

**Town of Milford
Zoning Board of Adjustment Minutes
September 5, 2013
Paul Cunningham
Case #2013-14
Rehearing**

Present: Fletcher Seagroves, Chairman
Zach Tripp
Laura Horning
Kevin Taylor
Michael Thornton – Alternate

Katherine Bauer – Board of Selectmen’s representative

Absent: Paul Butler – Alternate
Bob Pichette
Len Harten - Alternate

Secretary: Peg Ouellette

Rehearing of Case #2013-07, an appeal of the 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 approved on November 21, 2013

Fletcher Seagroves, Chairman, opened the meeting, read the notice of hearing and informed all of the procedures. The list of abutters was read. Roland and Clara Ayotte, Paul Cunningham and Suzanne Fournier, and Donald Labonte were present.

L. Horning made a motion that only new testimony be heard, given that all the old testimony has been heard and reheard both in the previous hearing and touched upon in the rehearing request.

K. Taylor seconded.

Motion was unanimously passed.

R. Shepard, attorney for Paul Cunningham agreed with the decision to limit this rehearing to new information. He would incorporate by reference the previous testimony that had been submitted to the Board and all exhibits. He requested that the memo prepared by P. Cunningham be made part of the record.

F. Seagroves agreed.

R. Shepard continued that the question debated on 6/20/13 was whether the non-conforming use at 113 Savage Rd was discontinued. He understands the property is occupied by a tenant, Eli Johnson, who refinishes furniture on site and sells it on-line. Trucks come every couple of weeks to take deliveries away. From their perspective, all evidence points to the previous use of the property as a warehouse or active auction business and a boat-building business that terminated quite some time ago and referred to the submitted time line. They argue that this timeline along with previous testimony is clear evidence of discontinuance of the business use. Regarding testimony it wasn't dissolved by the State until December, 2012, they argue that the reason for administrative dissolution was non-payment of annual fees for 2010 and 2011 that coincides with the death of the owner in February, 2010. The evidence is clear that the active auction business terminated in all forms on May 24, 2010, longer than a year before this new business. The fact the business was sued by the State of NH has been gone over, the issue is the business discontinuance. Does the remaining warehouse containing inventory after the auction business closed mean the business continues? They argue it doesn't. It was the remnant and remains of the business to be sold off. The fact that there was inventory in this building from May 24 until it was sold is not evidence of a continuing business. A business by definition is one where people actively participate in the business. He then referred to page 10 of P. Cunningham's memo regarding abandonment of non-conforming use and to the ZBA Handbook's definition of abandonment. This was abandonment caused by the death of the owner, litigation and other issues. Page 12 goes to the heart – mere use vs. non-conforming use. In summary, it was their position that after Mr. Devine died, the business was closed by the State of NH, the Chapter 7 bankruptcy liquidation, and departure of employees. The business ended during a gap of approximately 20 months when there was no business. Eli Johnson then started a new business. The new issues were: Did mere warehousing of inventory of a dead business constitute a business and whether the fact this business was not administratively dissolved by NH Secretary of State until Dec. 2012 constitutes a continuance of business. They say no. He concluded, saying the rest of the facts have already been presented to the Board in complete detail.

Z. Tripp inquired about the time frame during bankruptcy when assets and valuables in the garage were gone through by the courts and removed or left.

P. Cunningham said that was around the time that Joseph C. Devine, Trustee met with creditors. Atty. Kenison had previously mentioned the Trustee going through the property, but he didn't have dates. One letter presented for this rehearing identified an individual who removed material after a March 7 auction and sold it, who said he had permission.

R. Shepard said he didn't know how that impacted the subsequent loss of other resources the bank or trustees didn't have access to. He then referred to an article in a Maine Antique magazine.

K. Taylor asked if Mr. Cunningham knew when they finally dissolved the business; when everything was out of there, when everything was done and it was abandoned. Was it past the 20 months? Is that the point, was there still stuff that could have combined that trust? Were his children involved in the trust? Someone had to give Mr. Carlton, a well-respected man, permission to do that. Up until the auction of Aug. 11 they were selling his stuff. If the children are still part of that trust and authorizing somebody to auction things, they are part of that trust and the company is still going, as far as he is concerned. He believed some of the sons may have been on the Board of Directors.

R. Shepard said that is for the Board to answer. It is their position that any liquidation occurring afterwards was not part of an active business operation. An active business operation for an auction house should be holding auctions, not business liquidation. This was a liquidation of business that was dead as of May 2010. That is the Board's determination to make. He felt evidence showed items were liquidated and removed, whether they had value or not, after May 24, 2010, during this 20 month period. He didn't feel there was evidence it was done after that, and that was irrelevant. The 20 month period and the 12 months before Eli Johnson came in was the relevant period.

K. Taylor asked what if the trust was auctioning during that 20-month period?

R.. Shepard said the trust wasn't the business.

K. Taylor said if the children were involved, isn't that the business? Might they be acting for the business?

L. Horning cited case law in the Handbook, Chapter 2 , Lawlor v. Town of Salem on page 23, and said P. Cunningham implied the Town almost had a responsibility to cite an abandoned use for any reason but they also have the right to take the rest of the ordinance into consideration. The Handbook said the town drafted an ordinance to define abandonment as discontinuance for more than one year without regard to the landowner's intent. The Court applied McKenzie and ruled that intent is irrelevant. When a business maintains a site in a state of readiness to continue use it is not abandonment even if no product is created on-site. The Court agreed with the trial court's analogy and, even with all the preparation, the store owner cannot guarantee that customers will purchase merchandise. Evidence was presented that the landowners were on site in readiness to provide a product, through any entity. They were still moving product in and out of the warehouse. She asked when P. Cunningham purchased the home next to the Devine property.

P. Cunningham responded it was in March, 2005.

There was a brief discussion regarding the date the Cunninghams purchased their property relative to when J. Devine retired and subsequently died, and the level of activity when the Cunninghams purchased their property.

P. Cunningham said Lawlor said intent mattered when making a decision about abandonment but McKenzie overruled Lawlor and said intent does not matter. When the successor trustee, Joseph C. Devine, indicated he had no intention of continuing the business, that indicates intent. Although under McKenzie it is irrelevant, but he included it as part of his case. That is one reason the property appeared to be in such a discontinued state by the time it was purchased.

L. Horning was not sure she agreed. This is a warehousing situation. This is court case law. As long as the property maintains readiness to provide a product and the Pike case states that. Receipts seen as part of the testimony indicate that product was still being produced and removed.

R. Shepard said if the pre-existing use was just warehousing and the new use is semi-manufacturing; is it a change that requires applicant to apply for a special exception? Is it continuance of the same use; it is not just a warehouse now. If it was, particularly after the Devine auction company closed, that is a change in business.

L. Horning responded there was also a boat business there.

F. Seagroves ended discussion on business use by stating that the question was when the business was abandoned. The applicant states that the State closed it. That is not true.

P. Cunningham referred to the bankruptcy and said a state of readiness is being prepared to conduct business, not warehousing artifacts and inventory.

F. Seagroves said this was an auctioneer and appraiser. Some can remember one of the biggest auctioneers was Langdell, who would buy up things and store it until he had enough to hold an auction. What was Joe Devine doing?

R. Shepard said abandonment is just one issue. You could find there was not abandonment but also find that the business changed. Further discussion ensued.

F. Seagroves said in his opinion, they rented the house for two months to get rid of everything else in there. Mr. Carlton, who is well-known for his knowledge of weapons was hired and the Ayottes had provided information that Mr. Carlton was selling for Mr. Devine.

P. Cunningham disagreed.

F. Seagroves said he was getting 30%.

P. Cunningham said Mr. Carlton took artifacts from the property after the March 7 auction and sold them through Five Rivers; J. C. Devine is nowhere in those letters. If they were assets of the business then they ought to have gone to some of the creditors or the consignors.

Z. Tripp asked whether Mr. Carlton was selling on behalf of the estate to liquidate assets of value, were they part of the Chapter 7 liquidation, or were they just given to him.

M. Thornton said one of the legs of the appeal was that the entity could be sued. It was an entity in existence that you could attach for material after the closing of the business. As far as he was concerned that constituted continuation of business when they were selling off assets and still liable for proceeds that could have gone to the creditor.

P. Cunningham said one reason the Court gave an injunction was to prevent the property from being ransacked so that everything wouldn't be gone before the State could accomplish its restitution for penalties and for consignors. At the first creditors meeting there were a lot of consignors who had not yet been reimbursed. He has never claimed that the company, the legal status as a corporate entity, had any bearing on non-conforming use. The mere continuance of the legal entity that could be sued was one ground the majority of the Board used to say the business continued and therefore non-conforming use continued; his appeal was rejected. Once you disconnect the legal status, the paper existence of the company that allowed it to be sued and assets attached, and focus on non-conforming use as a business, you understand that with the attachment of the property, all assets from everybody by the court and then the liquidation with Chapter 7 bankruptcy it became impossible for the company to maintain a state of readiness. It is a grandfathered use and not a mechanism to hold inventory and repay creditors of a business that didn't exist. It could no longer conform or use the property in the manner in which it was initially grandfathered.

F. Seagroves said because Mr. Devine died, everything was in the trust and everything had to stop.

P. Cunningham stated it could have continued by the employees. Joseph C. Devine, the trustee, could have continued.

F. Seagroves said they couldn't until court gave them the okay.

P. Cunningham responded that his evidence proves the business was closed.

F. Seagroves said P. Cunningham hadn't proven it to him.

P. Cunningham had said the State shut them down and referred to testimony in his 20- page memo by employees of the company who said the business closed before May 24, 2010. The Justice Department had certified these factual allegations as true to the best of their belief and the evidence, that the business had already closed.

L. Horning said when a property is seized in a trust and is liquidating, removing assets is still conducting a form of business. Activity is maintained, there is still product in the warehouse to be distributed by whatever entity, as stated in the Pike decision. Whatever the state of readiness, whether a mixed product ready to go or soliciting bids or activities from bidders or people owed money. In her opinion it is a matter of readiness. She saw receipts and business activity and many businesses come out of Chapter 7 or Chapter 11. It doesn't mean the company is no longer viable. All they can consider is state of readiness and intent of the owner. Given the evidence and the Superior Court decision, she saw a state of readiness, whether for a debtor, collector, or whatever entity. It is still intent by the owner to distribute product, for whatever purpose.

F. Seagroves said Joe Devine died and there were items on consignment that he was going to sell. There was a lien put on it, and once there was a lien, they couldn't sell anything.

R. Shepard said they couldn't conduct business.

F. Seagroves said as far as he was concerned the clock stopped until the court gave them the okay to resume. That is when the clock starts.

P. Cunningham asked if that wasn't a state of non-readiness.

F. Seagroves said they were put in that state.

P. Cunningham said, for whatever reason, that is what the ordinance states.

There was discussion regarding what constituted a state of readiness.

F. Seagroves said he felt it didn't matter where the money is going; product is being sold and business being conducted. The Local Government Center said business stopped when it is abandoned. You have to sell, whether once a week or once a year. You have to want to sell or try to sell, to have the intent.

P. Cunningham said they used the analogy of a store, you stock your store and advertise. There was no indication of any of this by the Devine business. It was all sold through Five Rivers with no indication this is part of that business.

K. Taylor said if he owned a business with a court placed lien and had to pay to creditors, he would not have money to advertise. He believed the court handcuffed this company.

P. Cunningham said a month later the successor trustee filed for Chapter 7. There were other options.

K. Taylor said he didn't close the business. Filing Chapter 7 doesn't mean your business is closed. It is to liquidate assets.

F. Seagroves said Chapter 7 is a reorganization.

L. Horning agreed. In order to liquidate you have to solicit prospective purchasers, you have receipts. How those funds were liquidated is irrelevant to this case.

R. Shepard said that is different from an auction business.

L. Horning reiterated that it is irrelevant to this case.

Bill Parker, Community Development Director/Zoning Administrator spoke. He said his decision that it was an ongoing, grandfathered, nonconforming use was based on the evidence after reviewing P. Cunningham's evidence and request for determination. He called for a meeting with Mr. Ayotte who provided evidence that there still was evidence in the house of office use, which was grandfathered in, and warehousing. To him there was not a gap in time of more than a year. There was evidence on site that the use had continued in one form or another consistent with the prior uses of the property.

K. Taylor asked if anyone saw the children on the property at that time as they are the trustees.

B. Parker said he didn't know about the children. His office was brought in once the Ayottes bought the property.

F. Seagroves opened the meeting to the public.

John Kenison, Jr, attorney for Rick Ayotte spoke. He said he would not rehash a lot of prior testimony but stated that Al Carlton took what he did with the permission and at the direction of Joseph J. Devine. He corrected P. Cunningham that the trustee of the Joseph C. Devine Revocable Trust was Joseph J. Devine. Joseph C. was the father. Whatever Mr. Carlton took was done at the direction of Joseph Devine.

Z. Tripp asked J. Kenison if he knew whether the trustee Joseph J. Devine requested Al to sell in order to liquidate to settle the Chapter 7 bankruptcy or outside of that?

J. Kenison stated Joseph J. Devine is the trustee of the family trust. In a bankruptcy, there is a bankruptcy trustee whose job is to marshal assets and satisfy claims against the estate.

K. Taylor asked if the house was part of the bankruptcy.

J. Kenison said it was part of the family trust along with the South St property, the Savage Rd property, and two other pieces of property. P Cunningham inferred that any material removed from the storage facility or warehouse at any time was done illegally. He mentioned lawsuits that were brought but were all non-suited, either because there had been no wrongdoing by Joseph C. Devine before his death, or improper jurisdiction. It was the bankruptcy trustee's job to do what he saw fit with the assets of the estate. We all know the corporation didn't cease to exist until dissolved by the State in Dec., 2010. Also, the zoning ordinance requires looking at use. Not who was using it, not the use they intended, but how it was being used and that use continued, uninterrupted. When he retired, Joe Devine could have said he wanted everything out of there, that he wanted his house back and the business and employees could continue and do what they want. He didn't. The State said they needed to sell the property. The estate could have done that. If either one had done that we would not be arguing it was grandfathered. It wouldn't be. Whoever controlled that property; Joseph Devine, or the estate, or the trustee in bankruptcy or the J. C. Devine Revocable Trust, the property and the goods in it were allowed to be there pretty much unfinished, which means the use continued and it ceased when the Ayottes bought it and Joe J. Devine rented it back from February through the end of March so he and Carlton could get stuff out. J. Kenison thought it irrelevant whether it was a business or ongoing; it is the use, which was constant. The only change was four months when the Ayottes were renovating and they rented it back to Eli Johnson, who is not a manufacturer. He has an antique business much like Joe Devine had an antique gun business. He buys furniture, takes pictures and puts them on-line and sells it. He said current activity is largely the activity Bill Parker saw. There has never been a discontinuance of use. There was a four month interruption. The Board should reaffirm its prior decision.

Z. Tripp asked if it was the bankruptcy trustee's responsibility for liquidating the assets of Joe C. Devine Corporation?

J. Kenison said that was correct. It was his understanding the appointed trustee didn't have a Class 3 firearms license, so another trustee that did was brought onto the property to remove any weapons they were authorized to take. He wasn't privy to whether they took any.

Z. Tripp said, using the logic that the Chapter 7 bankruptcy was necessary for a business, any liquidation of assets to satisfy the bankruptcy would have been sold or liquidated by the bankruptcy trustee. J. Kenison said to a certain extent.

Z. Tripp asked if they can conclude any materials sold out of the warehouse by the trustee Joseph J. Devine, were liquidated for the Chapter 7 bankruptcy, which he believed was a legitimate business activity. If the bankruptcy trustee was selling those then, yes. If the family revocable trust was selling them, that was not part of the bankruptcy but simply the family trustee liquidating stuff.

J. Kenison was not sure how to answer. They were both forms that had nothing to do with J. C. Devine auction house.

Z. Tripp said he was trying to determine if the goods in the garage were liquidated for the Chapter 7 bankruptcy which he believed was a legitimate business activity. If the family trustee was selling them, that was not part of the bankruptcy but simply the family relocating stuff.

J. Kenison said bankruptcy trustees will go in and grab anything that has a quick, easy liquidity value with a ready market but most of these do not have a ready market, which is why you advertise. Al Carlton sold a couple of holsters.

Z. Tripp asked if Al Carlton was selling for the bankruptcy or the family trust.

J. Kenison said he sold them for \$200 and \$300; a trustee getting paid to sell things is looking for high value items. For low value items, he would turn it over to the business. Joseph J. Devine was the successor as president of J.C. Devine Inc. and it was returned to him to do whatever he wanted.

K. Taylor asked if at some point both trustees were on the property looking over everything.

J. Kenison said yes, as far as he knew.

Z. Tripp asked if the Ayottes purchased the property from Joseph J. Devine, the family trustee, not the trustee of the bankruptcy.

J. Kenison said yes. The property was not in bankruptcy.

M. Thornton said the document says J. C. Devine became embroiled in various legal issues in 2010, continuing into 2011 and 2012. There has to be someone to sue. If there is nothing of value to be sued over, there is no business.

J. Kenison responded that no one said there was nothing of value to be sued over, all the stockpile had value. To whom, is the question and finding that market is the challenge.

M. Thornton said his point was that it was still in business.

J. Kenison agreed, in one form or another. The last court document was filed in 2012.

L. Horning asked if it was his expert testimony, that there was still product there and it was still being moved by an entity that represented a business.

J. Kenison said yes. More importantly, it was a use, regardless of who owned it.

L. Horning agreed. It is a use question. The use didn't discontinue except for the four months of renovation. It was rented back to someone who continued to use it in similar fashion. She asked questions of J. Kenison and R. Ayotte as to evidence that Joe Devine was refurbishing guns.

J. Kenison said as part of the ongoing business he was a gunsmith.

R. Ayotte spoke of a padlocked room within a room in the house that held gunsmithing equipment and ammunition, and that the ammunition was worth thousands of dollars because it was antique and rare. He talked to Al Carlton who was selling a little box of ammunition there to someone for \$500. Behind the garage there was thousands of dollars of teakwood and mahogany from the boat building which he let them take after he signed the papers. It was part of the rental.

Z. Tripp asked when Al sold that box of expensive ammunition.

J. Kenison said they don't know whether Al bought it from Devine and resold it or sold it and shared the proceeds with Devine. At an auction Al sold one of the pieces owned to Jason E. Devine, one of the sons.

L. Horning said it is a moot question. The product was still being moved and maintained.

R. Ayotte said even the last weekend Al went to a gun show and sold stuff for Mr. Devine.

M. Thornton said they signed in November and once in a while they went back. They were still taking things when they signed papers but the ammunition was all gone at that point.

J. Kenison said that is why they rented it for another month.

R. Ayotte said he didn't push the issue. It took months, because there was so much stuff.

F. Seagroves said they're talking about use.

J. Kenison said use of the business, use of the warehouse which is part of the business and every business that has ever been there since 1957.

Peter Grazer spoke, saying he worked at the property through March or April, 2012. He was aware of the contents after they bought it. There were lists of munitions in the room blocked off and other contents in the adjoining room. There were boat molds and exotic hardwoods in the side of the barn. While he was there those were gradually removed but they were on the property after they purchased it and while he was there working on it.

Richard Couture of Clark Rd spoke, saying he assisted in evaluating the property and estimating the cost of repairs so the Ayottes could make an offer to buy. He explained the condition of the property, and said the house and garage were full of furniture and other things including a car stored underneath. Once they had a Purchase & Sales Agreement he became the chief carpenter. There was an eight month transition period where he met Al Carlton. Joe Jr. was there almost every day and he sold a lot of residual stuff from the house that was stored in the garage. This continued through midsummer, 2012 but they were out on time for the tenant to move in. The room within the room with the metal door was obviously a place where a lot of firearm activity went on. He described evidence of guns and ammunition in the basement, the attic, and elsewhere, and evidence of boat building in the garage; all kinds of activity.

Suzanne Fournier of Woodward Dr spoke. She said the business was shut down May 20, 2010 and never re-opened. The ordinance deals with use, but it is the use grandfathered in 1969, the import / export and successive types that were similar, such as auction and appraising. Warehousing is a subordinate use; the export business and warehouse business had to warehouse. According to the ordinance it cannot be elevated to the original use. Warehousing by itself can be anything; is it part of import/export? They had stuff when the business closed and never re-opened. When they were disposing of things, it was not under the auspices of the grandfathered use. It is what was in between plus the 4 months that J. Kenison admitted to. For 4 months there was no business. That plus the 20 months there was no grandfathered business going on; it was stockpiling, satisfying debt. When she moved there in March, 2005 there was nothing obvious and no trucks outside. Today there are trucks visible most of the time and trucks go in and out. There is no mention of Devine on the Carlton receipts except for what he hand wrote and one of the receipts is dated December, 2013 which is in the future. There was no business at 113 Savage Rd. That had ended and never re-started. What Mr. Carlton was selling was immaterial. He was no longer an employee. He didn't own the property. He opened a contractor business. Referencing the P. Cunningham document, if a consignment store goes out of business they are left with the debts to pay and it may take one to two months. It was 20 months plus 4 months that J. Kenison spoke of. It is clear that all of southern NH knew that Mr. Devine died, the business closed, and employees were not being paid. They started their own business.

J. Kenison referred to a case concerning a subordinate use, involving a pig farm that had been in business for 150 years or so. As a subordinate use they stockpiled pig manure. They brought in sand and other mixtures to mix with the pig manure to sell it. Primary use of this nonconforming entity was pig farming. Here the primary use had always been home office and storage, nothing to do with the auction business. They didn't conduct auctions there or put a tent in the back yard and invite the public. If so, we would have very different type of use in Eli's warehousing of and selling of furniture. The primary use, whether with the Zahns, Devines or currently with E. Johnson has been bringing things in, turning them around and selling them. That has always been the primary use and there has been continuity of that type of use all along. Joe Devine was in the auction business but storage was the primary use of this property and that was what the Zoning ordinance talks about.

S. Fournier said there may be a new piece of information The 25 phone lines mentioned in a previous meeting were there, and there are documents somewhere in the packet stating that auctions were held at 113 Savage Rd until 1998 when Mr. Devine bought the South St. building

for his office. That is when he started holding auctions at hotels. An article in the Telegraph talks about that. She said the Chair had said the 25 phone lines were evidence there were auctions held there. It was an active auction facility and that was new information.

F. Seagroves commented, the business was still being run there.

S. Fournier said until 1998 when Mr. Devine moved his office to South St. He fully retired in 2006. In 2005 when they moved in, there were no trucks or anything. It was discreet business activity in 2008. She and P. Cunningham weren't there when there was an auction. In one letter, someone recalled a lot of cars there for an auction. Now there was more activity with the use. It points to there being auctions there in the '70's. That is the grandfathered use.

F. Seagroves closed the public portion of the meeting.

K. Taylor said he was going to support the Zoning Administrator's decision. The question is when the property was abandoned. In 2010, it was told to cease and the son took over. It was in bankruptcy and being sued. You can't sue something that isn't around so he believed that at that time it was still going on and the business was continuing until the Ayottes bought the property.

L. Horning said, going back to the handbook, the Superior Court decision, citing from Pike Industries v. Woodward (Page II-22), and looking at the overall spirit of the ordinance, it is a land use question, in her opinion, that Mr. Parker did due diligence and she upholds his decision, given the extensive evidence.

Z. Tripp said the case is an appeal from an administrative decision of the Community Development Director, Mr. Parker. In his memo, B. Parker's said the business was dissolved in Dec. 2012. Z. Tripp disagreed saying that date happened to be a date the State dissolved the business for lack of payment of annual fees to maintain the corporate identity, not evidence of if, or when, the use was abandoned. He didn't want to vote to reverse B. Parker's decision because of a disagreement with the rationale. He could have come to a correct conclusion regarding the use of the property at 113 Savage Rd but using what he felt was incorrect logic. The Board's difficulty was determining if or when 113 Savage Rd ceased business activity. His understanding was that; the property was owned by J. C. Devine Revocable Trust, the corporate entity, J. C., Inc. ran the administrative part of the business at 20 South St. which was the office, and the corporate entity, J.C. Devine Inc. used the Savage Rd lot for storage, a legitimate use of off-site facility. Joseph C. Devine was using it as a warehouse. This is not uncommon. With the testimony of P. Cunningham and Ms. Fournier, the level of activity in 2005 sounds like activity associated with warehousing. It comes down to who owned and what uses they had. The property was owned by a trust and use was warehousing for the corporation. There is a difference between warehousing and filling your house with stuff. Warehousing is a business use. In the court case, Pike was a more traditional business. The Supreme Court said, paraphrasing, that the only issue before the ZBA was whether Pike had discontinued its use. Second, ZBA needs to consider other aspects of the business. Third, the ZBA did not need to consider Pike's objective intent. He believed the same rationale applied with our ordinance. He considered the start of business at Savage Rd was with purchase by the Ayottes. They started renovations for the business they intended to run. If someone wanted to start a business in the Oval and signed a lease and remodeled the interior, you have the logic of Pike the business activity restarted in February, 2012. The question before the Board is whether the business activity existed between February, 2011 and February, 2012. Addressing the applicants' notion of use vs. nonconforming, nonconforming is business activity in a residence R district. The use started as headquarters for the auction company and it moved to South St. Use of the rest of the property stayed the same. The question is whether business use at 113 Savage Rd. was abandoned on or before February, 2011. In his opinion, if the use is warehousing by the trust where a customer was J. C. Devine, the bankruptcy hearing and activity of liquidating assets was necessary business activity. The business may have been closed, but had

to liquidate. He agreed with the Board it was a necessary business activity. He had trouble with when that stopped. What assets were liquidated and which were not. J. Kenison cleared that up. The bankruptcy liquidation was business activity. When that concluded, the trust could have used 113 Savage Rd for continuing ongoing business, whatever that may be, new warehousing, new furniture place. It was his understanding once the bankruptcy trustee took what they wanted, they could have done away with other merchandise and started a new business. He didn't believe the trust's selling some items through Al Carlton was business activity. He didn't see evidence of the trust trying to start a new business, similar to what the current tenant did. The time line is unclear as to whether the trust was able to do that before February 2011. He thought they probably were, but didn't. Therefore, he thought there was a 1 year lapse from February, 2011 to February, 2012. He would not uphold the administrator's decision.

M. Thornton said he would uphold the decision because a business is comprised of several phases. A birth phase, a death phase and the rest is ongoing when you have a healthy business. This death phase seemed protracted. That business did not conclude in totality until early 2012 according to the receipts and auction statements. One statement dated 6/15/12 is for goods and services of the boat business. Therefore, his answer is yes.

F. Seagroves said he would uphold the zoning official's decision. One statement that helped him tonight was before Joe Devine died he could have sold the property but didn't. When the sons or the trust got it the trust could have sold the house and property. They learned tonight there were 4 pieces of property they could have sold but didn't. They kept the property, at least at 113 Savage Rd, for a time, so he felt there was intent to run the business. He saw Al Carlton as a contractor to sell some of the merchandise because he was well known in the weapons field and had contacts. As stated, Al sold property at gun shows which, as far as he could see, was owned by the Devines. So the business was still ongoing. He didn't see any intent to continue the business but that didn't mean it wasn't there. It ended when they sold the house and got all the assets out of the house. You don't have to sell something every day or month. You only need the intent to sell. J. Devine was an auctioneer; the sons didn't want to be auctioneers. He felt the business terminated when they sold the house. He also said they talked about the business being run there, but didn't specify the type of business. In all the paperwork they only talk about a business. Joe Devine sold antique guns but was also an appraiser and auctioneer. The current tenant is selling antiques, which is consistent.

L. Horning said the other part of the question is whether what is going on now had been going on with the Devine property. She cited the Superior Court comments and Chapter III of the Zoning Handbook and said she would uphold the Zoning Administrator's decision.

F. Seagroves stated: After reviewing the petition and hearing all the evidence and taking into consideration the personal knowledge of the property in question, this Board of Adjustment member has determined the following finds of fact:

Do you uphold the decision of the Zoning official?

K. Taylor – yes; M. Thornton – yes; L. Horning – yes; Z. Tripp – no; F. Seagroves – yes

K.. Taylor moved to accept the administrative decision in Case # 2013-14.

L. Horning seconded.

Final Vote:

L. Horning – yes, K. Taylor – yes, Z. Tripp – no, M. Thornton – yes, F. Seagroves – yes

F. Seagroves stated that the Board had affirmed the administrative decision.