

Date Received:

Town Clerk:



**NOTICE OF DECISION
Number: 12-01**

Date of Application: 2/27/2012

Subject of Appeal: The application of Daniel J. Kelly III DBA DJ's Classic Cars for a special permit and finding under section 1.33 of the Ashburnham Zoning By Laws to reestablish a nonconforming use to operate a sales facility for motor vehicles, and all other necessary zoning relief on the property located at 73 Fitchburg Road, Map 34, Parcel 26, in the RA Zoning District.

Date of Hearing: 4/25/2012

Date of Decision: 4/25/2012

Finding: The Board finds that the reestablishment of the requested uses are not detrimental or injurious to the neighborhood and that the criteria for grant of a special permit as requested have been satisfied as set forth in more detail below.

Decision: Unanimous to make a finding and grant a special permit with conditions.

Conditions:

1. Hours of operation; Mon-Fri 10:00 AM to 8:00 PM, Sat. 10:00 AM to 6:00 PM, and Sunday 12:00 PM to 5:00 PM, or by appointment.
2. Signage: To remain in same location and no larger than existing sign.
3. No auto body work, painting or bondo. Permitted uses are repairs, sales, detailing and storage only.
4. Applicant to conduct ground water testing prior to transfer of ownership, copies to be submitted to the Zoning Board of Appeals and made available to abutters.
5. Apartment to be brought to code and tested to be safe before using, in accordance with Board of Health requirements, results to be submitted to the Zoning Board of Appeals and made available to abutters.

Record of Proceedings and Findings

1. Applicant, Daniel J. Kelly III, of Leominster, Massachusetts, filed this application for a Special Permit to re-establish a nonconforming use of property pursuant to Section 1.33 of the Ashburnham Zoning Bylaw. The subject property, Assessor Map 34, Parcel 26, is located at 73 Fitchburg Road in Ashburnham and is owned by Richard and Paula Boutwell, who reside at abutting property at 63 Fitchburg Road. The Boutwells acquired the property by deed, dated June 2, 1983, recorded at Worcester North District Registry of Deeds (“Registry”) at Book 1319, Page 86. Following publication, notice to parties in interest and posting pursuant to G.L. c. 40A and the Open Meeting Law, the Board held a public hearing on the application on April 25, 2012. Applicant was present representing the petition. The Boutwells were present and were represented by counsel, James M. Burgoyne.
2. Applicant, who currently does business in Ashburnham as DJ’s Classic Cars, seeks to re-establish the nonconforming commercial use of the 73 Fitchburg Road property which formerly was used for automobile service, repairs, inspections and accessory uses. He proposes to conduct motor vehicle repairs and sales and to use the property for storage and detailing of motor vehicles. He proposes to lease the property from the Boutwells and eventually purchase the property.
3. The subject property is located at 73 Fitchburg Road and is shown on the Assessor Map 34 as Parcel 26. The parcel is approximately 1.9 acres in size and is located in the RA Zoning District. The most recent plan of record of the property is recorded at the Registry at Plan Book 482, Plan 25.
4. The property contains one building which houses a three bay motor vehicle service garage and office on the first floor and a four room apartment on the second floor. The building was constructed in 1957 by Richard Boutwell’s parents, Myron and Velma Boutwell. Mr. Boutwell’s parents purchased the property in order to relocate a motor vehicle repair business to the subject site from its former location on Main Street. The apartment located on the second floor of the building was occupied over the years by Mr. Boutwells parents, the Boutwells themselves, and various tenants and employees of the business.
5. Following the purchase by the Boutwell parents in September, 1956 (by deed recorded at Book 788, Page 412), the property was conveyed to Boutwell’s Garage, Inc., which thereafter deeded it to Velma Boutwell in December, 1976, who, in turn, deeded it to the current owners in 1983. Richard Boutwell and his family have continuously been involved with ownership and operation of the property for over 45 years from its commencement in 1957 until August 2004, when the business, then being operated by the Boutwell’s son-in-law, was closed. Since construction and commencement of use in the late 1950’s, the property was continuously used for nonconforming commercial use for automobile service, sales of used motor vehicles, retail gasoline and diesel fuel sales,

repair and storage of school buses for the town of Ashburnham, as well as for Massachusetts vehicle inspections, towing services and heating oil sales.

6. The subject property was used for retail gasoline sales from the late 1950's until the gasoline sales were discontinued and the underground gasoline storage tanks and pumps were removed in 2006.
7. The motor vehicle repair and gasoline related uses of the property were suspended in approximately 2004, as the result of an environmental release of gasoline and the various response actions that were being conducted at the premises. These response actions occurred between 1998 when the release was first detected, until 2008, when a Response Action Outcome was filed with the Massachusetts Department of Environmental Protection. The sales and storage of gasoline are not proposed to be resumed at the premises.

The town first adopted zoning in 1961. At the time of adoption of the first Ashburnham Zoning By-laws, the use of the subject property for automobile sales and repairs and accessory commercial uses had already been established and thereafter remained lawfully established uses. With the exception of the residential use of the apartment located within the building, which is a use permitted by right in the RA Zoning District, the commercial uses of the property, which were being operated in 2004, were not permitted uses in the RA Zoning District but were permitted to continue pursuant to the protections afforded to established nonconforming uses under Section 6 of the Zoning Act (Chapter 40A). However, Section 1.33 of the Ashburnham By-laws provides as follows:

Abandonment- all non-conforming uses which have been *abandoned or discontinued* for more than two (2) years shall not be re-established except by special permit from the Board of Appeals after a public hearing and a finding that such re-establishment will not be detrimental or injurious to the neighborhood. (emphasis supplied)

8. It is undisputed that the nonconforming commercial use of the property was discontinued for a period of greater than two years. We make no finding concerning whether the owners intended to permanently abandon the nonconforming uses and should not be inferred from this decision.
9. As noted above, once nonconforming uses have been abandoned or discontinued for more than two years, they may not be re-established except by the grant of a special permit from the Board of Appeals after a public hearing and a finding that such re-establishment will not be detrimental or injurious to the neighborhood.
10. The discontinuance of the nonconforming use occurred largely due to the duration of the environmental response actions that were undertaken at the property, including the removal of the tank systems, prolonged environmental testing, and the need to install a public water supply pipeline extension to the neighborhood, all of which affected the utility and marketability of the property for several years.

11. Since the completion of environmental response actions at the property, the Boutwells have attempted to re-establish a productive use of the vacant property and building for sale or lease without success. In December 2011, this Applicant requested a variance to conduct the same uses he proposes under this application. At the time the variance was initially applied for, applicant stated that he was not aware that the re-establishment of the nonconforming uses could be authorized by special permit under Section 1.33.
12. The Board's decision in Case Number 11-08 dated January 18, 2012, granting the variance subject to a number of conditions, was appealed in Land Court by Mr. and Mrs. Adams, owners of abutting property located at 57 Fitchburg Road, to the north of the Boutwell land. That appeal is presently pending in the Land Court.
13. The Board finds that the proposed use satisfies the criteria set forth in the Bylaw for the grant of a special permit in that it is not detrimental or injurious to the neighborhood.
 - A. The lot conforms to the applicable dimensional requirements of the Bylaw for uses in the RA district. The lot is 1.9 acres in size with significant length of street frontage, which will allow the structures and uses to be operated without undue density or overcrowding of the land.
 - B. The property has been used for nearly five decades for motor vehicle repairs, service and sales without any significant nuisance or detriment caused by the sales and repair uses that are sought to be reestablished. The immediate abutter to the west is the residence owned by the Boutwells. To the east, an abutting property is used for construction business, which includes septic pumping equipment and outhouse rentals. Most of the properties in the neighborhood were developed or purchased after the use of the property was established, no one appeared or opposed the application, except the Adams.
 - C. Adequate and appropriate facilities are available to service the use. The lot is served by public water supply and a private septic system. A plan for upgrade and improvements to the on-site septic system has been approved by the Ashburnham Board of Health and is proposed to be implemented to service the use in the future.
 - D. The use will not cause undue noise or nuisance to the neighborhood. The proposed auto sales will be subject to licensing oversight by the Board of Selectmen under applicable licensing regulations. Most of the detailing and repairs of motor vehicles will occur within the building and will not involve body work, thereby limiting the presence of towing vehicles travelling to and from the premises.
 - E. Facilities for the storage, pumping and dispensing of gasoline and diesel fuel have been removed since 2006 and are not proposed to be re-established or authorized by this special permit.
 - F. The business will initially involve only the Applicant and his son as employees.
 - G. Authorizing the use as proposed will encourage and return the property to productive economic use and is in harmony with the intent and purpose of the by-law to encourage the most appropriate use of the land.
 - H. The limited use will not generate any excessive traffic or safety hazards to vehicles and pedestrians. Fitchburg Road, Route 12, is adequate in construction to accommodate any vehicular traffic to be generated. The prior use for gasoline sales

operated with far more vehicles entering and exiting the site without any excessive traffic conflicts or accidents.

14. The only abutters who appeared in opposition to the application were Wayne and Terri Adams of 57 Fitchburg Road. No other abutters appeared or spoke in opposition to the grant of the special permit and findings as requested. Mr. Adams stated that he is not opposed to the business use of the property but is concerned about the residential occupancy of the apartment based on alleged health and safety concerns for any future occupants. Both Mr. and Mrs. Adams questioned whether the Board should rely on a Response Action Outcome opinion filed with the Department of Environmental Protection since the LSP Opinion contained certain disclaimer language. The Board noted that in response to direct inquiry to the Central Regional Office of the Massachusetts DEP, DEP officials noted that the site was listed as having achieved a Class A-2 Response Action Outcome under the relevant regulations, that audit actions had been conducted, and that no further response actions were deemed necessary in regards to the property in the absence of evidence warranting further response actions. No evidence was submitted to the Board that the conditions upon which the site closure was based have changed or warrant further response actions, or that any environmental conditions are present that make the site's proposed use inappropriate. Furthermore, the residential use of the property is allowed as of right in the district and it is only the commercial use that is subject to reestablishment by special permit.

Vote of Board: The Board voted unanimously, 5-0, to Find that the reestablishment of the prior nonconforming uses as proposed are not detrimental or injurious to the neighborhood and thereupon voted unanimously, 5-0, to Grant the Special Permit as requested, subject to the conditions as set forth above.

Board Members Present and Voting: Joseph Daigle, Acting Chairman
Rich Archer, Acting Clerk
Terry Girouard
John MacMillan (Alternate Member)
Leo Janssens II (Alternate Member)

Board Members Absent: David Perry
Mark Carlisle
Cheryl Anderson

Notice: Any decision of the Zoning Board of Appeals may be appealed to Court, in accordance with Massachusetts General Laws Chapter 40A, Section 17, by the applicant, Town Boards or officers or any person aggrieved by said decision.

Pursuant to G. L. c. 40A, s. 11, this special permit shall not take effect until a copy of the decision bearing the certification of the city or town clerk that 20 days have elapsed after the decision has been filed in the office of the town clerk and either that no appeal has been filed or the appeal has been filed within such time, is recorded in the registry of deeds for the county and district in which the land is located and indexed in the grantor index under the name of the owner of record or is recorded and noted on the owner's certificate of title. The person exercising rights under a duly appealed special permit does so at risk that a court will reverse the permit and that any construction performed under the permit may be ordered undone. The fee for recording or registering shall be paid by the owner or applicant.

CERTIFICATION

I hereby certify that the foregoing Notice of Decision was filed in the Office of the Ashburnham Town Clerk, that twenty (20) days have elapsed since the date of said filing, and that:

_____ No notice of appeal from said Decision has been received relating thereto; (or)

_____ A Notice of appeal from said decision was received within said twenty day period.

Dated:

Ashburnham Town Clerk