Town of Grafton
Zoning Board of Appeals
30 Providence Road
Grafton, MA. 01519

508-839-5335 x 1154 - Fax: 508-839-4602
E-mail: koshivosk@grafton-ma.gov
Website: www.grafton-ma.gov

Zoning Board of Appeals

New Case Notice

Case Number #
2018 / 847

The Grafton Board of Appeals has received a petition from JOSEPH M. ANTONELLIS, ESQ. FOR SCOTT G for 44 BRIGHAM HILL ROAD requesting that the Zoning Board of Appeals grant a

Special Permit

to allow: TO ALLOW THE APPLICANT TO REVITALIZE THE EXISTING BUILDING TO ALLOW FOR CONTINUED COMMERCIAL/LIGHT INDUSTRIAL USE. BOOK: 58240 PAGE: 305

Map: 64 Lot: 8.0 Block: 000

The Board will conduct a Public Hearing on at 7:00 PM in Conference Room A, at the Municipal Center, 30 Providence Road, Grafton, MA 01519 to consider this request.

ZONING BOARD OF APPEALS

William Yeomans, Chairman
William McCusker, Vice Chairman
Kay Reed, Clerk
Elias Hanna, Member #1
Karl Chapin, Member #2
Megan Perrotta, Alternate #1
Marianne Desrosiers, Alternate #2

RECEIVED
JUN 04 2018
Zoning Board of Appeals

RECEIVED TOWN CLERK
GRAFTON, MA
2018 JUN -4 PM 1:27

PETITION TO THE ZONING BOARD OF APPEALS
TOWN OF GRAFTON, MASSACHUSETTS

DATE: June 4, 2018

I/We hereby petition your Board to conduct a public hearing and consider the granting of relief from under hardship resulting from literal enforcement of the protective Zoning Bylaw, by exercising your power to:

(Mark one)

_____ Review refusal of Selectman or others to grant a permit

_____ Grant a **VARIANCE** from the terms of the Zoning Bylaw, SECTION_____.

X Grant a **SPECIAL PERMIT** for a specific use which is subject to the approval of your Board.

FOR LAND/BUILDINGS AT 44 Brigham Hill Road, Grafton, MA

TO ALLOW:

The Applicant to revitalize the existing building to allow for continued commercial/light industrial uses.

Please complete this **entire** section:

Location of property: Tax Plan # 64 Plot # 8
Zoning District in which the property is located: Residential (R-40)
Title of Property in name of: ~~Brigham Hill Realty Corp.~~ 44 Brigham Hill Rd. LLC
Whose address is: 44 Brigham Hill Road, Grafton, MA
Deed recorded in Book # 58240, Page # 305
Plan Book #_____, Plan # _____
Signature of Petitioner: [signature]
Print Name Joseph M. Antonellis, Esq. for Scott Goddard
Address of Petitioner: 288 Main St., Milford, MA
Phone Number of Petitioner: 508 473 2203

TOWN OF GRAFTON
GRAFTON MEMORIAL MUNICIPAL CENTER
30 PROVIDENCE ROAD
GRAFTON, MASSACHUSETTS 01519
(508) 839-5335 ext 1170 • FAX: (508) 839-4602
www.grafton-ma.gov

TREASURER / COLLECTOR

Certificate of Good Standing

Applicants seeking permits with the Town of Grafton must submit this completed form at the time of application. When all obligations are paid to date, you must attach this "Certificate of Good Standing," with your application. Delinquent bills must be paid in full before the appropriate department accepts your application. Please make arrangements to pay these outstanding bills at the Collector's Office.

Please note: it can take up to three (3) business days to process each request.

Please check all that apply and indicate if permit(s) have been issued.

	Permit Issued? Yes	No		Permit Issued? Yes	No
☐Building – Inspection(s)	____	____	☐Septic System	____	____
☐Building – Electric	____	____	☐Conservation	____	____
☐Building – Plumbing	____	____	☐Planning	____	____
☐Board of Health	____	____	☐Other	____	____

Other Permit: _____

Joseph M. Antonellis, Esq. for Scott Goddard
Petitioner Name

Brigham Hill Realty Corp.
Property Owner / Applicant

44 Brigham Hill Road
Petitioner Address

44 Brigham Hill Road
Property Address

Grafton, MA 01519
City, State, Zip

Grafton, MA
City, State, Zip

508-473-2203
Phone

Date:	Current	Delinquent	N/A
Real Estate	✓		
Personal Property			✓
Motor Vehicle Excise	✓		
Disposal	✓		
General Billing			✓

CAL
Treasurer / Collector Signature

6/4/18
Date

Form Revised: 10/15/2012

over

Mayer, Antonellis, Jachowicz & Haranas, LLP

Attorneys at Law

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William H. Mayer
Robert P. Jachowicz
Joseph M. Antonellis
Peter J. Haranas
Jill P. Dawiczyk
Erin Wright (also admitted in R.I.)
A. Eli Leino (also admitted in N.H.)

MEMORANDUM

To:	Town of Grafton Zoning Board of Appeals
From:	A. Eli Leino, Esquire
Date:	June 4, 2018
Regarding:	44 Brigham Hill Road – Pre-existing Non-conforming Use

Dear Members of the Grafton Zoning Board:

This memorandum accompanies a submission by Brigham Hill Realty Corp. for a special permit regarding the property at 44 Brigham Hill Road, Grafton, Massachusetts. Brigham Hill Realty Corp. purchased the property through a foreclosure sale in December 2017, and intends to continue using the property for light industrial and/or commercial purposes; a pre-existing non-conforming use under the Town's bylaws. On June 23, 2016, the Town of Grafton Fire Department shut down the building's sprinkler systems and effectively ended the previous owner's use of the property.

With regard to Brigham Hill Road, the legal question of abandonment becomes one of intent. Attached to this memorandum is a case that provides significant support to Brigham Hill Realty Corp.'s understanding that the previous owner did not abandon the use, and that by filing this application, the applicant has tolled the two year requirement of Massachusetts General Laws Chapter 40A Section 6 ("A zoning ordinance or by-law may define and regulate nonconforming uses and structures abandoned or not used for a period of two years or more."). It is understood in Massachusetts that the right to continue a nonconforming use runs with the land and not with the owner. See Revere v. Rowe Contracting Co., 289 N.E.2d 830 (1972).

In Derby Refining Company v. City of Chelsea (555 N.E.2d 534, (Mass. 1990)) the Supreme Judicial Court identified two factors that must appear concurrently to constitute abandonment: (1) the intent to abandon and (2) voluntary conduct, whether affirmative or negative, which carries the implication of abandonment. In applying that test, the Supreme Judicial Court found numerous examples where mere non-use did not constitute abandonment, and found specifically that an application made by the property owner could be found by a judge "as not showing the intent to abandon."

In applying that test to the present facts, the filing of an application for a special permit by Brigham Hill Realty Corp. demonstrates the applicant's intent to continue using the property in the same manner as previously used — conversely, it demonstrates the intent not to abandon the previous use. If we assume the Fire Department's 2016 letter signifies a cut-off date for continuing the use (which is itself not a foregone conclusion), this application has been submitted before the two-year window closes, and the fact that the Zoning Board of Appeals hearing will not take place until June 28, 2018 is not relevant.

Attorney Joseph M. Antonellis and I would be happy to further discuss any facet of this application with members of the Board, and look forward to seeing you at the hearing.

Most sincerely,

A. Eli Leino
Counsel for Brigham Hill Realty Corp.

Commercial Property Record Card

Parcel ID: 110/064.0-0000-0008.0 MAP: 064.0 BLOCK: 0000 LOT: 0008.0 Parcel Address: 44 BRIGHAM HILL ROAD FY: 2018

PARCEL INFORMATION									
Owner:	Use-Code:	400	Sale Price:	450,000	Book:	33519	Road Type:	T	Inspect Date:	07/16/2013
BRIGHAM HILL REALTY CORP	Tax Class:	T	Sale Date:	01/14/2005	Page:	259	Rd Condition:	P	Meas Date:	07/16/2013
	Tot Fin Area:	29040	Sale Type:	P	Cert/Doc:		Traffic:	L	Entrance:	C
Address:	Tot Land Area:	1.102	Sale Valid:	B			Water:	PS	Collect Id:	RB
44 BRIGHAM HILL ROAD	Sewer:		Grantor:	BURGESS INVESTMENT			Sewer:	SP	Inspect Reas:	C
GRAFTON MA 01519-1136	Exempt-B/L%		Resid-B/L%	0/0	Comm-B/L%	0/0	Indust-B/L%	100/100	Open Sp-B/L%	0/0

COMMERCIAL SECTIONS/GROUPS

Section: ID:101 Use-Code:400

Category	Grnd-Fl-Area	Story Height	Bldg-Class	Yr-Built	Eff-Yr-Built	Cost Bldg
3	4080	1.0	C	1943	1986	90700

Groups:

Id	Cd	B-FL-A	Flrs	Flrs
1	400	4080	1	1

Section: ID:102 Use-Code:400

Category	Grnd-Fl-Area	Story Height	Bldg-Class	Yr-Built	Eff-Yr-Built	Cost Bldg
3	8768	1.0	C	1943	1986	175900

Groups:

Id	Cd	B-FL-A	Flrs	Flrs
1	400	8768	1	1

Section: ID:103 Use-Code:400

Category	Grnd-Fl-Area	Story Height	Bldg-Class	Yr-Built	Eff-Yr-Built	Cost Bldg
3	7146	2.0	C	1943	1986	248100

Groups:

Id	Cd	B-FL-A	Flrs	Flrs
1	400	7146	2	1

Section: ID:104 Use-Code:400

Category	Grnd-Fl-Area	Story Height	Bldg-Class	Yr-Built	Eff-Yr-Built	Cost Bldg
3	1900	1.0	D	1943	1986	42800

Groups:

Id	Cd	B-FL-A	Flrs	Flrs
1	400	1900	1	1

Sketch

LAND INFORMATION

NBHD CODE: 24 NBHD CLASS: ZONE: R4

Seg	Type	Code	Method	Sq-Ft	Acres	Influ-Y/N	Value	Class
1	P	400	S	48003		N	151,209	

DETACHED STRUCTURE INFORMATION

Str	Unit	Msr-1	Msr-2	E-YR-Blt	Grade	Cond	%Good P/F/E/R	Cost	Class
AS	S	12000		1981	A	A	60///60	6,900	4
C6	F	50		1981	A	A	50///50	200	4

VALUATION INFORMATION

Current Total:	715,800	Bldg:	564,600	Land:	151,200	MktLnd:	151,200
Prior Total:	715,800	Bldg:	564,600	Land:	151,200	MktLnd:	151,200

Photo

No Sketch Available

No Picture Available

555 N.E.2d 534 (1990), Derby Refining Co. v. City of Chelsea /**/ div.c1 {text-align: center} /**/

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555 N.E.2d 534 (1990)

407 Mass. 703

DERBY REFINING COMPANY, et al. [1]

v.

CITY OF CHELSEA, et al. [2]

Supreme Judicial Court of Massachusetts, Suffolk.

June 19, 1990

Argued April 4, 1990.

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Ira H. Zaleznik, Boston, for defendant.

Robert C. Gerrard (Carol R. Cohen, Boston, with him), for plaintiffs.

Before LIACOS, C.J., and WILKINS, LYNCH, O'CONNOR and GREANEY, JJ.

GREANEY, Justice.

The question in this case is whether Belcher New England, Inc. (Belcher), may operate a liquid asphalt storage facility on waterfront property at 99 Marginal Street **[407 Mass. 704]** in Chelsea. Belcher maintains that its use of the property is protected under G.L. c. 40A, § 6 (1988 ed.), as a prior nonconforming use, from the application of a new Chelsea zoning ordinance which purports to prohibit the use. Belcher also argues that the new Chelsea zoning ordinance is invalid. Chelsea maintains the converse of both propositions. We transferred the appeal from the Appeals Court on our own motion. We conclude, as did the Land Court judge who heard and decided the case, that the use is protected by G.L. c. 40A, § 6. Consequently, we need not address the arguments pertaining to the validity of the new zoning ordinance.

Belcher brought the action in the Land Court [3] to determine whether the new Chelsea zoning ordinance applied to the property. The judge conducted a lengthy trial, which included testimony from several expert witnesses and personal inspections of the property from the shore and from a tugboat. We take the facts from the judge's extremely thorough memorandum of decision.

The property lies on the bank of the Chelsea Creek in Chelsea, in a highly industrialized neighborhood formerly designated as an industrial waterfront district. As described in *Mahoney v. Chelsea,* 20 Mass.App.Ct. 91, 478 N.E.2d 160 (1985), a decision

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referred to by the judge as accurately depicting the area she observed on the views, "[t]he district is generally old and unattractive and is composed largely of oil tank farms, warehouses, junkyards, and a shipyard. Abutting the district is an industrial district which contains a junkyard, a truck sales office, a fruit and produce warehouse and land owned by the Quincy and Sun Oil Companies. The banks of the creek in East Boston across from the site are lined with oil tank farms and a salvage yard." Id. at 92, 478 N.E.2d 160.

Title to the property was acquired in the 1920's by Texaco Oil Refining and Marketing, Inc. (Texaco), or its predecessor **[407 Mass. 705]** corporations. Some time around 1960, Texaco

constructed a petroleum storage facility on the property by installing seven large storage tanks, a dock, "breasting dolphins," and a truck-loading ramp. Ocean-going tankers would dock at the breasting dolphins, hook onto the permanent system of piping, and pump their cargoes directly into the storage tanks. Those cargoes included three grades of gasoline, ship kerosene, two grades of aviation fuel, and a petroleum product called "No. 2 fuel," which is similar to diesel fuel. The petroleum products then would be pumped from the storage tanks to a loading rack for direct delivery into trucks by means of a second system of pipes equipped with downspouts. The facility also includes two brick buildings, which housed Texaco's offices, warehouses, and physical plant, and a separate garage to house and service delivery trucks.

Texaco continued to operate the petroleum storage facility on the property until 1983, when, in response to changing economic conditions in the industry, it entered an agreement entitling it to joint use of a similar facility owned by Gulf Oil Corporation on Eastern Avenue in Chelsea. Texaco then proceeded to "mothball" the Marginal Street facility. This process included pumping out the storage tanks, hiring a contractor to clean them, purging the feed lines, filling them with a chemical preservative, and sealing them. The business office was closed, and its contents removed. However, Texaco continued to heat the building, and hired a security firm to check the premises.

After "mothballing" the property, Texaco tried to sell it. Texaco marketed the facility in the same way that it customarily disposed of other properties no longer needed in the operation of its business. It placed advertisements in trade journals and made contact with petroleum suppliers to ascertain whether they might be interested in a purchase. In addition to these marketing efforts, Texaco hired a firm to install a "cathodic protection system" to preserve the steel of the empty tanks for the next user. Texaco also maintained the flammable storage licenses issued pursuant to G.L. c. 148, § 13 (1988 ed.), for the entire period during which the property **[407 Mass. 706]** was on the market for sale. The judge found that Texaco "was anxious to sell the facility and to realize the highest possible price therefor which would appear to be the use which had been made of the locus for many years."

After one proposed sale fell through, Texaco succeeded in selling the facility to Derby Refining Company (Derby) on January 15, 1986. On that same date, Derby leased the facility to Belcher. The Chelsea zoning ordinance in effect when Derby took title to the premises from Texaco provided for an industrial waterfront district. Permitted uses in this district included "oil and gas tank farms including distributive facilities." The use of the property as a petroleum storage facility thus was a conforming use at the time of Derby's acquisition of the property.

Belcher immediately set about to determine the best use to make of the property. It ultimately decided to operate a liquid asphalt storage facility on the premises. [4] To prepare for this use, Belcher installed a hot oil heating system to heat the tanks and pipes so that the asphalt could be preserved in a liquid state for pumping. Belcher also insulated the exteriors of
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three of the storage tanks to prevent heat loss, [5] added scales to the truck-loading dock, and made various other modifications to the pipes, valves, and tanks. This work began in the summer of 1986.

On March 14, 1986, after Derby had purchased the property but before Belcher had begun

work to prepare it for asphalt storage, notice appeared in the Chelsea Record, a newspaper of general circulation in Chelsea, of a public hearing to be held on proposed amendments to the zoning ordinance. The new zoning ordinance passed pursuant to that notice radically changed the permitted uses in the new waterfront district which was no longer zoned as an industrial waterfront district. The new ordinance provides: "The **[407 Mass. 707]** purpose of the Waterfront District is to provide an area for uses which are water related and/or which benefit from the proximity to the airport or the harbor, and to encourage public access to the waterfront." Belcher's intended use of the property as an asphalt storage facility was rendered a nonconforming use by this new zoning ordinance.

In September of 1986, Belcher applied for a certificate of occupancy for the facility. After first determining that the certificate should issue, and notifying Belcher to that effect, the building inspector of Chelsea had second thoughts, and revoked the portion of the certificate relating to asphalt storage "pending the satisfactory documentation regarding the emission of objectionable vapors." Belcher continued to press for full approval, but decided to withdraw its application in February, 1987. In March, 1987, Belcher again applied for a certificate of occupancy. The application was denied, and this action ensued.

The issue at trial was whether Belcher's use of the property as a liquid asphalt storage facility was protected as a preexisting, nonconforming use under G.L. c. 40A, § 6 (1988 ed.), set forth in relevant part below. [6] The judge reasoned that the decision turned on the answer to two questions raised by the language of § 6: (1) Was there a use of the property "lawfully in existence" on March 14, 1986, the date of first notice concerning the proposed amendment to the zoning ordinances, and (2) Is Belcher's use of the property as **[407 Mass. 708]** a liquid asphalt storage facility a "change or substantial extension" of Texaco's prior use of the property? The judge answered the first question in the affirmative, and the second in the negative.

1. Preexisting lawful use. We agree with the judge that the case should be decided by application of the two provisions of G.L. c. 40A, § 6, quoted above, to the facts. The first consideration is whether the facility constituted a lawful use existing on the property when notice of the revision of the zoning ordinance was first published on March 14, 1986. Chelsea makes two arguments in support of its contention that there was no lawful, preexisting use on the property on March 14, 1986. First, Chelsea contends that Texaco had abandoned use of the property when it mothballed the facility in 1983. [7] Second, Chelsea argues that, even assuming an abandonment had not occurred, Belcher's use of the property as a liquid asphalt storage facility is not a lawful use because Belcher lacked requisite United States Coast Guard (Coast Guard) approval. We address each argument in turn.

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a. Abandonment. Under Massachusetts law, the right to continue a nonconforming use is not confined to the existing user, but runs with the land. See *Revere v. Rowe Contracting Co.,* 362 Mass. 884, 885, 289 N.E.2d 830 (1972). However, that right can be lost if a predecessor in title has abandoned the use. See *Wayland v. Lee,* 325 Mass. 637, 642 n. 2, 91 N.E.2d 835 (1950), and cases cited. To constitute an abandonment, the discontinuance of a nonconforming use must result from "the concurrence of two factors, (1) the intent to abandon and (2) voluntary conduct,

whether affirmative or negative, which carries the implication of abandonment." *Pioneer Insulation & Modernizing Corp. v. Lynn,* 331 Mass. 560, 565, 120 N.E.2d 913 (1954). See *Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth,* 385 Mass. 205, 220-221, 431 N.E.2d 213 (1982); *Dawson v. Board of Appeals of Bourne,* 18 Mass.App.Ct. 962, 963, 469 N.E.2d 509 (1984). [8]

[407 Mass. 709] Mere nonuse or sale of property does not, by itself, constitute an abandonment. See *Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth,* supra 385 Mass. at 221, 431 N.E.2d 213; *Pioneer Insulation & Modernizing Corp. v. Lynn,* supra 331 Mass. at 565, 120 N.E.2d 913; *Wayland v. Lee,* supra 325 Mass. at 642 n. 2, 91 N.E.2d 835; *Paul v. Selectmen of Scituate,* 301 Mass. 365, 370, 17 N.E.2d 193 (1938). Additional facts must be present before a finding of abandonment is warranted. Chelsea points primarily to three such facts: that Texaco (1) "mothballed" the facility; (2) applied for a property tax abatement for 1985; and (3) notified the Coast Guard that it no longer intended to operate a deep-water terminal on the premises.

The fact that Texaco "mothballed" the facility constitutes evidence of nonuse, but is not enough by itself to require a finding of abandonment. We agree with the judge that the reasonable inference to be drawn from the manner in which Texaco shut down the facility is precisely the opposite of abandonment--that Texaco intended to preserve the facility in good condition for a profitable resale. We also agree with the judge that Texaco's application for a 1985 property tax abatement merely reflected the fact that the facility was no longer producing income for Texaco. Consequently, that **[407 Mass. 710]** application could be found by the judge as not showing an intent to abandon.

Chelsea makes much of a letter sent by Texaco to the Coast Guard in which Texaco stated that it no longer intended to operate a deep-water terminal facility. Chelsea suggests, referring to *Dawson v. Board of Appeals of Bourne,* 18 Mass.App.Ct. 962, 469 N.E.2d 509 (1984), that the letter manifests an intent to abandon "as a matter of law." Reliance on the Dawson decision is misplaced. In Dawson, the plaintiffs had operated a nursing home prior to a change in the zoning law which rendered such use nonconforming. Approximately two years after closing the home and voluntarily surrendering their license to operate it, the plaintiffs sought a special permit to use the premises for a different nonconforming use

(apartments). In reversing the judgment for the plaintiffs, the Appeals Court held that "there was an abandonment of the use of the property as a nursing home when the license to maintain a nursing home was surrendered." Id. at 963, 469 N.E.2d 509.

The holding in Dawson rested on the fact that the plaintiffs voluntarily surrendered their operating license. By comparison, Texaco's action was mandatory; Federal law required it to "cancel, in writing, the letter for any facility at which oil transfer operations are no longer conducted." 33 C.F.R. § 154.110(c) (1989). Once Texaco determined that it would close the facility pending a sale, it had no choice but to notify the Coast Guard of the cancellation of its letter of intent. This involuntary action carries little persuasive weight when compared with Texaco's voluntary action of diligently renewing its flammable storage licenses in each year preceding the

sale to Derby. See *Tamerlane Realty Trust v. Board of Appeals of Provincetown,* 23 Mass.App.Ct. 450, 454-455, 503 N.E.2d 464 (1987) (maintaining an innkeeper's license indicates an intent to use the premises as an inn). There are also no clear indicia of abandonment. For example, the property was not left unprotected or unsecured, it was not changed to a conforming use, and no buildings were demolished. See 4 A.H. Rathkopf & D.A. Rathkopf, Law of Zoning and Planning, § 51.08, at 51-144-145 (1983 & 1989 Supp.). Keeping in mind **[407 Mass. 711]** that "[a]bandonment is primarily a question of fact," *Paul v. Selectmen of Scituate,* 301 Mass. 365, 370, 17 N.E.2d 193 (1938), we agree with the judge that Texaco's efforts, together with the affirmative steps taken to market the facility as a petroleum storage terminal, "are illustrative of Texaco's attempt to maintain the integrity of the premises as a marine distributive facility in order to sell it for such use. In short, even if Texaco had no further use of the locus for its own corporate purposes, it did not intend to surrender such use."

b. Lawfulness of Belcher's use. Chelsea next argues that the asphalt storage facility was not lawfully in existence at the time of the change to the zoning ordinance because Belcher at that time did not have a letter of intent to operate its facility on file with the Coast Guard. A valid nonconforming use is not rendered unlawful by failure to possess requisite government approval, provided that such approval can be easily obtained. See *Selectmen of Wrentham v. Monson,* 355 Mass. 715, 717-718, 247 N.E.2d 364 (1969). Here, Belcher's initial lack of Coast Guard approval was due in large part to the Federal regulation which compelled Texaco to cancel its existing letter of intent. 33 C.F.R. § 154.110(c). This cancellation was necessary before a new approval could be obtained. Furthermore, Belcher obtained Coast Guard approval shortly after completing its renovations to the facility. For these reasons, its use was not unlawful on the date of the zoning change.

2. Change or substantial extension. To be protected as a preexisting, nonconforming use, Belcher's use of the property must not constitute, in the language of G.L. c. 40A, § 6, a "change or substantial extension" of Texaco's previous use. See *Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence,* 324 Mass. 433, 435-436, 86 N.E.2d 906 (1949) ("A lawful nonconforming use of land existing at the time of the adoption of a zoning ordinance which may be continued is substantially the same use to which the land was devoted when the ordinance became effective and not some other substantially different use unless the ordinance otherwise provides"). As the judge correctly ruled, the issue whether a "change or substantial extension" had occurred would be determined by the application **[407 Mass. 712]** of the familiar three-part test enunciated in *Bridgewater v. Chuckran,* 351 Mass. 20, 217 N.E.2d 726 (1966). Under that test, we inquire: (1) "Whether the [current] use reflects the 'nature and purpose' of the [prior] use," (2) "Whether there is a difference in the quality or character, as well as the degree, of use," and (3) "Whether the current use is 'different in kind in its effect on the neighborhood.' " Id. at 23, 217 N.E.2d 726, and cases cited. See *Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth,* supra 385 Mass. at 212, 431 N.E.2d 213; *Revere v.*

Rowe Contracting Co., 362 Mass. 884, 885, 289 N.E.2d 830 (1972); *Jasper v. Michael A. Dolan, Inc.,* 355 Mass. 17, 23, 242 N.E.2d 540 (1968). As the one seeking protected status, Belcher had

the burden of establishing compliance with the Bridgewater v. Chuckran test. See Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth, supra; *Tamerlane Realty Trust v. Provincetown,* supra 23 Mass.App.Ct. at 454, 503 N.E.2d 464; *Martin v. Board of Appeals of Yarmouth,* 20 Mass.App.Ct. 972, 482 N.E.2d 336 (1985). [9]

a. Nature and purpose of the use. Chelsea argues that the use of the facility has changed from the storage of fuel products to storage of a building material. In support of this contention, Chelsea cites to our opinion in *Jasper v. Michael A. Dolan, Inc.,* 355 Mass. 17, 242 N.E.2d 540 (1968). The defendants in Jasper operated a food market and an adjoining beer and wine package store on a residentially zoned property. Because the store predated the zoning regulation, it constituted a protected preexisting, nonconforming use. After passage of the **[407 Mass. 713]** zoning ordinance, however, the defendants sought to transform the entire premises into a package store which would sell hard liquor in addition to beer and wine. Applying the Bridgewater v. Chuckran test, we held that "the sale of all-alcoholic beverages at the Belmont Street premises constitutes a new use and is in violation of the zoning ordinance." Jasper, supra at 24, 242 N.E.2d 540.

Our holding in Jasper rested principally on the consideration that "the operation of a separately conducted all-alcoholic package store is substantially different from the sale of beer and wine in connection with a food store." Id. at 24, 242 N.E.2d 540. This change would likely have resulted in a transformation in clientele, and a consequent change in impact on the surrounding neighborhood. Furthermore, as the Jasper case itself illustrates, the sale of beer and wine and the sale of hard liquor are treated separately for licensing purposes. This classification reflects a legislative determination that beer and wine are substantially different in character than more potent alcoholic beverages. These facts distinguish Jasper from the instant case.

We agree with the judge that Belcher's current use "is nearly identical in nature to that of Texaco: bulk deliveries by ocean-going vessels, bulk tank storage and wholesale distribution." In the absence of a demonstrated difference in neighborhood impact, a question we consider below, the fact that the product being delivered, stored, and distributed has changed from one petroleum product to another petroleum product does not mandate a conclusion that a change in the nature or purpose of the use has occurred. Compare Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth, supra (change from residential hotel catering to elderly customers to entertainment complex catering to young, nonresident customers); Everpure Ice Mfg. Co. v. Board of Appeals of Lawrence, supra (change from ice business to fuel oil business); Tamerlane Realty Trust v. Board of Appeals of Provincetown, supra (change from restaurant to hotel). The judge was warranted in finding that Belcher had satisfied the first prong of the Bridgewater v. Chuckran test.

[407 Mass. 714] b. Quality, character, and degree of use. Chelsea argues that the character of the storage activities occurring on the property has changed due to the fact

that liquid asphalt must be kept heated. Chelsea contends that the heating process produces offensive vapors, and has required substantial physical alteration to the facility, including the erection of two smokestacks. Because the issue of vapors will be dealt with below in our discussion of neighborhood impact, at this juncture we deal solely with the issue of physical

alteration.

We held in Cape Resort Hotels, Inc. v. Alcohol Licensing Bd. of Falmouth, supra, that "a valid nonconforming use does not lose that status merely because it is improved and made more efficient," provided, however, that the changes are "ordinarily and reasonably adapted to the original use and do not constitute a change in the original nature and purpose of the undertaking." Id. 385 Mass. at 215, 431 N.E.2d 213, quoting *Berliner v. Feldman,* 363 Mass. 767, 775, 298 N.E.2d 153 (1973). See *Morin v. Board of Appeals of Leominster,* supra 352 Mass. at 624, 227 N.E.2d 466; *Wayland v. Lee,* supra 325 Mass. at 643, 91 N.E.2d 835. Having concluded above that the original use of the property as a tank farm for petroleum products has not changed, we ask whether the modifications cited by Chelsea are "ordinarily and reasonably adapted" to that use. We conclude that they are. It is undisputed that liquid asphalt must be heated in order to prevent solidification, and that the modifications Belcher made to the facility were designed solely to accomplish that end. There is nothing to suggest that those changes were either extraordinary or unreasonable or that they changed the fundamental nature of the original enterprise. The judge was warranted in finding that Belcher had satisfied the second prong of the Bridgewater v. Chuckran test.

c. Neighborhood impact. The trial judge recognized that the third prong of the Bridgewater v. Chuckran test--pertaining to neighborhood impact--presented a close issue. In support of its contention that Belcher's liquid asphalt facility has a more deleterious impact on the surrounding neighborhood than Texaco's petroleum fuels facility had, Chelsea focuses **[407 Mass. 715]** on the offensive smells and potential health risks associated with the Belcher facility.

On the issue of neighborhood impact, the judge heard the following testimony. Two residents, who live next to the facility, testified that the asphalt exudes terrible odors. However, under cross-examination both residents admitted that various other businesses in their largely industrial neighborhood had also emitted offensive odors for years prior to Belcher's acquisition of the property.

Chelsea also presented testimony from two expert witnesses. A professional consulting engineer was retained to measure the emissions from Belcher's tanks at various sites around the neighborhood. The highest readings were taken at one owner's residence, where the expert recorded, over a twenty-four hour period, a total suspended particulate (TSP) concentration of 140 micrograms per cubic meter, and volatile organic compound (VOC) concentration of 320 micrograms per cubic meter [10]. The expert conceded that the twenty-four hour TSP exposure limit set by the Department of Environmental Quality Engineering (DEQE) (now the Department of Environmental Protection) is 250 micrograms per cubic meter, and that he had not compared the Belcher emissions to those produced by Texaco when it operated the facility. Based on the emission levels recorded by this expert, a risk assessment expert estimated an increased risk of approximately three cancer cases per 1,000 people over a lifetime of continuous exposure. The latter expert offered no figure comparing this risk to that produced by Texaco's tenure.

Belcher offered three expert witnesses to rebut the defendants' experts, and to provide their own assessments of the health risks associated with asphalt emissions. The first, the chief chemist and environmental toxicologist of an environmental consulting firm, estimated the number

increased cancers to be approximately six to seven per 1,000,000 people exposed continuously for seventy years to the levels of **[407 Mass. 716]** asphalt emissions found by the defendants' consulting engineer. The second expert, a doctor of toxicology and comparative pharmacology, supplemented this testimony by concluding, based on a review of existing professional literature, that no scientific basis exists to conclude that asphalt emissions, in the levels present here, represent a public health hazard. Finally, a third expert, a senior technical specialist in an environmental consulting firm, testified as to the contents of a DEQE report detailing the results of emissions tests conducted at the facility while it was being operated by Texaco, and compared those results to the Belcher emissions recorded by one of Chelsea's experts. This expert concluded that the VOCs emitted by Texaco were approximately seven times greater than those emitted by Belcher [11].

The judge felt that the evidence on the comparative health risk of petroleum fuels and petroleum asphalt was ambiguous and inconclusive. Nonetheless, she concluded that Belcher **[407 Mass. 717]** had satisfied the burden under the third prong of the Bridgewater v. Chuckran test by proving that: (1) its asphalt business operates only in warm weather, while the petroleum fuel business formerly run by Texaco operated year-round; and (2) Belcher uses only three of the storage tanks, while Texaco used all seven [12]. The judge also found that the current complaints regarding the odors emitted from the asphalt tanks might be due to the fact that the Belcher facility "is the current nemesis of the neighborhood while the Texaco problems have faded." We are satisfied that the judge's determination that Belcher's use is not "different in kind in its effect on the neighborhood" than was Texaco's prior use has support in the evidence. Over-all, the case is one which is very dependent on its facts, the unusual nature of the Texaco and Belcher operations, the existing uses in a heavily industrialized waterfront zone, and the visual observations made by the judge. These considerations combine to make the judge's analysis of the situation a plausible one which necessarily ought to be sustained on appeal.

Judgment affirmed.

Notes:

[1] Belcher New England, Inc. The plaintiffs are affiliated corporations which we shall refer to collectively in this opinion as Belcher because Belcher is operating the liquid asphalt facility in issue.

[2] The inspector of buildings of Chelsea. We shall refer to the defendants collectively as Chelsea.

[3] The action was brought pursuant to G.L. c. 185, § 1(j 1/2), and G.L. c. 240, § 14A (1988 ed.). See Banquer Realty Co. v. Acting Bldg. Comm'r of Boston, 389 Mass. 565, 569-571, 451 N.E.2d 422 (1983).

[4] The judge found that, like the various gasolines and grades of fuel oil that Texaco had previously stored at the facility, liquid asphalt is a petroleum derivative.

[5] Of the seven storage tanks on the premises, Belcher utilizes only three in its asphalt storage operation.

[6] "Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, or to a building or special permit issued before the first publication of notice of the public hearing on such ordinance or by-law required by section five, but shall apply to any change or substantial extension of such use, to a building or special permit issued after the first notice of said public hearing, to any reconstruction, extension or structural change of such structure and to any alteration of a structure begun after the first notice of said public hearing to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent...."
This statute maintains the essential principles set forth in the prior G.L. c. 40A, § 5, for nonconforming uses and makes relevant the decision construing similar provisions of § 5.
[7] There appears to be no dispute that Texaco's use of the property prior to 1983 was a valid use under the zoning scheme in effect at that time.
[8] We reject Chelsea's suggestion that the judge erred by not finding that the lack of active use in 1986 made the use nonexistent. It is not disputed that Texaco had been operating a petroleum storage facility on the property for several years prior to the zone change. The fact that active use of the storage facility had been temporarily suspended did not require a finding that the use no longer existed. See Morin v. Board of Appeals of Leominster, 352 Mass. 620, 623, 227 N.E.2d 466 (1967), where the court dealt with an analogous situation in which the use of property had been suspended, and concluded that the use would be in existence as a valid nonconforming use "provided [the owner] had not abandoned the use ... prior to the adoption of [new] ordinance." Thus, the relevant issue in this case is whether that previous use had ceased to exist for practical purposes prior to March 14, 1986. See 1 R.M. Anderson, American Law of Zoning § 6.65 (3d ed. 1986). Chelsea's contrary argument essentially attempts to convert the noun "use," as it is employed in G.L. c. 40A, § 6, to the verb "use" which conveys ongoing activity. The distinction between the terms is pointed out in *Paul v. Selectmen of Scituate,* 301 Mass. 365, 370, 17 N.E.2d 193 (1938). Accordingly, the judge was correct in applying the subjective abandonment test to the facts. By contrast, the cases cited by Chelsea, see Everett v. Capitol Motor Transp. Co., 330 Mass. 417, 114 N.E.2d 547 (1953); Billerica v. Quinn, 320 Mass. 687, 71 N.E.2d 235 (1947), deal with the issue whether any prior use had even begun to exist, and are, for that reason alone, inapposite.
[9] Chelsea contends that the judge incorrectly placed the burden of proof on it. Pointing to the judge's finding that the evidence on the comparative health risks of petroleum fuels versus liquid asphalt was inconclusive, Chelsea argues that the judge's conclusion that no change in the use had occurred could have been based only on a misallocation of the burden of proof. However, comparative health risks were but one of several factors the judge considered on the issue of neighborhood impact, and her indication that the evidence was ambiguous was simply a reference to the inconclusive nature of the proof of that particular factor. As we shall discuss in more detail later in this opinion, other evidence before the judge provided support for her conclusion that, compared to Texaco's use, Belcher's use is not "different in kind in its effect on the neighborhood." A reading of the judge's decision and the transcript of the trial satisfies us that the judge was aware that Belcher had the burden of proof.

[10] In very general terms, TSPs are visible particles while VOCs are invisible, gaseous emissions. Both are emitted from heated asphalt.

[11] Chelsea argues that the judge committed several errors in permitting the testimony of the experts presented by Belcher to testify. None of the arguments has merit, and they may be disposed of by brief discussion.

a. The judge did not abuse the considerable discretion vested in her, see Kearns v. Ellis, 18 Mass.App.Ct. 923, 924, 465 N.E.2d 294 (1984), in dealing with the delay in the disclosure of the experts offered by Belcher in rebuttal. See Mass.R.Civ.P. 26(e)(1)(B), 365 Mass. 772 (1974). Counsel for Chelsea knew the identity of these expert witnesses for almost two months, had ample time to prepare, and chose to do nothing. The testimony of the experts was vital to a fair analysis of the issues in the case. In view of that fact, and the length of time available to Chelsea's counsel to prepare, the judge acted reasonably in allowing the testimony. See Shaw v. Rodman Ford Truck Center, Inc., 19 Mass.App.Ct. 709, 713, 477 N.E.2d 413 (1985); Giannaros v. M.S. Walker, Inc., 16 Mass.App.Ct. 902, 903, 448 N.E.2d 1297 (1983).

b. The judge properly concluded that the third expert's testimony was properly based on facts about emission levels contained in a DEQE report which had arrived at the facts through a scientific testing process sanctioned by the United States Environmental Protection Agency. This is not a case where the expert relied on opinions and conclusions (as distinguished from facts) in someone else's report.

c. The judge did not err in concluding that the second expert's testimony concerning the chemical composition of asphalt had a sufficient basis in the expert's personal knowledge, including his knowledge of the molecular structure of asphalt. See LaClair v. Silberline Mfg. Co., 379 Mass. 21, 32, 393 N.E.2d 867 (1979).

[12] Chelsea's contention that these comparisons are biased--because the figures for Texaco were taken during the period of that company's peak operations--is neither supported by the evidence nor legally relevant.

GODDARD CONSULTING LLC
Strategic Wetland Permitting

June 5, 2018

Zoning Board of Appeals
Town of Grafton
30 Providence Road
Grafton, MA 01519

Dear Members of the Zoning Board of Appeals:

Please allow this letter to serve notice that I, Scott Goddard, have hired Mayer, Antonellis, Jachowicz & Haranas, LLP to represent 44 Brigham Hill, LLC with regard to permitting the property at 44 Brigham Hill Road, Grafton, Massachusetts. By this letter, I authorize members of that law firm, including Joseph M. Antonellis, Esquire and A. Eli Leino, Esquire to present on behalf of 44 Brigham Hill, LLC at Zoning Board hearings and at other times where the corporation requires public representation on this matter.

Sincerely,

Scott Goddard,
Principal & PWS