

**ZBA MINUTES MEETING OF AUGUST 8, 2007** – Pineridge, Grolex

Members Present: Robert Cadle, Chase Duffy, Jay Prager, Alison Manugian, Megan Mahony

**Pineridge**

Chairman Cadle reconvened the Pineridge 40B hearing and read Megan Mahony's letter into the record.

Atty. Deschenes said that he just wanted to give the Board a quick update regarding the status of the project, noting that late last spring the plans were put on hold to discuss with the BOS and the PB a project under the flexible development by-law. He said that an agreement was reached and ratified at town meeting containing approximately 21 units, including the existing dwelling which would be managed through the DMR. He said that there would have been an 40% affordability rate with a much smaller sized project and the town agreed to work with them and provide sewer. He said that most people were happy with the agreement but things happen, such as Natural Heritage updating maps showing habitats of rare and endangered species. He noted that the entire site is now part of the endangered species plan and thus they had to file with MESA. He also noted that a neighbor, prior to moving, sent a photo of a blue spotted salamander and claimed that it was sitting on his land. He said that there was no proof and it is not a breeding ground, but to the east of the site is a known breeding area/vernal pool and thus Natural Heritage said that if one there is a salamander sitting there and a nearby breeding ground, the entire project must be moved back and 60% of the site must be untouched. He said that this gave them just south of 50% since the plan was filed before the maps were updated and stressed that this had a profound impact on the project. He noted that they could redesign the project or dump the plan and go back to the ZBA, but stressed that they are working on keeping the agreement with the Town and presented a greatly reduced project and site. He said that the project as shown meets slightly less than 50% disturbance with a total of 14 units and the existing home. He said that in doing the math, the costs of land acquisition and sewer upgrade don't change, noting that the project is at about 5% profit, which is not defensible under 40B but is under the flexible development by-law. He said that Mr. Hicks died and the trustees feel that it is best to try to make something happen there that isn't high density. He noted that he met twice with the BOS and they worked out a total of five

affordable units for 33% affordable. He said that some Selectmen want 38% affordable but that that brings the profit to zero, although he is working on how to get the affordables up to 40%. He noted that DMR prefers four bedroom homes so that would bring the total up to six units and 40% affordable. He stressed that this is a frustrating process with a lot of scrambling, noting that they are meeting with DMR next week. He said that he is asking patience from the ZBA to continue the 40B hearing, even for a significant period. He said that the Hicks Corp. has a lot of money and time invested in this site and actual construction costs are being used because a similar project is being constructed in Ayer.

Chairman Cadle asked whether the existing house could be added onto to create an additional bedroom.

Atty. Deschenes noted that they would have to do substantial and expensive work if not using existing the house as is, per DMR regulations.

Ms. Mahoney, as an interested party, asked what is proposed for the exterior of the existing dwelling.

Atty. Deschenes said that there would be a general sprucing up, noting that if the Town purchases the dwelling, the Town could make income from it.

Chairman Cadle asked how long a continuance would be requested. Atty. Deschenes asked whether late September would be acceptable.

The Board moved to continue Jenkins Road to the September 19, 2007 at 7:30 pm. The motion was seconded and passed unanimously.

## **Grolex**

Chairman Cadle reconvened the Grolex hearing, offering an explanation of how procedures are going to follow:

- 1- McElroy would present;
- 2- LaGasse would present and
- 3- Public comments, to be directed to the Board would be heard.

Mr. McElroy said that he left off last time talking primarily of the two year period of non-use, noting that it has been difficult to obtain records. He said

that he has some history, although it is somewhat redundant from last time. He said that the original Grolux operated from 1948 to 1994, at which time the name was changed to KRW and the operation continued to 1998. He then presented Sec. of State corporate information, noting that whatever the original company did, the right to continue was lost since it was over ten years ago and has been stopped for a long time. He said that in 1994, a new company took over, and presented the records from the Sec. of State. He said that the last annual report filed was for 2004, showing the business as metal fabrication. He said that nothing was filed for 2005, so therefore they were out of business. He said that several abutters attempted to get in contact with Mr. Williams but were unable to do so. He said that although the same name was used, it was a different corporation.

Ms. Mahoney asked whether it was the same type of business.

Mr. McElroy said that they seemed to be doing similar work, metal fabrication.

Ms. Mahoney asked again whether it was the same business.

Mr. McElroy said that all he has seen is metal fabrication for the past 15 years.

Ms. Mahoney asked what basis this information is based on, such as entering the building.

Mr. McElroy said that he has seen trucks delivering raw steel and trucks taking finished metal products out, noting that the prior businesses had big presses that stamp metal, brakes for bending metal, and CRC machines for creating metal parts. He said that that business had continued to 2004 and he can't get records past that. He noted that the information available indicates that Grolux went out of business in 2004 and that they had filed with the State every year up to then. He said that invoices could conclusively prove that and stressed that the other side has that ability to prove.

Mr. Prager asked when annual reports are due.

Mr. McElroy said that they were submitted on 3/14/04 for the past year.

Mr. Prager said that it may be April or May but some have been filed as late as July. He noted that it seems that their fiscal year is the calendar year.

Mr. McElroy said that some time after that the building was empty and then the auction was held and all equipment was sold.

Mr. Prager asked Mr. McElroy whether he was disputing the accuracy of Mr. Williams letter.

Mr. McElroy said that he was, and noted that the letter was drafted in Atty. Collins' office.

Discussion ensued regarding the six month period in question and the validity of the letter from the previous owner.

Mr. McElroy said that the auction was in spring of 2005, and the electricity was shut off in the fall.

Discussion ensued regarding dates, facts and interests of parties.

Mr. Prager noted concern regarding the assertion that Mr. Williams' letter is false, and that the business was winding down until fall of '05.

Mr. McElroy said that he didn't keep great records but would argue that the business was gone prior to that through visual sightings.

Mr. Prager noted that Mr. Gosselin stated that the business ran until October 18, 2005 when there was a liquidation auction.

Mr. McElroy said that that time frame doesn't make sense because GELD said that there was no activity in October 2005.

The Board noted that GELD did not say that, but that there was still usage through September 2005.

Mrs. Duffy said that the Board needs to determine what being in business is.

Mr. Prager said that if the owner has a problem with his business and is looking for orders but doesn't get any, he still is in business.

Discussion ensued regarding the structure of a business in use.

Mr. McElroy agreed that some manufacturing was being done there but now Mr. Lagasse moves in and lists the business as construction and material sales on the annual report, which is totally different than what was there before. He then presented copy of Mr. Lagasse's website showing the type of business he is in, which is related to construction and not manufacturing.

Chairman Cadle asked whether the packet was submitted to Atty. Collins and Mr. McElroy said that it was.

Of note: the ZBA coordinator never got the packet from Mr. McElroy.

Mr. Prager asked about the different address.

Mr. McElroy said that it is the same business with a line added that Mr. Lagasse does metal fabrication. He then submitted zoning definitions from other towns of construction vs. manufacturing.

Mr. Prager noted that Groton doesn't have a definition like this and Mr. McElroy agreed that it doesn't.

Mr. McElroy said that what is really different is that big trucks are going in and out, moving equipment and generating a lot of traffic. He noted that Grolex had a few deliveries a couple of times per week and a few trips taking product out. He said that these big tractors, flatbeds and associated gear are totally different. He said that he also has a letter from a neighbor of the former site and what is now the Town Garage, stating that sometimes activity would start as early as 4:00 am, including the unhitching of trailers, etc.

Mr. Prager asked whether it has happened at the Grolex site.

Mr. McElroy said that it hasn't but expects that it will and said that he doesn't want to have to police the site. He said that he wouldn't be here if this was just another Grolex, noting that he had no complaints with the past Grolex uses. He stressed that when the diesels are running the whole house vibrates.

The Building Inspector said that everyone should have chance to speak but noted that so far this is just a carbon copy of what happened last time.

Chairman Cadle said that although there are more details, it is similar.

Louis Levine, agent for Mr. McElroy noted that the Board is dealing with whether there is a change in a non-conforming use and although a non-conforming use can be continued it can't change without a special permit. He stressed that the Board is not here for a special permit, noting that the three cases cited by Atty. Collins are all requests for a special permit from a ZBA. He said that it is not germane to this discussion which is whether this is the same use as what the prior owners did, noting that common sense has to be applied. He said that if it is not the same as metal fabrication, this operation could not go on without a special permit. He noted that one case mentioned by Attorney Collins is relevant and what the court says is that non-conforming uses are intended to die and not to go on forever. He stressed that this needs to be looked at in a strict way with a strict standard, asking whether it is the same operation. He then cited a Bobrowski paper as reference. He said that there is a contractor yard there and if the Board believes that that is the same operation then the non-conforming use goes forward. He noted that Mr. McElroy said that the effect on the neighborhood is different and therefore this is a different use. He said that the by-law does permit manufacturing in some areas but does not allow a contractor's yard anywhere in the town and thus there should be no storage of heavy trucks or heavy equipment. He stressed that Mr. Lagasse has a right to do the same business as Grolex, manufacturing inside of the shop and not the storage of heavy equipment.

Chairman Cadle asked about the evidence of storage of heavy equipment on the site.

Atty. Levine said that it was what was represented tonight as well as on other occasions. He said that the nexus is whether this is the same kind of business and not whether they have similar types of tools. He then submitted the Bobrowski paper into the record, noting a list of cases that the courts have dealt with in the past years, with 95% of the cases being denials and with more similarities than the two businesses here.

Chairman Cadle noted the Derby case.

Atty. Levine said that it is as simple as that, and that metal fabrication happens generally inside the building, with no floats, no heavy equipment, etc. He suggested that this is a slippery slope.

Mr. Prager said that he came having drawn some conclusions, noting that he went on a site walk and read the by-laws. He feels that through certain aspects he is reasonably assured that business was in operation and didn't lose it's grandfathered status. He said that now there are two businesses going on, one being a welding operation and he could be convinced that driving a truck on-site for repairs would be okay. He said that there is also another aspect of the business that includes the storage of landscaping equipment, etc. but that there is no evidence of such business. He said that one could argue that the welding could continue, but he has a problem with the storage of trucks and heavy equipment. He stressed that Mr. Lagasse shouldn't be able to store equipment associated with his construction business on that site.

Discussion ensued regarding whether Mr. Lagasse should be able to continue with the welding business. Atty. Levine said no because there was a change and thus any grandfathering is lost and Mr. Prager said that it should continue. Mr. Prager said that the Board is only here to determine whether the Building Inspector is to be upheld.

Mr. Prager felt that the Board could uphold the Building Inspector and also determine that there are parts of the business that would require a special permit. He said that he disagrees with Atty. Levine that if Grolux started selling flowers as well as fabricating metal, that they would have to shut down the entire business because there is a change.

Chairman Cadle noted that businesses always change.

Atty. Levine said that there is a different approach if an existing business grows.

Mr. Prager said that that may be right in court but also there is a community issue here, noting that Mr. Lagasse didn't have the benefit of Bobrowski's paper when he purchased the site. He stressed that he feels that can Mr. Lagasse can continue the existing business and he won't make him shut it down. He then asked Atty. Levine what he wants the Board to do tonight.

Atty. Levine said that Board could determine that part of business is the same.

Mr. Prager said that it is his understanding that it is a welding business.

Atty. Levine said that if the Board believes that what is there is consistent with a manufacturing business then the operation can continue. He said that would hope that that stop would stop the rest of the business.

Mr. Prager said that there seems to be some agreement that welding can continue on the site.

Atty. Levine said that if the Board determines that it is the same, then yes. He said that it seems the objection is with trucks going in and out and that there is agreement there.

Atty. Collins said that there is agreement with some of what was said, noting that this is an appeal of the BI's determination. He said that non-use is one issue, noting that he was successful in contacting the prior owner and his secretary did type letter dictated by Mr. Williams, the prior owner. He said that the GELD letter and the Williams letter gibe, and that a public auction was held on October 18, 2005, and he will get the Board a copy of the notice. He said that the use issue is more complicated, noting that the Powers case being referred to runs through the law about what minimum protection is afforded to non-conforming uses. He said that the municipality is free to choose how to deal with non-conforming uses and in Groton, non-conformities have been dealt with in a pretty loose fashion. He noted that the 1963 by-laws stated that changes could be dealt with but was removed in 1978 because it made zoning useless. He suggested that the shows mindset of how the town deals with non-conformances, noting that the uses of singular and plural are pertinent. He said that he is recognizing that different things are being done on a single property, and noted that the concept of use is dealt with in a generic way and that things have to fit into a single category and use common sense in interpretation. He said that this applies to both permitted uses and non-conforming uses, noting that we have a lot of non-conforming business properties for a small town. He said that the changes should be allowed because they fit with the businesses that were there.



Chairman Cadle said that the examples in Atty. Collins' letter were interesting but wondered if they have ever been challenged.

Mrs. Duffy noted that the late Charlie Vlahos used to park trucks at a garage and was voted down until there was a zoning change.

Mr. Prager asked whether the Grolex businesses were owned by same owner and Atty. Collins said that they were not.

Mr. Prager asked about the impact on the neighborhood and Atty. Collins said that no one complained so clearly there was no impact.

Atty. Collins addressed the issue of the current town garage, which was previously leased by Mr. Lagasse, noting that there were complaints made but that no zoning violation was found by the previous building inspector. He then noted the Derby case, which he didn't cite before because the community is so different. He said that what is pertinent is what we have done in the past as a community and in zoning. He noted that the BI didn't order a cease and desist. He said that if Mr. Lagasse moved the business, HE would need an M-1 zone, as would have Grolex, noting that Mr. Lagasse does that same type of business as Grolex.

Mrs. Duffy noted that much of the neighborhood wasn't there during Grolex's tenure and that most of the houses were not there when Grolex was busy. She said that she hasn't seen much activity there over the years, including now.

Atty. Levine noted a Derby case correction, which was about a petroleum facility turning into a liquid asphalt facility, which was not allowed. He said that the fact that people don't complain shouldn't affect this decision.

Mr. Prager said that he wants to give the benefit of the doubt to the welding supply but not to truck storage.

Atty. Collins noted that Grolex did have trucks.

Mr. Prager noted that those trucks were associated with a different business than what is happening now in the building.

Ms. Mahony asked whether it is one business or two.

Mr. Legasse said it was one business.

Atty. Collins suggested that the applicant proposing a set of conditions that the neighborhood could live with.

Mr. Prager said that the issue is not the business but the use or uses.

Discussion ensued regarding the special permit route vs. upholding the BI's decision.

Ms. Mahony said that a discussion about conditions would need to be during a special permit hearing.

Atty. Collins discussed what types of uses were there historically and noted that letters that were submitted into the record.

Chairman Cadle asked Atty. Collins whether if there is any change than is grandfathering is lost.

Atty. Collins said no, because the municipality can chose what to allow.

Chairman Cadle said that Atty. Collins said use or uses and wanted clarification.

Atty. Collins said that there is recognition of the fact that things occur and those things can continue.

Mr. Prager said that it is possible for a business or location to have many uses at any given time but what is at issue is what was happening on the site at the time of zoning changes and the storage of heavy equipment was not happening at that time, just metal manufacturing.

Atty. Collins said that Grollex had some trucks.

Mr. Prager said that those were related to the metal fabrication business and not a separation construction business.

Atty. Collins said that Grollex rented out space to another businesses at the same time.

Mr. Prager said that things have been very vague about what went on and if, after the zoning change, there would be a violation. He said that he felt certain that Grollex never stored equipment for this type of construction business.

Atty. Collins said that Grollex stored equipment on the site.

Mark Ferrell, abutter to Grollex for about 15 years, noted that the one vehicle that Grollex had was comparable to something for towing a car. He said that there were no flatbed trucks, excavating equipment, etc.

Mike Groult, abutter for 12 years, said that the business was dormant for years and the fact that it is coming back to life in a different neighborhood for the profit of one is unreasonable. He said that the former activity was a few workers going in and out and occasional deliveries, all of which was very quiet. He said that apparently Mr. Lagasse approached another landscaper to lease space to store equipment there.

Barbara Ferrell, across the street abutter, said that every morning dump trucks leave, flatbed trucks and backhoes are moved around and there is overwhelming diesel smoke and smells. She noted that there has been much less activity lately and it is much nicer.

Discussion ensued regarding how the Board should proceed.

Mrs. Duffy asked for clarification regarding what sort of activity occurs on the site.

Mr. Lagasse said that trucks leave at 7 or 7:30 am, may come back midday and then return at the end of the day at 4 or 4:30 pm. He noted that he has three trucks.

Chairman Cadle asked about snow plowing.

Mr. Lagasse said that employees have plows on their trucks which they take home from work and start plowing from there.

Mr. Prager said that the trucks don't seem too onerous and Chicopee Row has a lot of truck equipment, but in front of the Board is the change of use. He suggested coming back for a special permit with conditions.

The BI said that when the complaint was made, he went three or four times to view the property and there were a couple of pickup trucks, some plows inside, and welding equipment. He said that he told Mr. Lagasse that if the business expands to include trucking, etc, he will issue a cease and desist.

Atty. Levine said that he understands that this is a small community where everyone knows each other, stressing that this is not personal and just what the by-law says. He said that the same decision should be made regardless of where Mr. Lagasse lives, noting that he should have gone to the BI prior to purchase to ask for guidance. He said that instead, he opened up and a complaint was made. He said that if any testimony is accepted, there is a change in use.

Mr. Prager said that he never met Mr. Lagasse prior to the hearing and didn't know anything about his business.

Atty. Collins said that he wasn't involved at time but does know that Mr. Lagasse did approach the BI prior to the purchase and the BI didn't feel there would be a problem with running his operation in the building.

Mr. McElroy said that he spoke to another contractor in town who grew up here and was approached by Mr. Gosselin to purchase the building. He said that this contractor didn't pursue the purchase because he felt the Town wouldn't allow it.

Mrs. McElroy, a butter, said that they bought their house in 1991 from the daughter of the woman who wrote a letter about how noisy Grolex is now. She said that the daughter described it as a once quiet business that was no bother. Mrs. McElroy said that she was a stay at home mom and the business was unobtrusive and she was not bothered at all by it. She noted that she now works full time and leaves at 7 or 7:30 and there are clouds of diesel smoke, lots of pollution and noise. She said that the cloud of smoke goes all the way up the road when following the trucks. She stressed that she doesn't want to put a small business owner out of business but it is really tough on the neighborhood.

Chairman Cadle said that it is important that there are distinct areas for truck storage and welding, noting that he was at the site walk and although there was not much going on, it was a Saturday. He said that the applicant has standing and that he thinks there has been use within the required two years, but feels that this use a different operation than what was there for Grolex. He said that he does not agree that it is a permitted use and that there is permissive language in the by-law. He said that if one looks at the Schedule of Uses, truck storage is not allowed in an R-A district.

Discussion ensued regarding whether the welding part of the business can stay in operation and how to determine whether a non-conforming use can be a zoning violation.

Mr. McElroy read the decision regarding the old West Groton gas station that Mr. D'Agostino (an ex-building inspector) made, that trucking storage had occurred by Hollingsworth and Vose and thus Mr. Lagasse's operation was just a continuation.

Mr. Prager said that he saw welding going on at the site walk, noting that this is a permissible use in the building. He said that if welding is the only thing going on than neighbors wouldn't complain, and that the storage and daily movement of trucks can't be supported.

Chairman Cadle said that it seems to be everyone's problem.

Mr. Prager said that the Board needs to determine whether the use or uses are consistent with what happened there in 1963.

Atty. Collins noted that the BI found no violation.

Mr. Prager said that there is a violation of the by-law with the storage of trucks, noting that the BI may have had different information when he viewed the site. He said that now there are two uses going on: 1- welding, which is no problem and 2- truck storage, which is not okay without a special permit.

Ms. Mahony said that she is not convinced that this welding is the same as Grolex but a truck repair business is different than manufacturing.

Mrs. Manugian said that she has no problem with welding but there should be no truck storage.

Chairman Cadle said that the truck storage may not have been apparent when the BI looked at the site.

Mrs Duffy said that she thinks there was use with the two years, but has mixed feelings regarding the current use. She said that it should be the same and it is sort of different because they are not selling things that are produced but repairing already made items. She said that moving trucks doesn't seem to fit the Grolex model, noting that everything was different when Grolex was in its hay day.

Atty. Collins suggested a continuation so he can work up a special permit application that could have conditions that the neighborhood could live with.

Atty. Levine said that we are here for the appeal and noted that the Board is about to make a decision. He said that he would be happy to discuss a special permit in the future but stressed that the Board was not here for that now. He also noted that it is presumptuous that a petitioner craft conditions such that the Board has to grant a special permit because someone in the back of the room is okay with them.

Mr. Prager said that he shouldn't shut the door to negotiations.

Atty. Levine said that there is a standard to granting special permits, particularly that the operation not be more detrimental to the neighborhood.

Discussion ensued regarding how to frame the decision.

Atty. Collins said that Grolex did welding repairs.

Atty. Levine said that the Board needs to make it very clear what Mr. Lagasse can and can't do.

Mr. Prager said that he is not 100% in agreement with Mrs. Duffy that only welding related to the manufacturing of products and that he can live with welding repair occurring on site.

Ms. Mahony asked for clarification of the use of the building as originally for manufacturing or welding for repair.

Discussion ensued regarding the scope of Grolex's business and whether and how to define what is permissible or not.

Mr. Prager stressed that trucking that has nothing to do with the welding business is unacceptable.

The Board moved to close the public hearing. The motion was seconded and passed unanimously.

Mr. Prager noted that storage of vehicles that are not directly related to the metal fabrication and repair business is unacceptable.

The Board moved to notify the Building Inspector that the Board finds that the use of the building for uses, (e.g. storage of vehicles and equipment) not related to the repair and/or fabrication of metal products principally for third parties, is impermissible.

The Building Inspector noted that he is comfortable if the Board makes findings defining what is acceptable, hours of operation and thus there should be some truck comings and goings.

The above motion was seconded and passed unanimously.

The meeting adjourned at 10:45 pm.