

**MORRIS PLANNING & ZONING COMMISSION**  
**COMMUNITY HALL • 3 EAST STREET • MORRIS, CONNECTICUT 06763**

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**Regular Meeting Morris Town Hall and Live on Zoom**

**August 2nd, 2023 at 7:00 pm**

**Call in # 1-929-205-6099**

**<https://us02web.zoom.us/j/83261225058?pwd=OTlJd3NqVDR0TWVBUjlkCUJ1U3ZtQT09>**

**Meeting ID: 832 6122 5058**

**Passcode: 723581**

<b>David Wiig Chairman</b>		
Barbara Bongolotti	Dylan Hovey	Alternates:
Helen White	William Ayles Jr. (Vice-Chairman)	Chris Ciaffaglione
Veronica Florio	David Geremia Jr.	Geoff Paletsky
Douglas Barnes (Secretary)	Kim Dore	Erika Leone
	Staff: ZEO Tony Adili	
	Planner Janell Mullen	

**Agenda**

- 1. Call to Order**
- 2. Agenda Review**
- 3. New Business**
- 4. Old Business**
- 5. Complaints**
  - a. 95 Thomaston Rd**
  - b. 120 Burgess Rd**
  - c. 7 Benton Rd**
  - d. 150 Bantam Lake Rd**
  - e. 15 North Street**
- 6. Other Business**
- 7. Communications and Bills**
  - a. ZEO Report**
- 8. Adjourn**

## Planning & Zoning

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**From:** David Wiig <wiig@optonline.net> on behalf of David Wiig  
**Sent:** Tuesday, July 25, 2023 12:19 AM  
**To:** Steve Byrne  
**Cc:** Planning & Zoning  
**Subject:** re[2]: Burgess Road - Green & Sons

Steve and Tony

Thank you for the response. As for the rest, that for the moment is in our hands to follow-up on. Tony should see the appropriate people on Wednesday when they are all in the office.

Additionally, Did Attorney Malley provide the tax record on the dump truck that predated Zoning? He said he would provide it. That is crucial to establish some documentation of the excavation business being there before Zoning. Additionally, please have the Tax Collector look up both Green and Mosimann.

Dave

----- Original Message -----

**From:** Steven Byrne <attysbyrne@gmail.com>  
**To:** David Wiig <wiig@optonline.net>  
**Date:** Mon, 24 Jul 2023 14:48:24 -0400  
**Subject:** **Re: Burgess Road - Green & Sons**

Dave

In regard to trucks, the town tax collector should have a record of property taxes paid by Green & Sons on motor vehicles and also for business equipment.Â In regard to employees, all I have is the attached PPP loan info but it's not a government source.Â According to this document, there are 5 employees.

The historical record, from what I have seen, is unclear as to what was owned on or before 1979.Â I am not sure the town will have records going back that far [tax collector].

In regard to the parking lot and vegetative buffer, yes, Green & Sons could take steps to reduce this expansion and bring the nonconforming use back to what it was in regard to these two aspects.

In regard to Character, we can still use it when evaluating nonconforming use expansion/intensification.Â The language from 2021 [stated below] applies only to the denial of a land use applications filed with the PZC.Â There is no application here, just a question whether there is a zoning violation.

CGS Sec. 8-2(d)(10) Zoning regulations shall not be applied to deny any land use application, including for any site plan approval, special permit, special exception or other zoning approval, on the basis of (A) a district's character, unless such character is expressly articulated in such regulations by clear and explicit physical standards for site work and structures, or (B) the immutable characteristics, source of

income or income level of any applicant or end user, other than age or  
Conn. Gen. Stat. 8-2 Regulations (General Statutes of Connecticut  
(2023 Edition))

Attorney Steven E. Byrne  
Byrne & Byrne LLC  
790 Farmington Ave., Suite 2B  
Farmington CT 06032  
(860) 677-7355  
(860) 677-5262 (fax)

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On Fri, Jul 21, 2023 at 11:52â€PM David Wiig <[wiig@optonline.net](mailto:wiig@optonline.net)> wrote:

Steve  
Â  
Thank you for the opinion. It makes sense. Regardless, there are several questions.

Â  
Here are the questions:  
Â

1. Do you or Tony have documentation of the number of employees the Greens have and the number of trucks kept in Morris from a impartial source. For the trucks, if they are registered in Morris, can the assessor provide a list.
2. What historical record is there on Mosimann's vehicles in the assessor's office, beyond the truck that Attorney Mark Malley documented?
3. If the Greens want to rectify the expansion of the parking area and restore the previous vegetative buffer, will this rectify these potential over expansion/intensification of the use? Not that this necessarily is or is not enough, these two aspects of the current use of the land can be altered to reduce the non-conformity.
4. Is character of the use a proper way of looking at it give the recent legislative changes that were passed in 2021?

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If there is anything else, an e-mail will be sent. We may have follow-up questions after the meeting too. We will how it goes.

Â  
Dave  
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----- Original Message -----

Â Â  
**From:** Steven Byrne <[attysbyrne@gmail.com](mailto:attysbyrne@gmail.com)>  
**To:** David Wiig <[wiig@optonline.net](mailto:wiig@optonline.net)>  
**Date:** Fri, 21 Jul 2023 14:24:13 -0400  
**Subject:** Burgess Road - Green & Sons  
Â Â  
Dave

Attached is my letter responding to your questions.

Let me know if you find any typos or if I failed to address anything.Ã,Â If so, I can submit a revised letter in time for the commission's meeting.

Attorney Steven E. Byrne  
Byrne & Byrne LLC  
790 Farmington Ave., Suite 2B  
Farmington CTÃ,Â 06032  
(860) 677-7355  
(860) 677-5262 (fax)

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LAW OFFICES  
**BYRNE & BYRNE, LLC**  
2-B FARMINGTON COMMONS  
790 FARMINGTON AVENUE  
FARMINGTON, CONNECTICUT 06032

STEVEN E. BYRNE  
THOMAS P. BYRNE, IN MEMORIAM

TELEPHONE  
(860) 677-7355  
attysbyrne@gmail.com

July 21, 2023

David Wiig, Chairman  
Morris Planning & Zoning Commission  
3 East Street  
Morris CT 06763

Re: 120 Burgess Road – Nonconforming Status of Excavation Business

Dear David:

On behalf of the Morris Planning & Zoning Commission, you sent to me information and related questions concerning the current and past use of a parcel of property. The property consists of 10.21 acres fronting on Burgess Road. The property is located within the R-60 residential zone and was recently conveyed to a business entity known as Green Acres of Morris LLC and is used by Green & Sons LLC in connection with an excavation business. Evidence received by the Commission, in the form of town documents, photographs, letters and testimony showed that prior to the adoption of zoning in Morris, gravel was mined at the property. Less clear was whether an excavation business took place from the property since before the adoption of zoning. I was also provided with a copy of a letter from the Morris zoning enforcement officer to Quentin Green which states in part that “120 Burgess Rd has a preexisting nonconforming use previously as an excavating company.”

Complaints have been received by the Commission that the prior nonconforming use of the property has increased since the conveyance of the property to the current owner and that this increased use is in violation of the zoning regulations. The complaints have mostly identified the early starting of trucks, storage and use of equipment, noise and the removal of a landscape buffer as well as traffic safety. The Commission seeks legal guidance on what would constitute a permissible intensification of a nonconforming use as opposed to an impermissible expansion.

What is the Nonconforming Use(s)

The first issue to be addressed is what is the nonconforming use of the property. I have reviewed various meeting minutes of the Commission dating back to 1978. The minutes continuously address the use of this property, which was regularly identified as Mosimann nonconforming gravel mine with the additional identifier of Burgess Road. The nonconforming use was regulated pursuant to Sec. 63 of the 1979 zoning regulations which contained the following provision:

“Sec. 63.7 Existing Operations – Excavations in active operation prior to the effective date of these regulations may be renewed in accordance with the provisions of Sec. 63.6.

The Commission’s minutes provide evidence that as of the date zoning was adopted in Morris, this property was used for excavation purposes, namely the mining of gravel. Other evidence suggests that Mr. Mosimann also did excavation work in addition to the mining of gravel and that this work occurred off-site. Thus, it is clear that the gravel mining business was a nonconforming use. What is less evident is the status of the excavation business.

### Expansion or Intensification

The second issue is whether the current use of the property as the location for an excavation business is a lawful intensification or an unlawful expansion of the nonconforming gravel mining and excavation use. The business’ website [www.greenandsonscet.com] states that this business includes residential site development, home improvement and large estate property management. There is no mention of mining gravel. The evidence suggests the nonconforming use was limited to an owner and the use of a dump truck with the owner also engaged in other activities such as farming. The current use of the property involves two owners, employees and several dump trucks and other equipment and is the full-time use of the property.

The courts have attempted to provide guidance as to what constitutes an intensification [which is allowed] versus what is an expansion [which is not allowed]. “It is the intent of building zone regulations generally that nonconforming uses should not be allowed to increase, and an extension of that nonconforming use is inconsistent with the policy and comprehensive plan of the regulations.”<sup>1</sup>

“While a mere increase in the amount of business done pursuant to a nonconforming use is not an illegal expansion of the original use, a change in the character of a use . . . does constitute an unlawful extension.”<sup>2</sup>

“In this regard, we note that the holding of the Appellate Court in *Hall v. Brazzale*, *supra*, 31 Conn.App. 349 . . . That '[m]ore of the same . . . cannot be the basis for a finding of an unlawful expansion of a prior existing nonconforming use' . . . can only be read to apply where it is more of the same use, **not more of the same in the physical sense.**”<sup>3</sup> Thus, the occupation of additional space by a nonconforming use is an expansion. However, when local zoning regulations, allow for such a physical expansion, then it is permitted.<sup>4</sup>

Thus, the focus is on whether any changes to the nonconforming use indicate ‘more of the same’ or do they indicate a ‘change in the character of the use’. “In deciding whether the current activity is within the scope of a nonconforming use consideration should be given to three factors:

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<sup>1</sup> *Raffaele v. Planning & Zoning Board of Appeals*, 157 Conn. 454, (1969).

<sup>2</sup> *Bauer v. Waste Management of Connecticut, Inc.*, 234 Conn. 221 (1995).

<sup>3</sup> *Munroe v. Zoning Board of Appeals*, 75 Conn. App. 796 (2003).

<sup>4</sup> Section 10 of the zoning regulations does allow for the expansion of a nonconforming use within a building or structure.

1. The extent to which the current use reflects the nature and purpose of the original use;
2. Any differences in the character, nature and kind of use involved; and
3. Any substantial differences in effect upon the neighborhood resulting from differences in the activities conducted on the property.”<sup>5</sup>

With these factors in mind, your questions will be addressed.

### More and Bigger Trucks

In the case entitled Zachs v. Zoning Board of Appeals, the mere increase in the amount of antennas and associated equipment used by a commercial tower operator on his property did not amount to an expansion of the nonconforming use, the court finding it to be ‘more of the same’ and thus a permitted intensification of the nonconforming use. The court based its decision on whether the additional antennas and equipment reflected the original nature and purpose of the nonconforming use and whether the changes resulted in a change in character of the use. Thus, a dramatic increase in the amount of equipment used could result in an unlawful expansion. Such was the case where a nonconforming gravel business run by two brothers using two trucks and a front-end loader was transformed by a subsequent business owner to an operation using two front end loaders, a tracked excavator, a bulldozer, a screening plant as well as other equipment and an office trailer and occupied a larger portion of the property.<sup>6</sup> The Commission should focus on the purpose and nature of Mr. Mosimane’s business as it existed prior to the adoption of zoning and then determine how the current use differs in character from the 1979 use as well as the differences in its effects on the neighborhood.

### Larger Parking Area

The enlargement of the parking area appears to violate Section 10 of the zoning regulations. Under “Non-Conforming Use of Land”, this section provides in part that “no non-conforming use shall be enlarged or increased, nor extended to occupy a greater area of land than that occupied by such use at the time of the adoption of the zoning regulations.” The enlargement of a parking lot for a nonconforming social club was found by our State Supreme Court to be an impermissible expansion of a nonconforming use.<sup>7</sup>

### Change to Hours of Operation

A dramatic change in the hours of operation can be an unlawful extension of a nonconforming use. Cases have focused more on days of operation rather than hours of operation. However, a dramatic change to earlier and/or later business operations at this property could be viewed as an unlawful extension, especially if such change has an adverse effect on the neighborhood.<sup>8</sup>

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<sup>5</sup> Zach v. Zoning Board of Appeals, 218 Conn. 324 (1991).

<sup>6</sup> Oakham Sand & Gravel v. town of Oakham, 54 Mass. App. Ct 80 (2002).

<sup>7</sup> “An extension of the space allotted to a nonconforming use is a proscribed extension of that nonconforming use and is inconsistent with the policy and comprehensive plan of the regulations”. Raffaele v. Planning and Zoning Bd. of Appeals, 157 Conn. 454 (1969).

<sup>8</sup> Oakham Sand & Gravel v. town of Oakham, 54 Mass. App. Ct 80 (2002).

### Use of Property for Larger Jobs

While larger jobs may indicate a lawful intensification of the nonconforming use, it could also lead to an unlawful expansion if these larger jobs cause a dramatic increase in the nonconforming business activity at this property. For example, the change of the use of a nonconforming airport from a limited number of about 17 flights per year to an unlimited number of flights was seen as an unlawful expansion as the airport would go from a casual airport use of the property to a fully dedicated use.<sup>9</sup> Neighbors have complained of the increased activity at the property. Evidence that the current owner is performing larger jobs than the original nonconforming use provides support for their testimony that the nonconforming business has expanded to the point that it no longer reflects the nature and character of the original use and has a different effect on the neighborhood.

### Excavation Business as accessory to Gravel Mining

“To be an accessory use, it must be subordinate and customary to the dominant use of the property. By subordinate, it is meant that the accessory use is minor in significance as compared to the dominant use of the property. Customary is understood to mean that “it is usual to maintain the use in question in connection with the primary use of the land.”<sup>10</sup> Thus, the Commission would need to determine whether the excavation business is the subordinate use of the property as compared to the gravel mining business and whether an excavation business is customarily part of a gravel mining business. While the second part may be true, the first part of the test may be difficult to satisfy here as it appears that what was once the dominant use has now disappeared.

### Increased Visibility of the Nonconforming Use

The removal of trees from the property has resulted in the nonconforming use being more visible from the road. Testimony from neighbors implies that the state of the prior existing vegetative buffer practically obscured the business activity from view. Substantial differences in effect upon the neighborhood resulting from this change in visibility would be one of the factors for the Commission to consider in determining whether there has been an unlawful expansion.

### Reliable Evidence

It has been held many times that it is within the Commission’s authority to determine the reliability of evidence presented to it. The Commission can believe or disbelieve any witness testimony and determine what weight to assign to any evidence. In addition, the unsworn testimony of an applicant’s attorney or other interested person’s attorney is competent evidence for the Commission to consider. Lastly, the personal knowledge of Commission members is also considered reliable evidence. What is required is that the Commission only consider the evidence presented to it at a public meeting or hearing and that this evidence can be subjected to rebuttal evidence.<sup>11</sup>

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<sup>9</sup> Helicopter Associates Inc. v. City of Stamford, 201 Conn. 700 (1986).

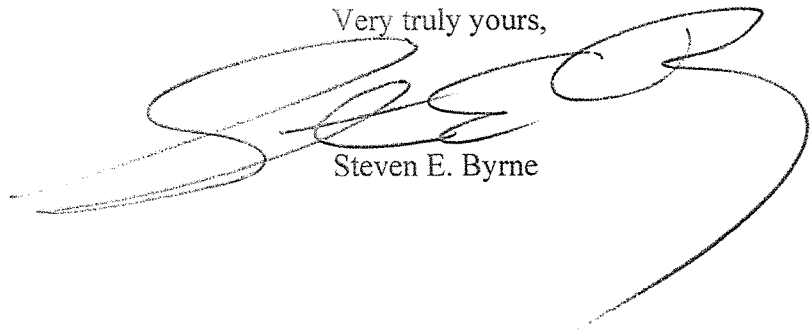
<sup>10</sup> Lawrence v. Zoning Board of Appeals, 158 Conn. 509 (1969).

<sup>11</sup> See generally R. Fuller, Connecticut Land Use Law and Practice 4<sup>th</sup> Ed, Sec. 21.5.



Thank you for seeking my opinion on this matter. If further opinion or comment is needed, I would appreciate the chance of providing additional response.

Very truly yours,

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Steven E. Byrne