Town of Milford
Zoning Board of Adjustment
October 6, 2016
Case #2016-22
Edward & Christine Medlyn
Appeal of Administration Decision

Present: Michael Thornton, Vice Chair
Joan Dargie
Jason Plourde
Rob Costantino
Steven Bonczar

Absent: Kevin Johnson, Chairman
Katherine Bauer – Board of Selectmen's representative

Secretary: Peg Ouellette

Edward and Christine Medlyn, are making an Appeal of Lincoln Daley's zoning determination letter dated May 23, 2016 issued to Attorney Morgan Hollis regarding expansion of a non-conforming use on property located at 419-425 Nashua Road, Milford, NH Tax Map 31, Lots 3 & 4, in Limited Commercial (LC) District.

APPROVED MINUTES 12/15/16

Michael Thornton, Acting Chair, opened the meeting and introduced the Board members. He informed all of the procedures of the Board. He read the notice of hearing. Attorney Thomas Quinn of Milford was present, representing the applicants.
T. Quinn came forward and said that on May 23, the Zoning Administrator responded to a letter from counsel to Rymes Heating Oils. The attorney was inquiring whether the consolidation Map 31, Lot 3 and 4 would allow proposed use of above ground fuel storage and associated equipment for storage of propane on the consolidated lot as part of an expansion of a nonconforming use. The Zoning Administrator responded that in his view, under Sec. 2.03.1.C of the Milford Zoning Ordinance the proposed expansion of the current nonconforming use by the addition of another above-ground fuel storage tank for liquid propane would be permitted, provided that the Zoning Board found that the proposed application met both the requirements of the section and granted a special exception, and that the lots were consolidated under one owner. He stated that the appeal was timely filed, and went through the chronology of events. Prior to Aug. 4 hearing, he visited town hall twice and there was no copy of the letter in the file. On Aug 4 he and his client were present at the hearing, which was postponed. He stated that Atty. Prolman wasn't provided a copy of that letter immediately before the Aug. 18 hearing, and there was no prior notification

of the letter to him or his clients. (See Point 2, page 3 of his notes in the packet.) He went on to state that the zoning determination was arguably wrong, saying that a merger of two lots automatically grants the nonconforming use status of one lot on to both lots. He said this was erroneous and not supported by NH law. He cited RSA 673 39A which controls the voluntary merger process: *"any owner of two or more contiguous, pre-existing, approved or subdivided lots or parcels wishes to merge them for municipal regulation and taxation purposes may do so by applying to the Planning Bd. or its designee except when such merger would create a violation of then-current ordinances or regulations. All such requests shall be approved and no public hearing shall be required.* So the merger could only be accomplished if it would not create a violation of then-current ordinances. (See his remarks in #1 of his notes, "The May 23, 2016 Zoning Determination is Legally Wrong.") He stated that in no way was Lot 3 been involved in any of the use made of Lot 4. They are completely separated; happen to be adjacent. While not in identical ownership, they are in related ownership. Merger would not only essentially double the size of Lot 4 but legal nonconforming lot of record, Lot 3, would have been converted to use not permitted by zoning. No statutory or case law for that. Statutory authority for continuance of nonconforming use is RSA 674 19 which reads, in part *"the zoning ordinance adopted under RSA 674 16 shall not apply to existing structures which is the existing use of any building. It shall apply to any alteration of a building where used for a purpose or in a manner substantially different from the use to which it was put before alteration."* He said, in other words, the nonconforming use is protected and can continue notwithstanding the fact that it does not comply with zoning. But the zoning ordinance does apply to any expansion, alteration or change in use. They believe the Rymes proposed use is substantially different. Lot 3 is residential and no allegation it has ever been anything other than that. Proposed use is far different. It is true that it would be part of a different lot but land and use would be different. They also believe that the storage and distribution of propane is substantially different from storage of heating oil. Heating oil has risk of fire, leakage and spills. Fires can be contained and spills are about containment and cleanup. Propane burns and can explode, sending a fireball in all directions, expanding the incident far beyond the immediate scene. Because it is vapor it poses greater challenge to fire department and to neighbors, residents and passersby. It has in common with oil that it is used as heating source but that is very different product. Not aware of any NH case where a nonconforming use was allowed to expand into a new and separate lot or any case where landowner was allowed to expand nonconforming use on one lot into separate lot by merging them. Idea of expanding a nonconforming use is at odds with prevailing nonconforming use law. Nonconforming use is a pre-existing use of land which is permitted to continue as of zoning laws despite that it violates zoning. People who invest in property and develop and use have right to expect that use will be allowed to continue. Nonconforming use law is about protecting prior pre-existing use. Lot 3 has been residential for decades. Nonconforming uses relate to conditions which existed prior to enactment of ordinances and relate to uses that existed on the property at the time of the enactment. Nonconforming use may be expanded when expansion is of natural activity related to the manner in which a property is used at the time of enactment. But the enlargement or expansion may not be substantial and may not render the premises or property proportionally less adequate. And the change may not involve a substantial effect on the neighborhood. The burden of establishing that the proposed use is fundamentally the same use and not a new or impermissible use falls on the applicant. He cited Supreme Court Case *Hurley v. Town of Hollis,* Town of Hampton v. Brust, and Devany v. Town of Windham. (see page 2 & 3 of his notes). Hurley case citing Grey Rocks Land Trust v. Town of Hebron which involved an owner of a marina. Court said they had never permitted an expansion of a nonconforming use that involved more than the internal expansion of a business within a pre-existing structure. They are being asked to double the size of the property that is operating under the

nonconforming use. He mentioned and gave background on a Hurley case where the Court permitted an increase of arcade machines within existing structure. In this case, they are taking a residential unit and turning it into propane storage and distribution. Third case Court cited was Devany v. Town of Windham involving a summer camp which owner kept expanding and adding a foundation and additional story. Town issued cease & desist. Superior Court said he had to take down the building and restore to original size. Landowner appealed, arguing that this was a natural expansion of a pre-existing nonconforming use. Court said that was an impossible stretch of the imagination. From these cases, it can be seen that the Court is very protective of zoning and concerned with expansion of nonconforming use. In this case, there is a property that has no nonconforming use status, Lot 3. By combining lots the applicants are asking to extend nonconforming use status to that property. Not just the southwest corner, but the entire property. At that point, no real basis to distinguish between southwest corner and rest. Merging the two lots and conferring nonconforming use status on the entire property is what they are asking to do – extending it to the whole piece even thought the application says differently. The fact that this approach is not effective is demonstrated by the fact that the applicant came in November seeking a variance. It was clear a variance was required. That variance was denied and no appeal made. Now he is trying to do it through the back door. No precedent supporting to zoning that nonconforming use can be conferred on adjacent property. Not in the ordinance. Article II, Sec. 2.02 & 2.03 contain no suggestion that provisions were intended to modify or deviate from acceptable nonconforming use. Those basically codify the common law. There was no intent to expand beyond existing law. Apparent intent of those sections was to structure the process for expansion of nonconforming use rather than having owner expand on his own. Under new regulations there was a structure. Special exception necessary to alter, change or expand nonconforming use. That was purpose of codification of common law. He noted that the language in the Milford ordinance re special exception was very similar to that of Town of Hollis. In the Hollis case, Supreme Ct. held that incorporation of the language into ordinance was intended to codify common and give town a role, not designed to change common law. Didn't think provisions of Art. II of Milford was intended to change the law. Three cases before this ZBA. This one, application for special exception, and application for variance. They believed proper order was hearing and deciding appeal of administrative decision because without that nothing else If zoning determination was overruled he believed the rest of it goes away. If upheld and they proceed to next cases; special exception can't be granted unless variance granted. Logically that would be next case and then the special exception.

J. Plourde said that was how they were planning to proceed.

T. Quinn saw it on the agenda but agendas are flexible. Wanted it on record that that was his and applicant's position. He asked for questions.

J. Plourde referred to L. Daley's letter dated May 23 to Morgan Hollis, asked him to explain if any discussions with him re the reason for way he wrote it? He could look at it being an engineer or attorney and could look at it two different ways. Could say he was recommending going for special exception or say it was up to the ZBA and their interpretation on whether proposed application met the requirements. Without Lincoln there – it would be easy to ask him if he was there. Also have zoning determination written by R. Lunn dated Sept. 2. Didn't know if any discussion with Lincoln re his intent with that May letter.

R. Lunn didn't feel comfortable talking about Lincoln's intent and interpretation.

J. Plourde said it seemed the two documents they had from the town, one from Lincoln, and the zoning determination from Robin were different?

R. Lunn agreed.

J. Plourde said he tended to look at Zoning Bd. consistent with Robin's zoning determination dated

Sept. 1.
S. Bonczar had comment. There was a lot of merit in the testimony just given.
R. Lunn said that felt like deliberation.
J. Dargie said they had to go for public comment first.
T. Quinn, said for the record he introduced the plan. These cases all related and they don't have a copy of plan for the special exception application part of this record but wanted to make it part of this record. He gave Bd. copy showing Lot 3 & and little bit of Lot 4.
R. Lunn said that will be Exhibit 1.
R. Costantino had question. Lot 3 was in LCB district?
T. Quinn said it was.
R. Costantino said there were acceptable uses. Even though it was a residence, if what they want to do now was an acceptable use on that lot in LCB, is that what acceptable uses were for?
T. Quinn said exactly. The underlying zoning Art. V set forth 15 permitted uses and couple more by special exception. Ordinance goes on to say any use not specifically permitted by right of special exception is not permitted. No question that this use of this lot for fuel storage and delivery was not a permitted use.
R. Costantino said one use listed was utilities, public or private.
T. Quinn said to look at the definition.
R. Costantino said he did.
T. Quinn said it was not private or public utility because it was not regulated.
R. Costantino read definition "Any agency that under public franchise or ownership or under certificate of convenience or necessity or by grant or authorization by a government agency provides the public with electricity, gas heat, steam, communication, transportation, water and sewage collection, stormwater collection or other similar service deemed necessary for the public health, safety and welfare is considered a utility." Didn't know if that fit into this.
T. Quinn said if they did, they wouldn't be there.
J. Dargie agreed.
M. Thornton asked if any abutters of the property wanted to step forward and say anything.
Attorney Morgan Hollis of Gottesman & Hollis of Nashua, representing the property which was the subject of the zoning determination came forward. Rymes owned both lots. For the record, he wanted to say it would be appropriate to table the matter of the public hearing, but hear those present who might want to speak. However, one of ZBA members had raised the question, if the zoning administrator (L. Daley) wasn't there to defend his decision, how could they make a decision whether he was right or not. They had a piece of paper. He thought he would be there. He called and left an e-mail. Then learned that he was sick and wouldn't be attending. The current administrator can defend her decision, but she didn't make the earlier one. How can they make a decision without know his rationalization? He was in uncomfortable position of defending L. Daley even though he didn't know how he reached that decision.
T. Quinn did say he didn't want cast aspersion but said it seemed they were trying to do something by the back door. They came before the Bd. for a variance request for one lot on which the house is, asking to put in a propane tank. Needed a variance. He read from the minutes of the meeting, page 2, re e-mails between Bill Parker (Zoning Administrator at the time) and K. Johnson re his mention of possibility of voluntarily merging the lots and request a special exception for expansion of existing nonconforming. Question was whether there was a reason they decided to request a variance. Bill Parker didn't know.
J. Rymes gave their reasons at the ZBA meeting. Atty. Morgan said there was no mystery. After that, Mr. Rymes contacted Atty. Morgan, who said they had to contact B. Parker, who was no longer the zoning

administrator. They went to the then current zoning administrator, who said he would do a letter, which was the letter dated May 23, on which he and his client relied. If it was not correct, this was the Bd's opportunity to overturn it. If they overturn, they will come back with process needed to consolidate the lots, expand to the tank. Would like a determination whether variance or special exception. It was clearly an expansion of nonconforming use and requires ZBA approval, one way or another. He said issue of timeliness was raised by appellant because they knew they had a problem. He cited RSA 675 that states an appeal from ZBA from an administrative officer shall be taken within reasonable time. Milford doesn't spell out exact time frame. Most say 30 days from ZBA decision to make sure they can't sit on it. Testimony from T. Quinn that they acted as soon as they could and they never received notice. No requirement that when zoning determination is made that is mailed out to anyone affected, including abutters. Generally it gets posted. When he saw it, he asked administrator if it was posted. He can't testify to what happened. He went through time line: On 7/6 Rymes filed for special exception for expansion of nonconforming use based on zoning administrator's decision dated 5/23. This was because they waited 30 days to make sure no filed an appeal. No law requiring notice to the people. Medlyn received notice of hearing scheduled for 8/4 for the special exception. Town sends out legal notices. Medlyns, having been represented by an attorney, received the notice, know about public hearing, knew there was a special exception application. T. Quinn even into the office and looked through. How was it you had applied for a special exception for expansion of a nonconforming use when this matter was previously for a variance. You were now on notice there had been some determination that there was a special exception. What you do about it is up to you. Nothing was done. It wasn't heard at 8/4 meeting. Continued to 8/18 and wasn't heard. Notice was at least 7 days in advance of meeting. Didn't know when they (appellants) received it. At the hearing, nothing was done. No appeal. Atty. Prolman showed up and delivered a document to him objecting, saying they couldn't expand by special exception and this constituted a variance requirement. Atty. Hollis gave him a copy of the determination. Atty. Prolman hadn't seen it. They filed appeal on the 29th. Medlyns and counsel had attended all the hearings on Nov. 5. They received public notice, were represented by counsel. More than 90 days from decision by the town administrator and 30 days beyond the time frame they received public notice of the special exception application was, in his opinion, was beyond reasonable time. They took too long. Statute requires reasonable time because people have to act in reliance of things, or people could appeal forever. That is what happened. They made application in July and now it was October. Now they have to get a determination whether they need a special exception or variance. If Bd. decides they need a second variance, the whole special exception hearing was for naught and they have to start over. His first argument was the time frame. The Bd. could dismiss this as not being reasonable. If they don't dismiss, they ought to postpone it, table it, and ask Mr. Daley to come in. Re issue of whether or not lot consolidation was permitted and whether Mr. Daley's decision was correct, T. Quinn testified about expansion of nonconforming use. He didn't disagree with summary of case law. But all of them were questioning whether a particular activity was expansion of nonconforming use and whether special exception or variance was required. They weren't contesting that. They want to put in a propane tank. It would require special exception. Disagreed that T. Quinn said it was illegal to combine two lots and there was no case law that said you could do this. No case that you can't. If a lot of little cabins around a pond or lake always gobbling up land next to them, but not contested because you can combine lots. Question is what you can do on them once combined. Statute cited said you cannot combine if it would be illegal. Not illegal to combine. What occurs thereafter is what is regulated. They acknowledged that adding Lots 3 & 4 didn't convey additional rights. Not arguing that because they add that lot they now had rights to move the business over there. They have a right to combine. No law that says they can do it, but no case

law says they can't. Can't expand a nonconforming use. When you add land to a nonconforming use it is less intense sue. Instead of a quarter acre you are at a half acre. You are not automatically saying you have right to add this nonconformity to this new lot. Assuming these lots are one, if they didn't want to expand the business at all, you can't say they can't add the two lots together. Question is, once they are added together, can you expand the nonconformity or if condition is offered that they are going to be added together, can you expand the nonconformity? Does it require special exception? They think it does – not a variance. They don't think variance to add the two lots together. They don't think it requires special exception to add the lot together. Guessing that would be same process that Mr. Parker went through. They could consolidate the lots and come in for special exception and Bd will agree or disagree. The variance is on Lot 3. This is a different lot – they are combining it and making it bigger. It may be at the end of the day the owner can't do anything on it if they were combined. That was why they weren't going to combine them before they applied, because if they combined them and were told they couldn't do anything they'd have to come back for subdivision. Determination by zoning administrator was based on consolidation of two adjacent lots. Criteria for determining whether a change in nonconforming use is lawful and whether substantial change in nature or purpose of the pre-existing nonconforming use by review of A. The extent of the use reflects the nature and purpose of the existing nonconforming use; B. Whether the use is merely a different manner of utilizing the same use or constitutes a use different in character; C. Whether the use will have a substantially different impact on the neighborhood. –Town of Salem v Wicksham 2001. Addition of a lot to a nonconforming lot is not a substantial change and not a violation of the law. Any additonal expansion would be expansion of nonconforming use which in the zoning administrator. Zoning administrator's determination should be upheld and appeal should be denied. He said Mr. Daley should be there to answer questions. The current zoning administrator made a determination that a variance was required on the overlay zone issue, which they don't disagree with. Any uses not permitted that want to expand require variance. That is different than whether or not proposed expansion under Sec. 2.03 is a special exception. Two very different issues. J. Plourde said they tend to view the determination as to the current administrator; he does. But that didn't negate all of the previous decisions. They were not two of the same decisions. One was one way; one the other. If they were to overrule the administrator they would request that the other two related cases be tabled because it was a change of circumstances. If they agree with the administrator they would like the Bd. to proceed with the special exception. He differs with the order. Think they can proceed with the special exception and vote. No need to prolong it. It was an issue depending on the outcome of this case.
M. Thornton asked for questions from the Bd. None.
Malia Olson of 36 Riverview St. said that a was paper handed out, "Appeal from Administrative Decision" that said "The Board of Adjustment decides cases where a claim is made that the administrative office has incorrectly interpreted the terms of the ordinance such as a district boundary or the exact meaning of an article or term." And "In determining the intent and meaning of a provision of the ordinance and map, the board is restricted to a fairly literal interpretation." And "When an appeal is made to a board of adjustment under this provision, the board must apply the strict letter of the law in exactly the same way that a building inspector must. It cannot alter the ordinance and map or waive any restrictions under the guise of interpreting the law." She disagreed with Atty. Hollis. Didn't think L. Daley needed to be there. The Bd's requirement was to interpret the ordinance as it exists. Under the ordinance at is exists, they are located in the LCB district which doesn't allow this use. Also in groundwater protection area which prohibits this use. Also included in the Elm St/Nashua St. corridor; the goals of that were to prohibit propane tanks. Thought that, the way Atty. Hollis put it, they were going to keep coming back no matter what. Thought there was no substantial different in this case than the one in

November. It was still same use. At that time they denied it. Asked that they deny again if it comes up and recognize this was the same thing.
M. Thornton asked for any further public comment.
T. Quinn presented copy of his report. R. Lunn said it was on the record and members had it. T. Quinn said this was a supplement.
R. Lunn said that would be Exhibit 2.
M. Hollis also presented his comments which R. Lunn named Exhibit 3.
M. Thornton closed public comment portion of the hearing and opened up discussion by the Bd.
S. Bonczar said he didn't feel any clarification from L. Daley being needed. They had a written decision and the ordinance and the definitions of nonconforming use and structures in the ordinance manual. It came down to the Bd interpretation of what's in it re nonconforming uses and how they feel that either supports or doesn't support the letter from Lincoln. In his years on the ZBA he'd never seen a situation where a nonconforming use was granted to an adjacent. In his opinion, this was to give relief to an owner within their lot to expand to expand a use that didn't conform to zoning ordinance of today. Never saw case where nonconforming expanded out of that original lot. Any time in the past it has been within the boundaries of that original lot. He saw a lot of merit in the appeal. If they allow this, it sets a dangerous precedent for the town with regard to all nonconforming lots within the town.
M. Thornton asked for any other opinions on whether they need Lincoln.
J. Dargie agreed with Steve. Didn't think it mattered at this point what his interpretation was. On the merits. She was on the Bd when they voted in Nov. She remembered what Atty. Hollis and K. Johnson said about why don't they do that. He was throwing that out. Thought it was odd at the time and thought it wasn't going to happen and they didn't discuss it further. Atty. Hollis mentioned they could add that lot to the existing lot. But expansion of the nonconforming use, she will look at it as she did in the past in the last go-around. She felt there were issues to neighbors and the health, safety and welfare. Whether as a variance or special exception in her mind she was asking why they were hearing it again. Didn't matter how many spins you put on it. It was expansion of nonconforming use that was not allowed. Couldn't see way to make it come out any better.
M. Thornton said it was not allowed because of overlay and not allowed because of what?
J. Dargie said not allowed because of the zoning.
R. Lunn said they were talking about just the determination.
J. Dargie said for the determination she didn't think they needed Lincoln there to continue to decide whether his determination was okay or not.
J. Plourde said they were talking about case in front of them. Appeal of Lincoln's zoning determination. Lincoln was still town employee. They should find out why he made that determination. Easy to find out that much.
S. Bonczar asked how would that add? He made a determination in writing. This was what it talked about re nonconforming uses and structures. The ZBA was there to interpret those. If Jason's interpretation was that it was allowed, Lincoln could explain for hours about why he came to that conclusion, but he interprets it to be something different. He didn't need that. If he reads the ordinance and interprets it, it didn't fit the determination.
J. Plourde said this project was before the Bd before he was on the Bd. So far they are on the third different zoning administrator during that time. It seemed there had been a decision by the zoning administrator to merge the lots and then go for special exception, from minutes read by Atty. Hollis. Lincoln's letter seemed to almost support that process. Now he could sit here and interpret this just as well as anybody on the Bd. Could they look at it differently? Yes. That is where their experiences and

thoughts came into plan. With three different zoning administrators and one still on town staff, didn't know why they wouldn't ask him. Was he saying it was up to the ZBA to make that determination; of was he saying this was why he supported this. Not looking at other cases on agenda or case in November. But related in the way that process had brought the applicant to this stage where he was pursuing a special exception because of town guidance. Bd. could interpret it as yes or no or this is the right process. Didn't feel it was a big deal to ask Lincoln if he still believed it or what his intent was – leaving it to Bd or why he thought it was a special exception route. You still need to get Planning Bd. approval. You could interpret his letter different ways
J. Dargie said it was up to the Bd to make that determination.
J. Plourde said he may have given improper guidance.
J. Dargie said he may have. She wasn't looking at the letter. She was looking at whether it was an expansion of a nonconforming use. Didn't see any harm in getting his input. Would it change their minds?
S. Bonczar said they were there for the appeal. Do they agree that this was proper or not? Period.
J. Dargie said right, and how he interprets it.
S. Bonczar said if Jason's interpretation was different, and if so, then he didn't agree with it. That was the narrow scope of the discussion.
R. Lunn said a motion was necessarily an up or down motion. It was an up or down, and that was it.
J. Plourde asked they would give Lincoln an opportunity to explain his letter.
M. Thornton said he'd be in favor of it.
J. Dargie said no harm. Not sure it was necessary.
J. Plourde may come and say he interpreted it this way.
J. Dargie it may be from what was previously said.
J. Plourde agreed. A lot of things that had gone on re this site that he wasn't privy to. He wasn't on the Bd. in any of the other conversations.
J. Dargie said it was kind of hard to separate it when you sat on the Bd for the last one and it wasn't that long ago.
R. Costantino would like to get things over as soon as possible. It appeared straightforward. But he was curious to see if Lincoln would say something other than he just copied those letters.
J. Dargie said it sounded like they wanted to have Lincoln there.
M. Thornton agreed and asked for a motion.
J. Dargie said they could stop deliberation and continue case to the next meeting. Don't need a motion?
M. Tornton, J. Dargie and J. Plourde had brief discussion re inviting Lincoln and whether it needed to be formal and in writing.
R. Lunn said this was like any testimony. Asking him to come and give testimony.
J. Plourde said he'd like to be able to understand his letter a little better.
S. Bonczar said he didn't need it. Other problem is Lincoln becomes sort of a sixth Bd member.
R. Lunn said no, he doesn't vote.
M. Thornton would like to see him there.
J. Dargie asked what meeting. Need to set the date.
M. Thornton said next was Oct. 20. This case would be continued to Oct. 20.
J. Dargie said she wouldn't be here on that date.
J. Plourde made motion to continue deliberations on case until Oct. 20.
R. Costantino seconded.
Vote on motion:

J. Dargie, J. Plourde, R. Costantino, and M. Thornton in favor.
S. Bonczar against.
Motion passed 4 to 1.
J. Dargie made motion to table Case #2016-23 and #2016-19 to Oct. 20.
J. Plourde seconded.
J. Dargie – yes; J. Plourde – yes R. Costantino – yes S. Bonczar – in light of previous motion, yes
M. Thornton –yes
Motion passed 5 to 0.