaged in the sale and service of automobiles. And notably, the current size and volume of sales and service on the property is markedly less than in the past, particularly around 1968 when the Bylaws went into effect. See Exhibit 1 (Wayne Erkkinen Affidavit, dated Oct. 10, 2017, noting 180-225 total vehicles on the site in 1968).

Mr. Forgues seems to be specifically challenging that there is a new Class II licensee on the property “which was never there before.” But the history of uses and tenants at the property shows that Class II licensees have frequently changed. See Exhibit 2 (tables of tenants and uses, and of Class II license holders). The mere change in the *identify* of a Class II license holder clearly does not constitute a substantial change or extension of the use.

To the extent that Mr. Forgues is claiming that the specified limits to the number of automobiles (as set forth in the ZBA’s December 16, 2021 Decision), totaling 82 cars, “is a definite increase in use,” it appears this issue has already been determined. The Board’s Decision notes that the number of cars inside and outside for the two Class II licenses has been limited. Mr. Forgues has not provided any proof or evidence that these limits are presently being exceeded by the licensees.

Thus, Mr. Forgues has not provided any actual evidence of an increase or change in use, as required under controlling law. See Powers v. Building Inspector of Barnstable, 363 Mass. 648 (1973); Bridgewater v. Chuckran, 351 Mass. 20 (1966). The relevant inquiries are: (i) whether the current use reflects the nature and purpose of the prior use; (ii) whether there is a difference in quality or character, as well as the degree, of use, and (iii) whether the current use is different in kind in its effect on the neighborhood. In addition, a certain amount of growth or increase of a use is allowed. See Board of Selectmen of Blackstone v. Clayton Tellestone, 4 Mass. App. Ct. 311 (1976) (“the character of a use does not change solely by reason of an increase in its volume”). And Mr. Forgues needs to show a “substantial” extension or increase in the use at issue to justify zoning enforcement by the Building Commissioner. Oakham Sand & Gravel Corp. v. Town of Oakham, 54 Mass. App. Ct. 80 (2002). He has not done so.

Secondly, Mr. Forgues claims that two neighboring properties (so-called lot B and Parcel A-1) were not owned by the Erkkinen family in 1968 and thus are not entitled to grandfathering. But this overlooks that the Erkkinens **rented** these specific properties for the specific purpose and use of their automobile business, and were doing so before 1968. See Exhibit 3 (Wayne Erkkinen Affidavit, dated Feb. 18, 2022). As Mr. Erkkinen explains, his family rented the Buckley property (Lot B) prior to 1968. This included renting the house and continuing “to use the front area for special car display.” Likewise with the Kurker property (Parcel A-1) — according to Mr. Erkkinen, before he joined the business full-time in 1966, his family’s auto business was already renting a significant portion of the Kurker property “in order to have more land for the outside storage/display of vehicles.” Presti submits that the actual **use** of the properties in question, in 1968, is the key, and not ownership. Where these properties were essentially a part of the day-to-day operation of the sizable automobile dealership that existed in 1968, and those uses continued thereafter, the grandfathering for the Erkkinen property should extend to the abutting properties, as of 1968 and continuing to the present.

This result is wholly consistent with prior findings, rulings and Decisions with regard to this property. In particular, the ZBA’s own Memo (dated November 9, 2017) “agree[d]” on various types of uses that have historically taken place at the site, including “automotive uses” from 1936–2004, with “operations taking place in and outside the building.” Exhibit 4. And Former Building Commissioner Craig Martin’s August 7, 2017 letter noted that “I have lived in Stow since 1946 and have observed steady automotive display, sales, service, tire repair, body shop, landscape equipment storage and school bus parking on the site.” Exhibit 5.

In addition, and in an abundance of caution (and with full reservation of its rights), Presti submits that Mr. Forgues has, for all intents and purposes, now abandoned his abandonment argument. That is, his January 6, 2022 appeal to the ZBA is completely silent on this issue; it is therefore waived. Assuming *arguendo* that it has not been waived, this exact issue has previously been examined and determined by this Board, as noted in the Board’s prior Decision in this same case, dated December 16, 2021 (ultimately remanding Mr. Forgues’s enforcement request back to the Building Commissioner). In the ZBA Decision on Kathleen Fisher’s appeal, dated December 20, 2017, this Board clearly decided there was no abandonment of the auto-related uses on the Presti property. Exhibit 6 (pages 3–4, ¶¶ 3–5).

In conclusion, for all these reasons this Board should affirm the Building Commissioner's December 21, 2021 decision (denying Mr. Forgues's request for a Cease-and-Desist Order).

Thank you for your attention and consideration of this matter.

Very truly yours,

/s/ Robert E. McLaughlin, Sr.
Robert E. McLaughlin, Sr.

Attachments

EXHIBIT 1

*Erkki World Inc.
4 Moosehead Industrial Pk.
PO Box 436
Greenville Jct, ME 04442*

AFFIDAVIT

To Whom this may concern,

I am submitting this Affidavit, to verify to the best of my knowledge , as both the previous Owner of the above referenced site, but also as the Owner/Operator of the primary business , ERKKINEN Buick , that was located on the site for over 40 years.

As background, I was, until the sale of the property, a proud, life long resident of the town of Stow, and for numbers of years , deeply involved in various volunteer positions within the Town , including that of Selectman.

My father purchased the site in 1936 , when two "Retail" businesses (a restaurant and gas station) were operating there. Over the years the uses expanded , eventually becoming a Buick Dealership, that included both new and used car sales, repairs, and a Body shop. In addition to our family's primary business, at various times the site accommodated numerous other tenants that encompassed other retail users, and the storage/display of vehicles and materials on the site, including a tire company, boat sales and service, day care facility, body shop, storage of buses, trucks , equipment, and many smaller storage type tenants (landscapers, contractors, etc).

In 1992 the Buick franchise was sold, but I continued to own the site, and also continued selling used vehicles under the business name of E.R. Kinnen, until the time of the sale of the property. At some point following the sale, I sold my inventory of vehicles to Mr ROBERT Brenn , who applied for and received a used car License from the Town, and continued the operation.

In 1968, the year that Zoning Bylaws were enacted in the Town of Stow, our business had the largest sales volume in our history up to that time....In line with national sales of cars, which was also the largest in history. For comparison, national sales of cars were 9,656,000 vehicles in 1968, and only 7,100,000 in 2016 I

In 1968, vehicles onsite would have consisted of approximately ;
100-120 new and used cars
20-25 employees cars
40-50 clients cars

20-30 vehicles of other tenants and their clients

180-225 Total vehicles on site

This number, and "activity level" at that time, far exceeds the current uses on the site today.

Secondly, the hours of operation of the Bulck Dealership were Monday-Friday 7am-9pm, and Saturdays from 8am-5pm. Again, the hours of our operation far exceeded the hours of ALL the current users of the site today.

Lastly, it is my observation that although specific "users" of the site have certainly changed over the years, virtually all of the "uses" on the site since my ownership have continued the nature and purpose as well as the quality and character of what has existed there since the 1940's.

In short, the uses of the site (Retail, Vehicle sales and service, Storage and Display) have been consistent throughout the time of my family's ownership of the property, up to and including 2004, and in my opinion, continue to this day.

More importantly, the "intensity" of the use of the property was certainly higher during the sites operation as a dealership, than anytime since the sale of the property.

Thank you for the opportunity to contribute factual information that might help in your decision making.

Respectfully,


WAYNE ERKKINEN

Ann-Marie Murray - October 10, 2017
Notary Public

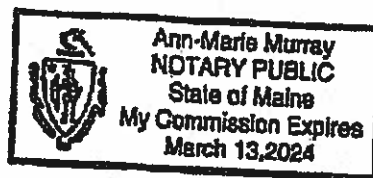


EXHIBIT 2

Tenants and Uses at 84-102 Great Rd.

	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2004	E.R. Kinnen/ Bob Brenn	Used Cars	*	*	*	*	
	R&L Auto	Car Repairs	*	*			*
	Robinson Marine	Boat Sales & Service	*	*	*	*	*
	Chris Cooter	Towing	*				
	Whalens	Auto Body Shop	*	*			*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Bob Brenn	House Rental					
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2005	E.R. Kinnen/ Bob Brenn	Used Cars	*	*	*	*	
	Apexx Auto	Used Cars	*	*	*	*	
	Artisan Auto	Car Repairs	*	*		*	*
	Robinson Marine	Boat Sales and Service	*	*	*	*	*
	Chris Cooter	Towing	*				
	Whalens	Body Shop	*	*			*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Stow Tile	Tile Sales	*	*			
	Downs	Storage	*				
	Bob Brenn	House Rental					
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2006	Apexx Auto	Used Cars	*	*	*	*	
	Artisan Auto	Car Repairs	*	*		*	*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Stow Tile	Tile Sales	*	*			
	Downs	Storage	*				
	Bob Brenn	House Rental					

	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2007	Apexx Auto	Used Cars	*	*	*	*	
	Patti	Used Cars	*	*	*	*	
	Artisan Auto	Car Repairs	*	*		*	*
	David's Auto	Car Repairs	*	*			*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Stow Tile	Tile Sales	*	*			
	Geremias	Landscaper	*				
	Morrell	Contractor	*				
	Downs	Storage	*				
	Bob Brenn	House Rental					
	(Rich Presti)	Used Car License					
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2008	Apexx Auto	Used Cars	*	*	*	*	
	Artisan Auto	Car Repairs	*	*		*	*
	David's Auto	Car Repairs and Sales	*	*	*	*	*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Newbrough	Tile Sales	*	*	*		
	Geremias	Landscaper	*				
	Santos	Landscaper	*				
	Luis	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	Celso	Tree	*				
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2009	David's Auto	Car Repairs and Sales	*	*	*	*	*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Newbrough	Tile Sales	*	*	*		
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				

	Celso	Tree	*				
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2010	Omega	Used Cars	*	*	*	*	
	David's Auto	Car Repairs and Sales	*	*			*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	Celso	Tree	*				
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2011	Omega	Used Cars	*	*	*	*	
	David's Auto	Car Repairs and sales	*	*			*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	Celso	Tree	*				
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2012	Infinite Auto	Used Cars	*	*	*	*	
	David's Auto	Car Repairs	*	*			*
	Dee Bus	Bus Co.	*				
	Steppingstones	Day Care					
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Proia	Landscaper	*				
	Morrell	Contractor	*				
	Murphy	Tree	*				
	Downs	House Rental					

	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2013	Infinite Auto	Used Cars	*	*	*	*	*
	Dee Bus	Bus Co.	*				
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Prioa	Landscaper	*				
	Morrell	Contractor	*				
	Murphy	Tree	*				
	LaPointe	Hobby Shop		*			
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2014	Infinite Auto	Used Cars	*	*	*	*	*
	Tierney	Car Wrapping	*	*			*
	Dee Bus	Bus Co.	*				
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	Murphy	Tree	*				
	LaPointe	Hobby Shop		*			
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2015	Infinite Auto	Used Cars	*	*	*	*	*
	Tierney	Car Wrapping	*	*			*
	Dee Bus	Bus Co.	*				
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	Murphy	Tree	*				
	LaPointe	Hobby Shop		*			
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	

	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2016	Infinite Auto	Used Cars	*	*	*	*	*
	Bama	Car Leasing	*				
	C.J. Auto	Towing	*				
	Tierney	Car Wrapping	*	*			*
	Dee Bus	Bus Co.	*				
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	D'Allessandro	Contractor	*				
	Murphy	Tree	*				
	LaPointe	Hobby Shop		*			
	Courtney	Containers	*				
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2017	Infinite Auto	Used Cars	*	*	*	*	*
	Bama	Car Leasing	*				
	C.J. Auto	Towing	*				
	Tierney	Car Wrapping	*	*			*
	Dee Bus	Bus Co.	*				
	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	D'Allendaro	Contractor	*				
	Murphy	Tree	*				
	Courtney	Containers	*				
	Downs	House Rental					
	(Rich Presti)	Used Car License				*	
	Tenant/Company	Type	Outside Storage	Retail	Outside Display	Vehicle Sales	Vehicle Service
2018	Infinite Auto	Used Cars	*	*	*	*	*
	C.J. Auto	Towing	*				
	Tierney	Car Wrapping	*	*			*
	Dee Bus	Bus Co.	*				

	Geremias	Landscaper	*				
	Stades	Landscaper	*				
	Morrell	Contractor	*				
	Murphy	Tree	*				
	Courtney	Containers	*				
	Napolitano	Personal Training		*			
	Downs	House Rental					
	Proia	Landscaper	*				
	(Rich Presti)	Used Car License				*	

THE TENANTS LISTED ABOVE ARE SUPPORTED BY BANK STATEMENTS/RENTS RECEIVED.

Town of Stow Class II Licenses – 84-102 Great Road from 2004-2017

Year	License Number	Date of Issue	Name	Notes/Information
2004	12	12/30/03	E.R. Kinen 102 Great Road	
2004	25	8/10/04	Bob Brenn Auto Sales 102 Great Road	
2005	25	1/11/05	Bob Brenn Auto Sales 102 Great Road	
2005	27	2/8/05	Apexx Automotive Enterprises Inc. 102 Great Road	
2005	28	9/27/05	Artisan Automotive 92 Great Road	
2006	27	1/10/06	Apexx Automotive Enterprises Inc. 102 Great Road	
2007	27	12/12/06	Apexx Automotive Enterprises Inc. 102 Great Road	
2007	28	12/12/06	Artisan Automotive 102 Great Road	

Year	License Number	Date of Issue	Name	Notes/Information
2008	27	12/11/07	Apexx Automotive Enterprises Inc. 102 Great Road	
2008	28	12/11/07	Artisan Automotive 102 Great Road	
2008	29	1/22/08	Rich Presti/Chapel Partners 102 Great Road	License approved 1/22/08. One-man vehicle sales business. License to read: Entire paved portion of 102 Great Road from area between western boundary. route 117 on north, Steppingsstones School on east, plus portion of main building for mechanical repairs. Includes sales building and outside storage/display for 50 vehicles.
2009	29	12/9/08	Rich Presti/Chapel Partners 102 Great Road	
2010	29	12/15/09	Rich Presti/Chapel Partners 102 Great Road	
2010	30	4/6/10	Omega Motor Sports, Inc. 102 Great Road	
2011	29	12/14/10	Rich Presti/Chapel Partners 102 Great Road	
2011	30	12/14/10	Omega Motor Sports, Inc. 102 Great Road	
2012	29	11/22/11	Rich Presti/Chapel Partners 102 Great Road	
2013	29	11/27/12	Rich Presti/Chapel Partners 102 Great Road	

Year	License Number	Date of Issue	Name	Notes/Information
2013	32	1/8/13	Dennis Scafidi/Infinite Automotive 102 Great Road	Original license approved 11/27/12 for Infinite Detail and Accessories, 100-102 Great Road. Fee for remainder of 2012 was waived and a license for 2013 was issued later in the meeting. At the 1/8/13 meeting, a new Class II license was issued to Mr. Scafidi to correct the business name to Infinite Automotive.
2014	29	11/26/13	Rich Presti/Chapel Partners 102 Great Road	
2014	32	11/26/13	Dennis Scafidi/Infinite Automotive 102 Great Road	
2015	29	11/25/14	Rich Presti/Chapel Partners 102 Great Road	
2015	32	11/25/14	Dennis Scafidi/Infinite Automotive 102 Great Road	
2016	29	11/24/15	Rich Presti/Chapel Partners 102 Great Road	
2016	32	11/24/15	Dennis Scafidi/Infinite Automotive 102 Great Road	
2017	29	11/29/16	Rich Presti/Chapel Partners 102 Great Road	
2017	32	11/29/16	Dennis Scafidi/Infinite Automotive 102 Great Road	

EXHIBIT 3

AFFIDAVIT

February 18, 2022

To Whom this may Concern:

Please consider the following as my sworn statement regarding the dates, circumstances and events regarding the property now known as 84-102 Great Rd, Stow.

My father had purchased a property directly on Rte 117 on the east end of what is referred to as the Lower Village of Stow, Ma. I believe he purchased it in 1936 from Mr William Buckley. At the time he purchased it the Buckley family was operating at small lunch stand and gas station. He tried to create a business there by capitalizing on the gas pumps alongside the road to service the ever growing use of gas fueled cars. In 1946 he took on the Kaiser -Frazier line of cars, and in 1948 he applied for and received a designation as a Buick automotive dealership franchisee....he quickly added both a body shop and a parts department. This catapulted his business dreams forward. Within just a few years, all aspects of the business including sales, service, bodywork , parts and "resales" (used cars) , had grown tremendously. In the late 50's my cousin Bill Erkinen joined the business as a salesperson , and my Dad and Bill began adding to the normal "trade-ins " that we would get as a result of new car sales, by buying additional used cars at the Concord Auto Auction. Based on this business growth , and the ever increasing inventory of both new and used cars, my father eventually approached two abutting property owners (Buckley's and Kurkers) about renting portions of their properties, in order to be able to function more optimally.

The Buckley's owned property directly west of my Dads property ..also bordering along Rte 117 . Although the Buckley's resided there , according to my Dad, they were more than enthusiastic about receiving money for renting their "dirt". My Dad was equally enthusiastic, as this area fronted on Rte 117 , and immediately became the Used Car Lot for Erkinen Buick. This arrangement began in the very early 1960's .

My Dads original property consisted mostly of an ever expanding building (showroom , administrative, body shop, and repairs) , and once used cars became a major component of the business , the Buckley land became more than necessary.

In 1966 Mr Buckley passed away (he is buried across the street in a grave site that he won in a card game at the social club in Maynard) . We then rented the Buckley house from his nephew (Art Trainer) and continued to use the front area for special car display. I became a full time employee in 1966 and was pushing my Dad to continue growing the business. We still had gas pumps out in front of the building and I eventually convinced my Dad to remove them and totally concentrate our efforts on being a complete "dealership" operation.

We eventually purchased the Buckley property (1970) , after using it for years as an "extension" of our business. We actually rented the house out for a few years , and I later moved in myself, before we finally demolished it.

In only a few years time , even the Buckley land became inadequate to service all the space requirements of the ever expanding business. As it continued to grow , my Dad approached another neighbor (the Kuckor family), who owned the property directly south of and abutting both my Dads property and the Buckley property. Just prior to me joining the business full time (1966) a deal was struck for us to rent a significant portion of that land in order to have more land for the outside storage/ display of vehicles. Eventually, the body shop was located under the Kurker barn (which was still functioning into the early 2000's), some of the growing inventory of both new and used vehicles were stored on their property , and sometimes even repairs were done "outside" ..because of inadequate building space. Based on that business relationship , I was able to secure an Option to purchase the Kurker family's property, which I exercised in 1990. I actually lived in the Kurker home , next to the barn for a time.

Based on these long term land leasing arrangements and the neighborly relationships of that time , my Dad was able to eventually purchase the Buckley property in 1970 and I purchased the Kurker property in 1990 , after many years of continuous use/renting of both properties.

After my Dads passing I was able to continue on in the family business , until selling the property in 2004. I was proud to be able to continue to "be in the car business" until the sale , and to see that the business has continued on to this day , on the same property that my family operated on back in the 1950's .

I continue to have good memories of growing up and working in the Town of Stow, as well as serving on both the Board of Appeals and as a Selectman.

Sincerely,

Wayne Erkkinen



Kimberly M Post 2/18/22

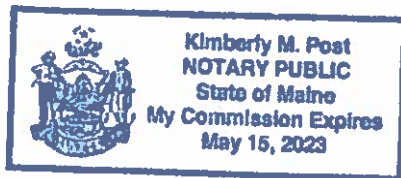


EXHIBIT 4

Planning Board
380 Great Road
Stow, MA 01775
Tel: 978-897-5098
Fax: 978-897-2321

Town of Stow Zoning Board of Appeals

Memo

To: Zoning Board of Appeals
From: Planning Department
Building Department
Date: 11/9/2017
Re: 92 Great Road Uses

Staff in the Planning and Building Department have reviewed the list of uses presented during the Public Hearing by the following sources:

- Kathleen Fisher (Petitioner)
- Richard Presti (92 Great Road landowner)
- Affidavit supplied by Wayne Erkimen (regarding uses in existence at the time of the 1968 zoning bylaw when the districts were established).
- Memo dated 10.2.2017 from the Stow Building Commissioner

The Planning Department and Building Commissioner's office have discussed the uses at the site and agree on the following types of uses that have historically taken place and/or currently exist at the site, including:

- **Automotive Uses**
 - (1936 – 2004) Automotive sales, repair, storage, painting, tires, body shop. Operations taking place in and outside of current building.
 - (2004 – 2017) Automobile sales, service and repair, C.J. Auto Towing, car leasing. Operations taking place in and outside of building.
- **On-site Storage**
 - (1936 – 2004) Automobiles, auto parts, farm equipment and tools, tractors, trucks, buses, snow plows, construction equipment, tires, landscaping equipment.
 - (2004 – 2017) Automobiles, trucks, buses, landscaping equipment, wood chipper, clean dumpsters, cord wood.
- **Service and Retail Within Existing Building at 92 Great Road**
 - (1936 – 2004) Automotive sales/service, Express Tire, Stepping Stones School (closed 2015)
 - (2004 – 2017) Automotive sales/service, TSS Graphics, Stepping Stones School (closed 2015), Auto Towing,

EXHIBIT 5



Building Department
380 Great Road
Stow, Ma. 01775

August 7, 2017

Mr. Christopher Alphen, Esq.
Blatman, Bobrowski & Havery, LLC
9 Damonmill Square, #4A4
Concord, MA 01742

RE: 84-102 Great Road
Stow, MA

Dear Mr. Alphen:

In response to your July 24, 2017 letter regarding the subject property and your request for further information, I believe that my letters of July 13, 2010, May 26, 2017 & June 30, 2017 provide the majority of details regarding my decision that no special permit is required. Specific to the Kathleen Fisher letter dated June 8, 2017 calling for cease & desist for various uses or activities I offer the following:

1. I have lived in Stow since 1946 and have observed steady automotive display, sales, service, tire repair, body shop, landscape equipment storage and school bus parking on the site. This is supported by the former Owner of the property, Wayne Erkkinen. Cease & Desist is denied
2. D'Allesandro Construction is not a tenant on the site.
3. Current replacement lighting on the site was installed by Hudson Light & Power (HL&P) at the request of the Owner. According to HL&P, the lighting is Full Cut Off, LED. A large inventory of automobiles, trucks & buses are provided security with this lighting. Cease & Desist is denied
4. With regard to vehicle parking, landscaped buffer & traffic on and off the site I find no violations. Cease & Desist is denied.
5. Any environmental concerns, odor, gas or oil storage should be brought to the attention of the Board of Health and or Fire Department. Inspections of the site related to general cleanup, safety and storage of materials were completed between 2008-2010 by the Planning Board, Fire Department, Board of Health & Building Department. All items were addressed by Mr. Presti.

The personal issues between Ms. Fisher & Mr. Presti regarding the fence damage, repaving operations, video and police involvement are beyond my jurisdiction.

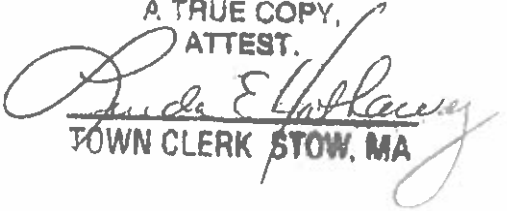
If you need any further information, please contact the building department at 978/897-2193

Very truly yours,

Craig D. Martin, P.E.
Building Commissioner/Zoning Officer
CC: Kathy Sferra-Conservation Commission Agent
Jesse Stedman-Town Planner
File

EXHIBIT 6

TOWN OF STOW
ZONING BOARD OF APPEALS
NOTICE OF DECISION

A TRUE COPY,
ATTEST.

TOWN CLERK STOW, MA

Applicant: Kathleen Fisher, 1 White Pond Road

Relief

Requested: Reversal of Building Inspector's denial of requests to enforce the Zoning Bylaw dated June 30, 2017 and August 7, 2017 with respect to locus.

Locus: 84-92 Great Road
Assessor's Map R-29, Parcels 85A and 83
Owner: Presti Family Limited Partnership¹

Sitting: Edmund C. Tarnuzzer, Jr., Chairman, Charles Barney, William Byron, Bruce Fletcher, Mark Jones

Decision of the Board:

Pursuant to G.L. c. 40A, ss. 8 and 15 and Section 9.1 of the Zoning Bylaw, and following public hearing, the Zoning Board of Appeals voted 5-0 to *affirm in part* and *reverse in part* the Building Inspector's Decisions.

Record

(Fisher) Application for Hearing received July 31, 2017, with exhibits
Presti Packet dated August 12, 2017, with exhibits
(Fisher) Application for Hearing received September 1, 2017, with exhibits
Katie Fisher Enforcement Appeal, Supplemental Materials
(Presti) Memorandum in Opposition to Appeal of Building Commissioner's Denial of Zoning Enforcement, with exhibits, dated October 2, 2017
Correspondence dated October 2, 2017 from Craig Martin, Building Inspector
(Presti) Supplemental Memorandum in Opposition to Appeal of Building Commissioner's Denial of Zoning Enforcement, with exhibits, dated October 19, 2017 (original and revised)
Memorandum of Stow Planning Department dated October 19, 2017
Correspondence dated October 19, 2017 from Mark Forgues, with exhibits
(Fisher) Letter of Christopher Alphen, Esq. dated November 9, 2017

¹ The Assessor's property record cards states the parcels' owner to be "Presti Family Limited Partnership Presti Management Corporation." According to records of the Secretary of State, the Presti Management Corporation is the sole general partner of the Presti Family Limited Partnership.

Memorandum of Stow Planning Department and Building Department dated November 9, 2017
Presti Packet dated November 9, 2017, with exhibits

Facts and Procedural History

Locus consists of two adjoining parcels identified as 84 and 92 Great Road. 84 Great Road has no frontage on Great Road and is accessed over 92 Great Road. Both parcels are located in a Business District. A residence and one additional structure (barn) are located on 84 Great Road, the "rear parcel." A third structure is located on 92 Great Road near its frontage, occupied by a number of businesses leasing space from property owner Presti. Portions of the locus are used by these and other businesses for exterior storage. Ms. Katie Fisher owns and resides at property locate at 1 White Pond Road, which abuts the 92 Great Road parcel near the main structure.

In letters dated April 7, 2017, and May 22, 2017, Ms. Fisher requested that the Building Inspector issue cease and desist orders to stop commercial traffic on locus. By letter dated May 26, 2017, the Building Inspector advised that his inspection of the property had determined that Mr. Presti's tenants were using the site for "storing materials which consist of trucks, cars, snow-plowing equipment, trailers, building and construction materials, piles of cord wood, wood chippers, clean dumpsters and school buses." The Building Inspector further advised that these uses were "grandfathered," i.e., lawful pre-existing nonconforming uses, and that as zoning enforcement officer he had no control over traffic.

In a letter dated June 8, 2017, Ms. Fisher requested from the Building Inspector information on any permits issued for construction and excavation activities occurring on the Presti property. In a letter dated June 30, 2017, the Building Inspector advised that no permits had issued for construction on locus, but that he would inspect the premises to determine if a permit were required. He further advised that the amount of soil removed from locus was below the threshold set by the Earth Removal Bylaw triggering a permit requirement. He further advised that he would meet with Mr. Presti regarding other issues raised by Ms Fisher.

In a letter dated July 24, 2017, counsel for Ms. Fisher requested further information from the Building Inspector, and alleged a number of zoning and other violations on locus. By letter dated August 7, 2017, the Building Inspector responded, finding 1) the challenged uses to be lawful, pre-existing nonconforming uses, requiring no special permits; 2) no zoning violation with respect to site lighting, vehicle parking, landscaped buffers, or traffic. The Building Inspector further advised that certain environmental and other concerns raised by Ms. Fisher should be addressed to other Town departments.

Ms. Fisher timely appealed the Building Inspector's June 30, 2017 and August 7, 2017 enforcement denials to the Board. Both appeals claim that certain uses on the property are not permitted under the Zoning Bylaw; are not protected as pre-existing nonconforming uses; and require a special permit. Several Zoning Bylaw violations, are also alleged, including violations of Bylaw provisions relating to lighting, landscaping, and parking.

Public hearing on the first appeal opened on September 11, 2017 and immediately continued without testimony to October 2 2017, when public hearing on the second appeal opened.² The two appeals were heard together on that date; continued to October 19, 2017 and November 9, 2017, when public hearing closed. On November 16, 2017, the Board voted unanimously to uphold the Building Inspector in part and reverse in part, as discussed further below.

Prior Determinations

A decision of the Board dated January 19, 2001, addressing the storage and display of boats on locus for sales and repairs, found that locus had been used for auto sales and service since 1936; that "similar continuous uses of the property and building have been made since 1936, up to and including the current tenant, Bay State Boat Works"; that "[s]ince the garage was first opened in 1936, a portion of the building occupied by the boat sales and repair shop has continually been used for the sale to the public of automobiles, tires, and now boats"; and that "[e]ach of these sales operations has continually made effective use of outside displays and storage of the goods for sale." The decision concluded that the outside display and storage of boats was a lawful preexisting nonconforming use and that no zoning violation had occurred.

On June 14, 2010, Mr. Presti requested a determination as to whether special permits were needed for certain tenants "currently renting space and storing items outside" on locus. On July 13, 2010, the Building Inspector advised that no special permits were needed as storage of vehicles, equipment and materials "are the same or consistent with the past uses of the site recognized as grandfathered uses. . . ." See July 13, 2010 letter from Building Inspector to Mr. Presti.

Findings of Fact

The Board makes the following findings of fact based on the record evidence, including the written submissions and testimony of Ms. Fisher, Mr. Presti, the Town Planning and Building Departments, and members of the public:

1. Information regarding use of locus dates to 1936, when the Erkinen family purchased the property. No zoning bylaw then existed in Stow. At that time a restaurant and gas station operated on locus.
2. Uses on the property grew to include a Buick dealership, new and used car sales, repairs, and a body shop. Other uses on the property by tenants over the years consisted of retail, storage and display of vehicles and materials, including a tire company, boat sales and service, body shop, and storage of vehicles and equipment by landscapers and contractors.
3. The above uses - automotive and other vehicle (boat) sales and service; related retail; outside storage and display - were ongoing in 1968, when the Town adopted a Zoning Bylaw, , placing the westerly portion of the front of locus in a Business District and the easterly and rear

² By agreement, the time for filing a decision in both appeals was extended to December 22, 2017.

portions in a Residential District. . To the extent any of the above uses were not permitted in the Business or Residential Districts, or allowed only by special permit, such uses were lawful, preexisting nonconforming uses. In 2004, the portion of locus zoned Residential was rezoned Business.

4. The above uses continued through a change in ownership of locus from the Erkinen family to Presti in 2004. Since 2004, documented use of locus has included used car sales; car repairs, boat sales and service; towing; auto body shop; bus storage; contractor, landscaping and tree businesses, including outside storage of materials and equipment; hobby shop; car wrapping; container storage; tile sales; a school³; and residential use (the dwelling on the rear parcel). [*Presti grids*]. *Tenants* have changed over the years, but *uses* continuing without interruption consist of automotive and other vehicle (boat) sales and service; related retail; and outside storage and display.

5. There has been no abandonment of the automobile sales use, notwithstanding the waxing and waning of automobile sales since 2004. Although not dispositive on its own, licenses to conduct vehicle sales (Class II) have been issued by the Town continuously during this time, to the present day, to a number of businesses operating on locus. Neither the intent to abandon the automobile sales use, nor voluntary conduct carrying the implication of abandonment was demonstrated. See Town of Orange v. Shay, 68 Mass.App.Ct. 358, 363 (2007)

6. Current uses on the property include: used automobile sales and service; automobile leasing; towing; car wrapping; bus company storage; landscaping business and storage; contractor business and storage; tree business and storage; container storage; and residential.

7. All of the above uses, except residential use, include outside storage. The automobile sales use includes outside display.

8. The three structures on locus predate the adoption of zoning in 1968.

9. Exterior lighting fixtures on locus are not "full cutoff." Cut sheets from Hudson Light and Power do not provide a lumen count, but the lighting fixtures are 128 Watts and the cut sheets indicate that they are not full cutoff.

10. Although occurrences of odor and dust emanating from locus were reported by Ms. Fisher, which reports the Board does not discount, there are currently no such emanations from the property.

Applicable Law and Discussion⁴

³ Stepping Stones School, closed in 2015.

⁴ Section 3.9.6 of the Stow Zoning Bylaw governs changes to nonconforming uses and structures. Certain criteria contained in Section 3.9.6.1 and Section 3.9.6.2 are applicable *if it is determined, through application of the Powers test*, that the proposed use is a "change or substantial extension" of the existing nonconforming use.

General Laws c. 40A, s. 6 "provides that a nonconforming use of land, if lawfully created, is exempt from subsequently enacted zoning provisions." Oakham Sand and Gravel Corp. v. Town of Oakham, 54 Mass.App.Ct. 80 (2002). To preserve the protection afforded a preexisting, nonconforming use under G.L. c. 40A, s. 6, any subsequent use of the property must not constitute a "change or substantial extension" of the protected nonconforming use. *Id.*, citing Ka-Hur Enterprises, Inc. v. Zoning Bd. of Appeals of Provincetown, 40 Mass.App.Ct. 71, 74 (1996). If any subsequent use *does* constitute a "change or substantial extension" of the nonconforming use, a special permit is required under G.L. c. 40A, s. 6, granted only if the changed use is determined to be not substantially more detrimental to the neighborhood than the existing nonconforming use. See G.L. c. 40A, s. 6; Cumberland Farms, Inc. v. Jacob, 2015 WL 5824402 at p. 10 (Land Court, Oct. 6, 2015 (Long, J.)), citing Barron Chevrolet, Inc. v. Town of Danvers, 419 Mass. 404, 410 (1995).

Not *all* changes to a preexisting nonconforming use trigger the requirement of a special permit. A three-pronged test is applied to the facts of each case to determine whether such requirement is triggered (the "Powers" or "Chuckran" test⁵): (1) Whether the proposed use reflects the nature and purpose of the prior use, (2) Whether there is a difference in the quality or character, as well as the degree, of use, and (3) Whether the current use is 'different in kind in its effect on the neighborhood. Derby Refining Co. v. City of Chelsea, 407 Mass. 703, 712 (1990); Almeida v. Arruda, 89 Mass. App. Ct. at 243. If the use in question is consistent with all three Powers considerations - in other words, if the answers are yes, no, and no, respectively - the use is protected under G.L. c. 40A, s. 6 without further inquiry. See Cumberland Farms, Inc. v. Jacob, supra at p. 10, citing Barron Chevrolet, Inc. v. Town of Danvers, 419 Mass. at 413. If the Powers test is failed, a special permit is required. *Id.*

The Board has reviewed the existing uses on locus and has first considered whether these uses are permitted in the Business District under Section 3.3 of the Zoning Bylaw. For those uses that are not permitted in the Business District (for example, outside storage), the Board has considered whether these uses are lawfully nonconforming; that is, whether the uses were in existence in 1968 when the Zoning Bylaw was adopted, rendering them nonconforming. The Board has applied the Powers test to determine whether each of the current uses is a "change or substantial extension" of the lawful, preexisting nonconforming uses. The Board has also examined the evidence to determine whether any of the preexisting nonconforming uses have been abandoned as that term is used in the Zoning Bylaw.⁶

Based on the above examinations, the Board concludes that *automobile sales* are permitted under Section 3.3.2.3; to the extent the *outside display and storage of automobiles* are not allowed under that section of the Bylaw, such outside display and storage of automobiles were lawfully in

⁵ Powers v. Building Inspector of Barnstable, 363 Mass. 348 (1973); Bridgewater v. Chuckran, 351 Mass. 20 (1966).

⁶ Section 3.9.3 of the Zoning Bylaw provides that "if the nonconforming use is discontinued or abandoned for a period of two or more years, it shall not be reestablished except upon a special permit granted by the Board of Appeals."

existence in 1968 and for decades prior. The Board finds no abandonment of the automobile sales use, where neither an intent to abandon the use nor voluntary conduct carrying the implication of abandonment was demonstrated. Applying the Powers test to the current automobile sales use, including outside display and storage, the Board finds that the current outside display and storage of *automobiles* is not a "change or substantial extension" of the preexisting nonconforming use. However, the Board finds that the outside display or storage of vehicles *other than automobiles* is a change or substantial extension of the preexisting nonconforming use, as this is an increase in intensity and has greater impacts on the neighborhood. The storage of trucks and buses might be said to reflect the "nature and purpose" of the original nonconforming use, storage of automobiles. However, trucks and buses have a different character and visual impact on the neighborhood; further, the entry and exit of trucks and buses for storage or display on locus generates more noise than cars entering and exiting the property, producing a greater impact on the neighborhood. Under G.L. c. 40A, s. 6, a special permit is required for the outside display or storage of vehicles other than automobiles.

The Board further concludes that certain *automobile service* use is permitted under Section 3.3.3.3, subject to certain limitations and requirements. The Board finds that to the extent *automobile service* use on the property exceeds the limitations of this Bylaw section, such automobile services were lawfully in existence in 1968 and for decades prior. Applying the Powers test to the current automobile service use, the Board finds that the current use is not a "change or substantial extension" of the preexisting nonconforming use. The current automobile service use has not enlarged or expanded the area of locus occupied, and has not increased the noise level or visual impact of this use.

The Board further concludes that the *automobile leasing and towing* uses are allowed at least in part under Section 3.3.2.1 and 3.3.2.2, which permit "service establishments" and "business or professional offices." To the extent these uses include activity outside the building, they do not conform to the Bylaw, but they are consistent with the automobile-related services that have been located on the property since the 1930s. Applying the Powers test to the *automobile leasing and towing uses*, the Board finds that the current use is not a "change or substantial extension" of the preexisting nonconforming use. The leasing and towing uses of the property do not occupy a greater portion of locus, nor do they increase the noise level or visual impact on the neighborhood, from the prior nonconforming automobile-related services

The Board further concludes that the *car wrapping* use is permitted as a "service establishment" under Section 3.3.2.1 or as a "business or professional use" under Section 3.3.2.2. This business has no manufacturing element. It provides to customers computer-aided design and printing, followed by application of the printed product to their vehicles. To the extent the car wrapping use includes activity outside the building, it does not conform to Section 3.3.2.1, but the use is wholly consistent with the automobile-related services that have been located on the property since prior to 1968. Applying the Powers test to the *car wrapping use*, the Board finds that the current use is not a "change or substantial extension" of the preexisting nonconforming use. Application of the printed product to vehicle exteriors creates no greater noise, visual impact, or vibration than other automobile services previously provided on locus.

The Board further concludes that the *contractor, landscaper and tree businesses, with associated storage of equipment, including containers*, are not permitted uses under Bylaw Section 3.3. The Board finds that certain storage of equipment by businesses is a lawfully nonconforming use, having been in existence prior to the 1968 Zoning Bylaw adoption. The Board further finds, however, that the storage of equipment, including containers, has changed and expanded since that time. Applying the Powers test to the *contractor, landscaper, and tree businesses, including associated storage of equipment*, the Board finds that the current use is a "change or substantial extension" of the preexisting nonconforming use. The current storage by multiple tenants of a variety of equipment does not reflect the "nature and purpose" of the storage use in 1968, which centered on automobiles. Further, there is a difference in the quality, character, and degree of storage use since that time. The area of locus used for storage has expanded since 1968, and that for this purpose, portions of the property have been cleared and the topography altered. The types of containers stored on the property have grown to include clean dumpsters, which generate noise when being moved on and off the property. As a result of these changes to the appearance and noise generated on the property, the current storage use has an effect "different in kind" on the neighborhood than the prior storage use. A special permit is required for the businesses and associated storage of equipment

The Board further concludes that to the extent the main structure on locus containing the above uses does not conform to the dimensional requirements of Bylaw Section 3.3.1, such requirements are inapplicable to the structures and uses contained within. All buildings on locus are lawfully nonconforming, having been constructed prior to 1968.

Section 7.7.4.1 of the Bylaw requires a landscaped buffer to screen parking and loading areas on property adjacent to a Residential district. The appellant argues that this requirement applies to locus and that zoning violation exists where no such landscaped buffer screens locus from her property. Parking, loading and storage uses have occurred on locus since well prior to the 1968 adoption of the Zoning Bylaw. Under G.L. c. 40A, s. 6, "a nonconforming use of land, if lawfully created, is exempt from subsequently enacted zoning provisions." Oakham Sand and Gravel Corp. v. Town of Oakham, 54 Mass.App.Ct. 80 (2002). We have found that these uses to be lawfully preexisting on locus, and accordingly that the requirements of Section 7.7.4.1, enacted no earlier than 1968, do not apply. Accordingly, we find no violation of this Section.

The Board finds sufficient evidence that the lighting fixtures on locus do not conform to Zoning Bylaw. Sections 3.8.1.5 prohibits exterior lighting from shining on adjacent properties or towards any street in such a manner as to create a nuisance or hazard; Section 3.8.1.5. 6 requires that all exterior lighting fixtures with an output in excess of 2000 lumens is required to be "full cutoff." The exterior lighting fixtures on locus are not "full cutoff." Cut sheets from Hudson Light and Power do not provide a lumen count, but the lighting fixtures are 128 Watts and the cut sheets indicate that they are not full cutoff. The lighting fixtures must be adjusted so as to comply with Section 3.8.1.5, including subsections (1)-(6), of the Zoning Bylaw.

The Board finds no evidence of any other violations of the Zoning Bylaw on locus.

Conclusion

Based on the record and for the reasons above, the Board upholds in part and reverses in part the Building Inspector's two denials of Ms. Fisher's zoning enforcement requests. Special Permits are required for the uses identified above *only*; the other uses discussed are lawfully nonconforming and/or do not constitute a "change or substantial expansion" of such preexisting nonconforming uses. For a period of sixty days, no cease and desist order shall issue with respect to the uses identified above as requiring a special permit. After such sixty-day period, if no application for a special permit has been filed with the Board, such cease and desist order may issue.

Lighting on locus shall be modified in accordance with the Zoning Bylaw.

SIGNATURE PAGE FOLLOWS

Appeals of this decision may be made pursuant to Section 17 of Massachusetts General Laws, Chapter 40A and shall be filed within twenty (20) days after the date this decision is filed with the Stow Town Clerk.

STOW ZONING BOARD OF APPEALS

December 20, 2017
Received and filed
Volume III, Page 750 and 762

Linda E. Hathaway
Town Clerk of Stow

Donald Tannup
Charles A. Barry
William J. [unclear]
Mark Jones
Bruce E. [unclear]

A TRUE COPY,
ATTEST
Linda E. Hathaway 9 of 9
TOWN CLERK, STOW, MA