

**Town of Milford
Zoning Board of Adjustment Minutes
June 20, 2013
Paul Cunningham
Case #2013-07
Appeal from Administrative Decision**

Present: Fletcher Seagroves, Chair
Zach Tripp
Laura Horning
Kevin Taylor
Bob Pichette

Katherine Bauer – Board of Selectmen’s representative

Absent: Paul Butler, Alternate
Mike Thornton, Alternate

Secretary: Peg Ouellette

Paul Cunningham is requesting an appeal of Community Development Director/Zoning Administrator’s administrative decision regarding the continuance of a non-conforming use at 113 Savage Rd, Map 6, Lot 40, in the Residence “R” district.

MINUTES OF THE JUNE 20, 2013 MEETING APPROVED ON AUGUST 1, 2013.

Fletcher Seagroves, as Chairman, opened the meeting stating that the hearings are held in accordance with the Town of Milford Zoning Ordinance and the applicable New Hampshire Statutes. There was one old business item on the agenda and one new case.

F. Seagroves stated that for this case the procedure would differ. He would have the applicant come forward and state his case, after which Community Development Director/Zoning Administrator Bill Parker would come forward to explain his decision. Then the meeting would be opened for public comment. After closing of the public portion and Board discussion of the criteria, the Board would vote on the criteria. He read the notice of a request for an appeal by Paul Cunningham to a Community Development/Zoning Administrator's decision regarding continuation of non-conforming use at 113 Savage Road, Map 6, Lot 40 in the Residence R District. This case was tabled from the previous meeting. The list of abutters was read. Abutters Laura and Clara Ayotte, and Donald Labonte, and Suzanne Fournier (wife of Paul Cunningham) were present.

F. Seagroves then asked the applicant to come forward. He stated that since this was a hearing, the Board could ask questions at any time. He stated he wanted to clarify a couple of items. He asked the applicant about an e-mail to Bill Parker on 5/17/13 in which the applicant stated that "ZBA Board member Kevin Taylor spoke to me with the suggestion that I ask you questions." He inquired if applicant spoke to Mr. Taylor.

Applicant stated it was at the ZBA meeting.

F. Seagroves asked whether he spoke to Mr. Taylor at any other time.

Applicant stated absolutely not. Mr. Taylor suggested contacting Bill Parker to find out why he was not contacted.

F. Seagroves asked the applicant to present his case.

P. Cunningham came forward. They have lived in Milford for 27 years and have lived at 9 Woodward Circle for the past eight years. He filed a complaint that the Savage Rd. property was being used for commercial business activity that had not been there for many years. Current furniture business represents a resumption of non-conforming use that had expired. Despite strong evidence he had provided that the grandfather use by Joseph C. Devine, Inc. was discontinued for more than one year, his zoning complaint was closed by administrative decision of Bill Parker. History of the property doesn't support a conclusion that the grandfathered use was continuous. He would go through the evidence and refute documentation provided by Zoning Administrator. There was no proof that the grandfathered use was continuous between May 2010 and Aug. 2012. He presented a chart summarizing the chronology of the non-conforming use of the Savage Rd. property. 1957- Zahn Family ownership. Continuing to sale to Devine in 1973. Subsequent purchase by Ayottes in 2012. Relevant facts: following the death of Joseph Devine 2/24/10, prior owner of the Savage Rd. property, the auction house of Joseph Devine, Inc. with its principal office and mailing address at 20 South St, Milford since 1998 abruptly ceased operation in April 2010 after a controversial March 7 auction held in Nashua according to newspaper reports. A sign posted on the door of Mr. Devine's downtown business informed the public in May 2010 that "J. C. Devine, Inc. Auctioneers & Appraisers, has suspended business operations due to the death of our President and CEO Joseph C. Devine." Telephone, fax, e-mail and web site also had been discontinued. The State of NH Office of Attorney General filed a lawsuit in Hillsborough County Superior Court on May 24, 2010 against the Devine auction house and was granted permission by the Court to seize all real estate, cash, bank accounts and other assets associated with the business in an effort to seek restitution for unmet payment obligations to consignors and civil penalties and costs for violations of the Consumer Protection Act. P. Cunningham stated this disciplinary action against assets of Joseph Devine was a crucial piece of evidence of this claim that the grandfathered use was subsequently discontinued for more than a year; there is no doubt that on this date the

Devine auction house closed and went out of business. He stated this was documented by NH Dept. of Justice which certified as true and correct the factual allegations made in their petition for injunctive relief, “Devine is now out of business. Devine has closed without paying consignors of goods sold. Several Devine employees attempted to keep operating the business but were unsuccessful because Devine was insolvent.” He stated this meant that as of May 24, 2010 the business of Joseph C. Devine, Inc. was no longer in a state of readiness to produce or deliver a product, stock merchandise, preserve or repair equipment, deliver bids for work, maintain a staff, pay utilities, advertise its services, or otherwise continue its grandfathered use of the Savage Rd property for auction house business. On Oct. 25, 2011 the Savage Rd property was inherited by one of his sons as part of a revocable trust created in June 2000 and put up for sale as a single-family home in Residence R district as documented by the real estate listing. On Feb. 15, 2012 it was sold to the present owners, who operated no business on the premises. On Aug. 1, 2012, the current tenant, Mr. Eli Johnson, began operating a commercial business involving purchasing, refinishing, warehousing and reselling of antique furniture. Up to that time, there had been no disclosure to town officials of any plans for resumption of business activity on the premises and no disclosure to the town by the tenant when business activity commenced on Aug. 1, 2012. It was only after the Zoning Administrator met with Mr. Ayotte on Jan. 11, 2013 as part of the investigation of complaint to the town that the “alleged business use of the property” was disclosed to the Milford Community Development Office. As far as the town was concerned, until Jan. 2013 there was no hard evidence of any business activity and no town records to document the legal non-conforming status of the Savage Rd property even though the town was alerted by his wife as early as Feb. 2012 of the possible unpermitted use. The Zoning Administrator made no mention of above facts in his 2/5 decision or 8/15 memo to the ZBA; what he relied on in making his determination was documentation provided by Mr. Ayotte at their January 11 meeting. This documentation is three items: first, letters of testimony from former Devine employees, business associates and friends of the family; second, 2012 notice of dissolution issued to Joseph C. Devine, Inc. issued by NH Dept. of State; third, Mr. Johnson’s occupancy of the Savage Rd property in August 2012. These items provide no proof that use was continuous between May 2010 and Aug. 2012. First, letters testifying that people’s observations of business activity and the presence of artifacts on the premises up to the purchase by the Ayottes in February 2012 – he was not disputing occurrence of business activity on the property prior to May 2010, to which these letters attest. He said no letters can, nor do, testify to the resumption of Devine business activity occurring after that, the date the Devine family business suspended all operations and the State attached all real estate and financial assets associated with that business. The business had been sued by TD Bank for \$398,000 from half a million loan taken out in 2003. Case was still in Hillsborough County Probate Court in July 2011. They and other suits brought against the auction house effectively dissolved J.C. Devine and ended its grandfathered use of the Savage Rd property for all practical purposes. He said it was as if the business had burned down, metaphorically speaking. There remained only remnants—inventory found on the property, i.e. boatbuilding materials, wiring, security systems, gun and ammunition and artifacts. These do not represent continuing business activity after May 2010, but historical evidence of prior Devine businesses. The remnants include relics of what was considered one of the oldest auction houses in NH which closed its doors in 2010 and had assets seized by the State.

Stock found on the property represents artifacts and remnants of past discontinued businesses, not evidence of present continuance. Second, re the 2010 notice of dissolution issued to J.C. Devine, Inc. by NH Dept. of State, presented as evidence that grandfathered use of the property continued up to Dec. 2012 by virtue of its ongoing status as a corporation. Mr. Cunningham referred to a disclaimer on the Secretary of State’s website stating that information “only refers to the status of

the entity's filing requirements with this office." Town zoning ordinance doesn't specify the business's corporate status as the litmus test of whether a property retains or loses its grandfathered use status. The ordinance specifies that discontinued use of the property for one year for any reason prevents the resumption of the non-conforming use. He stated that by giving a fixed, specified time period of non-use that constitutes abandonment, the ordinance makes clear the town's authority-not the State- to limit the expansion of non-conforming uses in residential zoned neighborhoods. He stated this was a right supported by the NH Supreme Court, and cited McKenzie v. Town of Eaton Zoning Board of Adjustment. He quoted the NH Supreme Court "it is well-established both in this State and others that a legitimate purpose of zoning is the reduction and elimination of non-conforming uses. Under such ordinances the mere non-use for a stated time becomes of itself sufficient determinant of non-conforming use." He maintained that by establishing a time limit the Town has issued an objective test that prevents resumption of non-conforming use if it is discontinued for one year, with or without an administrative dissolution notice.

The business's corporate status established by the State differs from its grandfathered use established by the town. One doesn't replace or serve as evidence for the other. Doing so implies that non-conforming use of the Savage Rd property could be resumed even if it discontinued for more than one year until non-filing with the State or issuance of a dissolution notice. He stated the 2012 dissolution notice documented the fact that he filed his last report with the State Feb. 4, 2010 shortly before his death and the business failed to file in 2011 and 2012 because Mr. Devine had died and the business closed. He said rather than serving as documentation of continued legal grandfathered use, the dissolution notice documents the abandonment in 2011 and 2012 following the last year the business filed a report. Third, re the item presented by Bill Parker for Mr. Johnson's occupancy in Aug. 2012, which he says is proof of continuance of grandfathered activity, the structures that existed on the site prior to the adoption of zoning in 1969. But, there was no prior business use of the property, grandfathered or otherwise, during the previous five and a half months when the Ayottes renovated or the three and a half months prior to that when the property was on the market - that is nine months, an additional three months prior to it being put up for sale, and it is abandonment for one year. More, if including the 17 consecutive months of non-use when the Devine auction house disappeared in cloud of bankruptcy. He stated that Mr. Johnson's occupancy was not proof of ongoing continuance of non-conforming, but a resumption of grandfathered use that had expired. He stated a problem with a 1,536 SF oversized garage that current tenant is using as warehouse to store inventory of liquidated retail businesses. The garage was built in 1980, not prior to 1969, as documented in Town assessor's property guide. It was built by Joseph Devine, not the Zahn family as incorrectly reported by Mr. Parker. It was not on the property when it was sold in 1973; Mr. Devine built it in 1980, eleven years after the 1969 ordinance. It cannot be considered grandfathered because it didn't exist prior to enactment of the zoning regulations. It was built for a business that arguably represented a major change in use of the property from an import/export business to manufacturing boats. He concluded that the history of the property indicated discontinued use for more than one year from May 2010 to August 2012. The current business is operated out of a structure whose grandfathered use was assumed and not established. He was asking the Board to reverse Bill Parker's decision permitting continuing the non-conforming use and the non-conforming use not be permitted hereafter to be resumed and that the property be put to "the highest and best use of the site" as determined by the town assessor's office, in this case a single-family home in a zoned Residence.

F. Seagroves asked for questions. There were none.

F. Seagroves stated the applicant referred to when Mr. Devine moved to South St, he used that address. He had a post office box.

P. Cunningham agreed.

F. Seagroves said it was particularly for the South St address.

P. Cunningham said he had a mailbox and a store location and office.

F. Seagroves asked for any other questions. There were none. He opened the hearing to public comment.

Bill Parker, Community Development Director/Zoning Administrator, spoke. He read a statement and his e-mail dated 2/5/13, explaining the history of research of complaints regarding the property and the documentation provided to him in making his determination. (he acknowledged Mr. Cunningham's correction that the barn was built in 1980).

F. Seagroves asked Bill re his statement that the business was dissolved 12/4/12.

B. Parker stated it was end of December or September.

F. Seagroves said September.

B. Parker said in his memo it was Sept 2012.

F. Seagroves asked where Mr. Parker had gotten that.

B. Parker said it may have been one of the documents provided by Dr. Cunningham. Regardless, there was still not a one-year non-continuance.

K. Taylor asked, if the State recognized the business until 2010 and it two years it considered it not around. If the business lapsed in 2010 because Devine passed away.

B. Parker said he went with the official documents dated Dec. 2012.

F. Seagroves believed that is when they dissolved the corporate status, not the business status.

B. Parker stated that could be concluded.

F. Seagroves said you have to file every year or two to keep corporate status. In NH you can run a business using just your name, but then you cannot use "Corporation" or "Inc." etc.

L. Horning asked applicant if it was correct that he stated the probate proceedings re this business continued until July 2012. She believed the estate remained in probate for the entire duration.

P. Cunningham tried to recall, but would have to consult his notes. He said 2011.

L. Horning responded that his statement was that in July 2012 it remained in probate while being resolved and parceled out to the various family members. That takes some time.

F. Seagroves stated the business was in a revocable trust.

L. Horning agreed. It remained in trust throughout that duration.

F. Seagroves found a copy from corporate division of the State's last principal mailing address as PO Box 413.

P. Cunningham said although 20 South Street, PO Box 412.

F. Seagroves opened the hearing for public comment.

Donald Labonte of 5 Woodward Dr., Milford came forward. He is an abutter. Prior to arrival of the new owners, he only detected one time that Mr. Devine was doing anything – it was a barbecue. Other than that he didn't notice anything. After the new owners, he noticed logging around the house and quite a pile of timber in the driveway. They haven't cleared up the slash, which is drying and is a fire hazard. He was driving home on night and someone had blocked the whole right lane with a tractor trailer. The lot dips down to the right and you cannot see around it. The driveway (at the subject property) is narrow and never meant as a loading zone and commercial site. Road is narrow and backing in is not an option. It is dangerous to have loading tractor trailers in the middle He commented, is there such a shortage of commercial space in Milford that they have to run a business in a residential area? Quality of life is why he is there. It centers around good citizenship and being good neighbors. If you want to start a business, follow the rules. You go to the Zoning Board and find out if you can start a business there. This man started a business under the radar and came to the ZBA after he was caught. Why should they

grant continuance to someone who only came forward after he got caught? It is bad precedent. To grant a favorable decision is a hardship to those who come before them following the rules.

B. Parker stated he had never seen a tractor trailer and asked how long Mr. Labonte had lived there?

D. Labonte responded 12 years.

B. Parker asked, prior to the time that Mr. Devine bought.

D. Labonte asked why they didn't back into the drive.

B. Parker responded that D. Labonte said it was too narrow

D. Labonte said that was correct. If the tenant continues to operate, he already has a panel truck in front of the garage that is not used for family use. Something needs to happen to the driveway to make it safe.

B. Pichette said he spent time there the last few days and there were a lot of UPS trucks stopping there. People have to go around them.

D. Labonte agreed. He said something should be done so it is reasonably safe to back a truck up there. Like Scarborough Ln, if you are parking a truck up there it is hard to get around. There is a lot of fast-moving traffic on the street.

John Kennison, the son-in-law of the Ayottes came forward. He grew up in Milford from 1963 to 2005 when he married the Ayottes' daughter and moved to New Boston. Parents still live in Milford. He has property in town. He was there on behalf of the Ayottes. He said Mr. Cunningham was a very good historian and he didn't have a lot of disagreement with his history. He had issue with the conclusion drawn from the history. The Zahns purchased the property in 1957 and lived there until approximately 1973. They ran an import/export business. Rich would say this property and the Zahns were important to him because some of the artwork he does was dealt by the Zahn family and that is why his interest in the property. Also he is the only abutting piece of property. Devine purchased it in 1973 to 2012. When the Zahns bought it there was no zoning; that came in 1969. Even at that point the import/export would have been allowed. At some time that changed and it is now considered grandfathered. Devines had a different business there. Auction business was there the entire time. It wasn't a case of the auction business stopped and the boat business started. Both businesses continued. Devines built an oversized garage and presumably got town approval and building permits for that. Zoning allows some reasonable expansion. We don't second-guess what the town did at that time now. More important to note that Joe Devine lived in that house but also used it for his business enterprise which was incorporated entity, J. C. Devine, Inc. and that corporation is a separate legal entity which can be sued and act as any other person. Mr. Cunningham referred to the fact that some time after Mr. Devine passed the business was sued and there was a long legal proceeding. If there is no business entity to there could not have been a suit. That legal entity existed until dissolved by the State in 2012. When the State dissolved it they sent a letter to the Devines state if they wanted to reinstate they could but would have to pay all back fees. They didn't, and the business was dissolved. That business was the tenant of the property. Joe Devine was the property owner but the business was his tenant which used the garage and part of the house for storage, which continued until the Ayotte purchase and for month after because the Devine family rented it back since they had so much stuff to clear out. All personal property was cleared out. What remained were corporate assets. It may not have been much. In the State's action to recover for some of the claims submitted by people who had consigned firearms to Mr. Devine- The Court had a trustee go in to see if there were any valuable firearms and take them out. What remained were gunsmithing tools, auction catalogs, auction items, boat forms and numerous things that needed to be cleared out before the Ayottes could take full possession. They could not move in to start renovation. The corporate was dissolved in Sept. 2012 and was a legal entity. The Ayottes purchased the property

in Feb. 2012 and so the continuance of the non-conforming use continued until the business was dissolved and actually continued after the Ayottes purchased the property. Mr. Johnson rented in August and actually started, with agreement with the Ayottes, storing things there in July. There has been continuity of use. Sec. 2.03.1 of the ordinance says “the intent of this section is to allow for the lawful continuance of non-conforming uses” but that is not without some ability by the town to control, and that is the one year of discontinuance. It was not discontinuance. It was used as a warehouse by Devine Inc. The fact that the owner had died before doesn’t make a difference. It was incorporated by the laws of NH and that continued until it was dissolved. Re the issue of the tractor trailer, he had spoken with the tenant who said a big truck was there twice. A bedroom set was delivered and he had pavers unloaded by fork lift. Those are both residential purposes. He thought that the tenant would testify to that. Tenant uses a pickup truck and a box truck and trailer that he uses when the snowmobiles run. Mr. Kennison didn’t think any hazard was being created; if so, it would be more a police matter than a zoning issue. Dr. Cunningham talked about quiet nature of the property prior to the Ayottes purchasing. It is quite because Mr. Devine was elderly and left it part of the year. His business used and accessed it for storage while Mr. Devine was in FL. When the estate wound up and lawsuits against Devine and the business, the property was sold. Ayottes spent the better part of a year working on renovating it – gutting it almost entirely, new roof, new siding, cutting down trees that were crowding the property and destroying the roof and growing up through the drive. They did it at great expense. They improved the property. Mr. Johnson moved in; he and his wife have two small children and relatives visit. It is more active. There is still work to be done which they hope to continue throughout the summer.

Z. Tripp asked about the date the property was purchased and whether it was up for sale before 10/22/11?

Mr. Kennison didn’t know.

Z. Tripp asked if it was a single-family home.

Mr. Kennison said he believed it was so represented.

Z. Tripp asked if the MLS listing stated it as a single-family.

Mr. Kennison said he couldn’t say. He thought his father-in-law would say it was marketed as a business property.

Z. Tripp said comments sounded like the owner of the property was Devine the person, not the corporation.

Mr. Kennison said it was a trust.

Z. Tripp responded that the argument is that the Devine corporation was intact in 2012 and they were tenants of the property, and asked if there was evidence of the corporation as tenants making rent payments.

Mr. Kennison said it was not that formal.

Z. Tripp said the evidence that the auction portion probably ceased around 2010. Was there evidence that any other side businesses continued?

Mr. Kennison said he didn’t believe it ceased to exist. It ceased to operate in that it didn’t conduct auctions after March but that auction happened after Joe’s death.

Z. Tripp whether business transactions that occurred at the site within the last year of the time frame being discussed was the auction business.

Mr. Kennison thought the boat business had ceased to exist; most business was auction.

L. Horning referred to the statement that during that time the fact it was not what one would consider a full operation because it was in probate being sued it was an entity functioning as its one entity. It was being sued, being prohibited from operating because it was being sued and all operations had to cease.

Mr. Kennison said they were enjoined.

L. Horning said the company itself did not cease.

Mr. Kennison stated you cannot sue a non-entity.

L. Horning said re the comment about the slash she had personal experience with having trees taken down and it can take a long time to clean up; they had overgrown trees and it had to be done for safety.

Mr. Kennison stated that you can only burn at certain times.

L. Horning said you need permits. She commented that her neighbors run a business and at various times have U-Hauls. There are no regulations about parking U-Hauls 20 or 60 feet from her house.

Eli Johnson, who lives as a tenant at the subject property, came forward. He was there to defend himself re the slash and the vehicle parked outside. Since moving in he bought a tractor and has been cleaning up himself on his free time. The box truck or tractor trailer seen out front was for the pavers. He didn't have a date when that was seen. He had furniture delivered. He had 18 ft tractor trailer backed up in the narrow driveway. They come once every 2 or 3 weeks to pick up furniture he builds. He is an on-line business. Everything is sold on the internet. There is no store housing a retail business with customers coming in so it doesn't have that traffic every day. It has multiple stands of trees falling over. But that is not why they were there.

F. Seagroves asked him to stick to the grandfathering portion.

L. Horning asked the Chair if it was okay to look at the pictures of the driveway that Mr. Johnson had with the truck on it.

F. Seagroves said they were not there for that. He said Mr. Johnson had stated he has no one coming to his place.

E. Johnson responded he has no customers. He makes trips to the Post Office. He has trailers come two or three a week. He has neighbors posting pictures and videos. The Fire Dept. comes out when he has to burn.

F. Seagroves suggested calling the Fire Dept before burning.

E. Johnson said he does; he has a permit.

C. Zahn spoke on behalf of the Ayottes. He represented them as a buyer's agent. He is a realtor. It was not his listing. It was advertised as a residence with possibility of business. His father built the property in 1957 as an import/export business with a building permit, loading dock, warehouse and offices. St. George trucks and UUPS came every day. Market Basket and the industrial park were not there. It continued as a business all those years in harmony with the neighbors. Nobody complained. Everybody respected other's property. He represented the Ayottes legally as a buyer's agent. Wood cutting that was done was done in keeping with forestry practices. The Ayottes had a wetlands scientist out prior to cutting to map wetlands. When he sold the property there was still some evidence of firearms and some business still there but he didn't know to what extent. Certainly there was never the year-long break for grandfathered status to go away. Seeing the neighborhood now versus when he was growing up there as a child, with the industrial park, to say that that would be a disturbance in that neighborhood was kind of astonishing to him. He said he would be happy to answer questions from anyone. He was happy to be there on behalf of the Ayottes. He commented that the property was built as a business, specifically to accept trailer trucks and UPS, with a warehouse and office. There has always been some kind of business there as long as he has been in Milford, which is 55 years.

Rick Ayotte, owner of the property, came forward. He said they signed a purchase and sale agreement in November 2011. They couldn't get into the property until Feb. 2012 because of so much that had to be gotten rid of – bullets, one room full of ammunition. The garage was full from one end to the other; you couldn't see through it or go through it. They probably would have taken it over sooner, and wanted to, but had to wait another one to two months. They gave them

all those trees because it costs more if you only give them a few. He thought it improved the property. They were under the impression it was allowed for business but saw after it didn't say so. They have known the Zahn's for a long time and were drawn to the property. It needed a whole new persona. They like it and hope the tenant will enjoy it forever. There was not one law that people told against them. A lot of people came over but there was never anything against them.

L. Horning asked if it was Nov 11 when they signed the purchase and sale; when did they get in?

R. Ayotte responded Feb. 15, 2012. Because they were waiting for things to be moved out many things, a lot of things that didn't sell at auction. As a matter of fact there was a small sign on the door which said "J.C. Devine Inc." which he pulled off.

Clara Ayotte spoke, saying she and her husband had spent all of last year working on the property to bring it back to life. The Johnsons, on their own, have continued to enhance it. They are good tenants and spend their own money to enhance it. She thought it made a beautiful buffer from the industrial park.

Mr. Kennison came forward again to refocus back to the zoning ordinance which says whenever a non-conforming use has been discontinued. It is their position it was never discontinued. The use remained as a warehouse with plenty of corporate assets there. The use as a warehouse was never discontinued.

P. Cunningham wanted to identify the posting for the Ayottes with the Bean Seaver, whether it was advertised as a business when the Ayottes took it over. He showed two listings with it as a single-family home – no business or indication of a grandfathered business. Also, it was July 27, 2011. If he said 2012, he misspoke. It was July 27, 2011 with the probate court.

L. Horning asked if he meant the probate court ended its proceedings on July 27.

P. Cunningham said no. He was saying it was continuing.

L. Horning said it continued well past July 2011.

P. Cunningham said it may very well have, causing the business operation to cease.

F. Seagroves continued on to the discussion by the Board. He stated he would ask for a vote whether there was a continuance of a non-conforming use, or not a continued use of 113 Savage Rd, Map 6. Lot 40.

Z. Tripp asked if the Board will agree that the question hangs on whether there was ongoing business activity between August 2011 and August 2012, when the current tenant started his business?

F. Seagroves said he was looking for is, is there a continuing business going there. Do they want to put dates in?

Z. Tripp said the ordinance gives one year time frame. Given evidence supplied, the current business started August 2012. Therefore, he thought the question before the board was whether there was any evidence of business activity between August 2011 and August 2012.

F. Seagroves stated, looking at the application, Mr. Cunningham is requesting an appeal to the Community Development/Zoning Administrator decision regarding continuance of a non-conforming use.

Z. Tripp said the decision being appealed is that the Community Development Director said there was a continued use. Applicant is saying there was a one-year lapse in normal business activity

F. Seagroves said he is looking for whether there was a continuation or not.

Z. Tripp felt they should have dates, since the applicant is stating there was a one-year lapse and whether the board agrees that the Community Development office made an error in the one year.

F. Seagroves said if anything, he would use the date that Joe Devine died.

L. Horning stated she believed they were ruling on the appeal from the administrative decision. The administrative decision was in question. The question itself, in her opinion, had already been

mulled over in all the evidence presented to the Board and the office in three ways: a substantial amount of testimony as to the what the dates were, what occurred in what time frame, starting in 1957 until Feb. 2013. She felt they were answering the appeal from the administrative decision regarding the overall evidence.

F. Seagroves said whether the business was continuing there.

L. Horning said, whether the business was continuing or not. She agreed that was the question.

F. Seagroves said he would like to have everybody state an opinion, not merely state they agree with someone—restate what they said for the record.

Z. Tripp said he agreed with the applicant. Community Development made an incorrect decision. He didn't see evidence of normal business use between August 2011 and 2012. He agreed that it was discontinued use. Applicant brought a lot of evidence showing that Devine and Company, Inc. closed its doors in 2010 and then went through bankruptcy. He hadn't seen any evidence of legitimate business after 2011. Evidence in letters supplied - by Keith Shirley had evidence in 2007 and 2008 but it doesn't prove that one year time didn't elapse between August 2011 and 2012. Pete Graesser just said he had just known of business activity. Rich Couture said in reviewing the property he saw a lot of evidence of inventory. The biggest question is that all of the evidence is sheer mass of inventory. The question is whether inventory is part of a valid ongoing functioning business or is there because a business ceased to exist because of bankruptcy. There was no evidence of business activity. Going in and buying a compressor didn't sound like it was in line with an auction house. It was purchased by Alwyn Carleton who was going in there making dump runs to clear up the place after the owner died, which indicated to Mr. Tripp that it had ceased to exist. It didn't sound like part of the auction business. He would agree with the applicant that Community Development office made an incorrect assumption of an ongoing business. The State of NH did dissolve it in 2012 after they failed to pay for two years, which is why the entity dissolved as a corporation; it didn't answer the question whether there was a continuing business there between August 2011 and 2012.

L. Horning respectfully disagreed with Z. Tripp. She believed that when a death or event occurs that is outside the scope of the business's ability to rectify, such as a death or probate issue, that incapacitated it to function fully as a business but does not dissolve it as a business – she agreed with the comment you cannot sue a non-entity –the level of activity was impeded by the death and the period of time the estate was in probate which was almost two years according to the evidence. In her opinion there was a continual business there that was capable of being sued and parceled out. That takes some time. She didn't think that in this case it was within the purview of the entity to disappear because of a death. It takes time to resolve. The level of activity is not an indicator of whether a business is or isn't—that has been seen in this economic slump. Dissolving of the business in December 2012 was the end date for her from what she saw. She believed there had been a continuous business there as an entity. She was not questioning its level of occupancy, but its existence and right to exist during the period of time. She didn't believe there was error in judgment in the administrative office.

B. Pichette agreed with L. Horning. Joseph Devine Inc. was still in business in 2012. Otherwise it could not have been sued. It might have been slow or inactive, but it was still a business. He agreed with whatever L. Horning said.

K. Taylor disagreed. He felt it stopped in 2010. You appoint a trustee to liquidate all assets. He understood the business was probably still going but the State recognized that 2012 was the date they folded. But he believed that 2010 was the date they stopped but he was pleasantly disagreeing with the Community Development Director.

F. Seagroves asked, what is a business? Is it a business if you can't see anything from the outside of the building? Joseph Devine, or whoever after he passed away, could have walked into that

building and run a business. There were 25 phone lines there. It sounded like he was running an auction on the phone. Who knows his son or someone else didn't go in just selling the guns or ammunition. The next question is how many days a week do you need to run a business to be a business? One day, seven days? These were questions he considered. There are many businesses being run in town that people don't know about. Even though there is no activity in the house or you don't see cars going in and out, there could be a business there. He wasn't saying there was.

There was no doubt in his mind that the business ceased when Joe Devine. He quoted the sign on the door at 20 South Street after Joe Devine died on 2/4/10 stating "J.C. Devine Auctioneers [plural] and appraisers [plural] suspend business operations due to the death of our President and CEO." That told him that Joe was not the only auctioneer there. He believed they had auctions after Joe passed away. When he passed away the business went into a trust. (F. Seagroves noted when his mother passed away he had to put a lock on the door and you couldn't take anything out). He felt that is what happened here. They were handicapped. The courts have to stop all business in and out to make sure everyone gets due pay, i.e. employees, people who had given Joe items to sell; they needed to get that money. Although it may not have looked like normal business, he thought the business was still there. In researching on corporations he found that this was an "Inc." where you have to register your name with the State so someone else isn't using the same name. That is what happened when the State said the corporation was dissolved; Mr. Devine was using his "Inc" name, in his opinion.

The Chair requested a motion.

L. Horning started to make a motion.

F. Seagroves suggested wording that they were voting on whether there was a continuance of non-conforming use at 113 Savage Rd.

L. Horning agreed.

Z. Tripp said they were voting on the appeal.

F. Seagroves agreed; the appeal is that use was discontinued for a year. He asked Bill Parker if that was correct.

B. Parker suggested framing the motion as to whether you agree with the Zoning Administrator's decision; and then they can vote yes or no.

L. Horning made a motion to vote on whether they agree with the administrator's decision regarding the property in question at 113 Savage Road – whether it was a continuous business.

B. Pichette seconded.

Vote:

B. Pichette – yes

L. Horning – yes

Z. Tripp – no

K. Taylor – no

F. Seagroves – yes

Vote was that the Board agrees with Mr. Parker's decision.

Suzanne Fournier came forward, saying they didn't address the 1980 oversized garage that is non-conforming use. It was built in 1980.

L. Horning asked the Chair if they were hearing testimony.

F. Seagroves responded they were not. He said it is not up to the ZBA to look into that.

L. Horning stated it was a separate board altogether.

S. Fournier left.