

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

November 1st, 2023 at 7:00 pm

Call in # 1-929-205-6099

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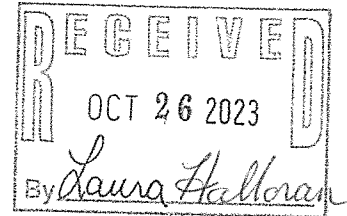
Meeting ID: 832 6122 5058

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. 120 Burgess Rd
  - b. 95 Thomaston Rd
  - c. 7 Benton Rd
  - d. 150 Bantam Lake Rd
6. Other Business
  - September 20<sup>th</sup> Meeting Minutes
  - October 4<sup>th</sup> Meeting Minutes
  - October 18<sup>th</sup> Meeting Minutes
7. Communications and Bills
  - a. ZEO Report
8. Adjourn



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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.greenandsonsct.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:

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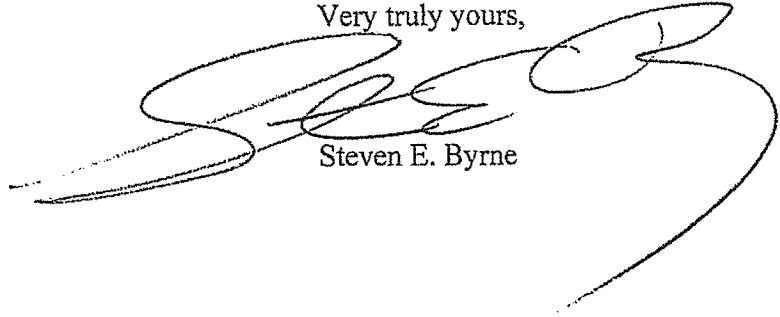
<sup>9</sup> Helicopter Associates Inc. v. City of Stamford, 201 Conn. 700 (1986).

<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 handwritten signature in black ink, appearing to be 'S. Byrne', with a long, sweeping horizontal line extending to the right.

Steven E. Byrne

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ADDITIONAL QUESTIONS FROM  
MORRIS PLANNING & ZONING COMMISSION  
Regarding Nonconforming Use at 120 Burgess Road  
August 8, 2023

1. Implications of the sale of equipment, dissolution of the business and cessation of the business.

- a. Does the sale of equipment, dissolution of the business and cessation of business amount to an abandonment of the nonconforming use?

*Connecticut General Statutes Sec. 8-2 provides that a nonconforming use can be considered abandoned or terminated only when such abandonment or termination was voluntary and there is no intent to reestablish the use. Thus, the fact that a business has been ceased and equipment sold is a factor for the Commission to consider. However, the Commission would still need to make a finding that there was no intent to reestablish the use.*

- b. Is the death of the property/business owner a significant factor in finding abandonment?

*The death of a business owner, by itself, is not proof of abandonment or termination of a nonconforming use as the nonconforming use attaches to the land and not the landowner.*

- c. Do we need to make a finding of an intent to abandon the nonconforming use?

*The Commission must make a finding on the issue of whether there is an intent to abandon the nonconforming use. This intent cannot be inferred solely based upon the passage of time where the nonconforming use had ceased.*

2. Is the signing of a tax document, under oath, in connection with the subsequent conveyance of the property as a residence with no mention of the nonconforming use evidence to support the finding that the nonconforming use was abandoned?

*Such a tax document could be considered as one piece of evidence relating to an intent to abandon. However, its relevance would be rely partly on why the tax document was filled out the way it was. For example, was this declaration based upon the owner's understanding that only an active use needed to be mentioned on the tax form and that she need not mention any intention to reestablish the nonconforming use.*

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3. Implications of the subdivision of a large property over time and the movement and apparent consolidation of the [nonconforming] use.

- a. If a larger property was used in part for a nonconforming use and the nonconforming use was moved to a different part of the property after the enactment of zoning, is this a permissible expansion or extension of the nonconforming use?

*It has been held that the migration or movement of a nonconforming use from one portion of a lot to another porting is an impermissible expansion or extension of the nonconformity. There is an exception for gravel mining operations. The reason for the mining exception is that the nature of the use is to consume the land by removing all useful material*

- b. How would this be affected by the subdivision history of what was a larger property prior to the enactment of zoning?

*If the removed/split off portion of the larger property does not contain the nonconforming use, then it could not be used in the future for that use. This would apply to gravel mining operations as well.*

4. What inference may the commission make if there is no evidence about activities prior to the enactment of zoning? Is the Commission required to make inferences against the party claiming the preexisting nonconforming use when there is simply no evidence one way or another?

*The burden of proof is on the property owner to prove there is a nonconforming use. If he/she presents no evidence, then the burden of proof has not been carried and the Commission must find there is no nonconforming use.*

Section 10 of the Zoning Regulations contains valid limitations on the migration and movement of nonconforming uses around a parcel of land. The question is what portion of Sec. 10 can be used for enforcement.

*After reviewing Sec. 10, I find most of it complies with state law and thus is enforceable except for those portions discussed below:*

Restoration of Damaged Structure

*The one-year time requirement for starting work, as well as provisions for extending this one-year period, are likely not enforceable as they are contrary to the language found in Connecticut General Statute Sec. 8-2 which provides that a nonconforming use cannot be terminated solely due to the passage of time without regard to the intent of the property owner.*



## SECTION 10 - NONCONFORMING SITUATIONS

### Non-Conforming Situations – Definitions:

A non-conforming situation is any use, building, structure, or lot or any use of any building, structure or lot, lawfully existing at the time of the adoption of these Regulations or any relevant amendment thereto which does not conform to the requirements of these Regulations or such amendment. Non-conforming situations are as follows:

1. Non-conforming lots:

A non-conforming lot is a lot of record that:

- a. existed prior to the original effective date of these Regulations (January 15, 1979) or prior to an amendment to these regulations, and
- b. does not conform to the lot area or lot frontage requirements of these Regulations as established on the original effective date or an amendment to these Regulations.

2. Non-conforming building or structure: A non-conforming building or structure is one which does not meet one or more of the requirements for building or structure location or dimensions on a lot.

3. Non-conforming use: A non-conforming use is a use of a lot, building or structure which has legally existed since before the adoption of these Regulations, or any relevant amendment thereto, that does not meet the use requirements for the zone district in which the building, structure, or lot exists. A non-conforming use may be a non-conforming use of land only, of a building or structure only, or a building, structure, and land in combination.

Non-conforming Situations – Statement of Intent: As required by Connecticut General Statutes, Section 8-2, these Regulations do not prohibit the continuance of any non-conforming use, lot, building, or structure legally existing at the time of the adoption of these Regulations, or any relevant amendment thereto. It is the public policy of the Town of Morris and the intent of these Regulations, that the degree of non-conformity in any non-conforming situation be reduced, and any non-conforming situations be eliminated, as quickly as possible.

### General Rule Concerning Change from Non-Conforming to Conforming:

Once a non-conforming situation, or any portion thereof, has been changed to conform to these Regulations, that situation or portion thereof shall not be permitted to revert or again become non-conforming.

Non-Conforming Use of Land: Where no structure is involved, the non-conforming use of land may be continued, provided, however:

1. 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, or any relevant amendment thereto, unless specifically allowed by other provisions of these Regulations.
2. That no non-conforming use be moved in whole or in part to any other portion of the lot or parcel of land occupied by such non-conforming use at the time of the adoption of these Regulations, or any relevant amendment thereto.

### Non-Conforming Use of Structures:

1. Unless specifically provided for under another section of these Regulations, a structure, the use of which does not conform to the use Regulations for the district in which it is situated, shall not be enlarged or extended, nor shall it be structurally altered or reconstructed unless such alterations are required by law; provided, however, that such maintenance and repair work as is required to keep a non-conforming structure in sound condition shall be permitted.
2. A non-conforming use may be extended throughout any parts of the structure which were manifestly arranged or designed for such use at the time of the adoption of these Regulations provided such extension was made within one year after the date of adoption of these Regulations or any relevant amendment thereto.

### Change in Non-Conforming Use:

1. In determining whether an activity represents a change in non-conforming use, the Commission shall consider three factors: (1) the extent to which the new use reflects the nature and purpose of the original non-conforming use; (2) any difference in the character, nature, and kind of use involved; and (3) any substantial difference in effect upon the neighborhood resulting from the differences in the activities conducted on the property.

Where a change of non-conforming use is proposed, the Commission may require the applicant to submit a Site Plan prepared in accordance with the requirements of Section 51.

The Commission may approve such change of use where it finds that the proposed non-conforming use will not have an adverse effect on the district, the neighborhood and surrounding properties greater than that of current non-conforming use.

In reaching the determination of adverse effect, the Commission shall consider, but not be limited to the following factors – traffic (both type and volume), number of uses permitted, noise, lighting, parking, external alterations to the building and lot, and factors relating to environmental pollution.

The Commission may attach appropriate conditions and safeguards to the approval of such change of non-conforming use where such conditions are determined necessary to ensure that the proposed non-conforming use will not have a greater adverse effect upon the district, the neighborhood and surrounding properties than that of the current non-conforming use. Such conversion may be allowed only pursuant to a Certificate of Use issued by the Commission or its Zoning Enforcement Officer.

2. If any non-conforming use of a structure is changed to a conforming use, or if the structure in which such use is conducted or maintained is moved for any distance, then any future use of such structure shall be in conformity with the standards specified by the Zoning Regulations for the district in which such structure is located.
3. If any structure in which any non-conforming uses are conducted or maintained is removed, the subsequent use of the land on which such structure was located, and the subsequent use of any structure thereon, shall be in conformity with the standards specified by the Zoning Regulations for the district in which such land or structure is located.

Non-Conforming Building or Structure: A building or structure or any portion thereof that is non-conforming in terms of the location or dimension requirements of these Regulations shall not be

enlarged or extended in any way that increases the existing non-conformity. This includes non-conforming vertical expansions, such as a second story addition over that portion of a one story building located within a required setback from a property line.

Location and dimension requirements include the building setback requirement from a street line or other property line, maximum percentage of building coverage on a lot ("lot coverage"), and any other building or structure location or dimension requirement of these Regulations.

Non-Conforming Accessory Building Located in a Commercial or Industrial Zoning District – Change of Use: An accessory building which is located in any Commercial District or Industrial District (L.R. District, L.C.D. District, CA District, CB District, LI-80 District) and which does not conform to the front, side or rear setback area requirements of the District shall not be approved for conversion to any primary or principal Permitted Use or Special Exception use.

Extension of Non-Conforming Use in a Building or Structure: A building or a structure containing a non-conforming use may be enlarged or extended up to 25% of the original total floor area of the building or structure devoted to the non-conforming use subject to the following:

1. An application for enlargement or extension of a building or structure containing a non-conforming use shall require submission of a Site Plan. The Site Plan and application shall clearly show the floor area of the building and the area of the lot devoted to the non-conforming use as it existed at the time such use became non-conforming, the area of any previous enlargements or extensions to the building or structure, and the area proposed for expansion.
2. The Commission may approve the enlargement or extension if it finds that the proposed enlargement or extension will not have an adverse effect on the district, the neighborhood and surrounding properties greater than that of the current non-conforming use.

The Commission may attach appropriate conditions and safeguards to the approval of such enlargement or extension where such conditions are determined necessary to ensure that the proposed enlargement or extension will not have a greater adverse effect upon the district, the neighborhood, and surrounding properties than that of the current non-conforming use. Such enlargement or extension may be allowed only pursuant to a Certificate of Use issued by the Commission or its Zoning Enforcement Officer.

3. The applicant shall provide a statement from the Assessor or copies of the assessor's records documenting that the building has not been expanded since the date it became non-conforming or that any such expansion was approved by the Commission and does not exceed 25% of the total floor area of the building which is devoted to the non-conforming use.
4. The total floor area of the enlargement shall not exceed 25% of the total floor area legally dedicated to the non-conforming use at the time it became non-conforming, including any previously granted approval for expansion.
5. Enlargements shall be allowed only to an existing building containing a non-conforming use. No new building or structure containing a non-conforming use shall be permitted.
6. The total maximum building coverage of the lot with the expansion shall not exceed 25% of the total lot area.

7. The location and dimensions of the enlargement shall conform to the requirements of these Regulations.
8. Off-street parking spaces meeting the requirements of these Regulations shall be provided on the lot.

Restoration of Damaged Structures: A non-conforming building or structure damaged by fire or other casualty may be reconstructed or restored subject to approval of a Zoning Permit provided that:

1. The reconstruction or restoration shall not exceed the previous non-conforming dimensions of the building or structure. Where it is necessary to reach this determination, the applicant may be required to provide documentation of the building or structure's size and height prior to the damage and
2. Work shall be started within one year of such damage and is diligently pursued to completion.
3. The Commission may grant an extension(s) of the date to start work, provided:
  - a. The owner submits a request for the extension in writing, stating the reasons for the request, and
  - b. The request is received prior to expiration of the one year deadline, and
  - c. The total of all extensions do not exceed one year.

Abandonment of a Non-Conforming Use: No non-conforming use once changed to a more conforming use shall revert back or be changed to a less conforming use.

Building On Vacant or Unimproved Non-Conforming Lots:

1. A non-conforming lot is a lot of record that:
  - a. existed prior to the original effective date of these Regulations (January 15, 1979) or prior to an amendment to these Regulations, and
  - b. does not conform to the lot area or lot frontage requirements of these Regulations as established on the original effective date of an amendment to these Regulations.
2. A permit may be issued for construction of a permitted structure or for a permitted use on a vacant or unimproved non-conforming lot provided:
  - a. the applicant provides an affidavit certifying that: the lot was owned separately and distinctly from any other adjoining lot having a common boundary line as evidenced by a deed recorded in the Town land records on or before the effective date of these Regulations or any amendment thereto which made the lot non-conforming, and the lot has been continuously thereafter owned as a separately distinct lot from any other adjoining lot, and
  - b. all setback and lot coverage requirements of the Regulations can be met.
3. Where based upon the affidavit required in 1.a. above, or where the Commission determines that the current or a prior owner of the non-conforming lot also owned an adjoining lot, no Zoning Permit for

construction or use of a non-conforming lot shall be issued until the Commission approves a Special Exception application.

a. As a part of the Special Exception application, the Commission shall consider all factual evidence relating to the lot and the adjoining land. Based upon this information and in consultation with its attorney, the Commission shall decide whether to require the merger of the non-conforming lot with adjoining land in order to make the non-conforming lot more conforming with lot area or frontage requirements of these Regulations.