



**PUBLIC HEARING
BEFORE THE GALLATIN COUNTY / BOZEMAN AREA
BOARD OF ADJUSTMENT**

**DUFFY – EXCEL DRILLING
APPEAL HEARING**

FINDINGS OF FACT AND ORDER

PURSUANT TO the Gallatin County / Bozeman Area (GC/BA) Zoning Regulation, which was adopted on July 27, 1999 and amended thereafter, and after legal notice, a public hearing was held before the GC/BA Board of Adjustment in Bozeman, MT on May 15, 2007. The purpose of the hearing was to hear and decide an appeal of an August 21, 2006 decision by the Gallatin County Code Compliance Specialist regarding a nonconforming use determination for Duffy / Excel Drilling.

THEREFORE, after hearing and considering all public testimony, the GC/BA Board of Adjustment makes the following Findings of Fact:

FINDINGS OF FACT

1. The Gallatin County / Bozeman Area (GC/BA) Zoning Regulation was adopted on July 27, 1999, and amended thereafter.
2. Excel Drilling (Tom Duffy) operates from 699 Bozeman Trail, Bozeman, MT (Tract 12 in the NW ¼, SW ¼, Sec. 16, T 2 S, R 6 E). The property is owned by Vivian Duffy.
3. The Duffy property is located in the A-S Agricultural Suburban District of the Gallatin County / Bozeman Area (GC/BA) Zoning District.
4. Section 10 regulates permitted and conditional uses in the A-S District. The intent of this district is to, “Encourage cluster development so that areas of agriculture and areas of environmental concern are preserved.”
5. Pursuant to Section 10.020, permitted and accessory uses in the A-S District include items such as agricultural activities, single-family dwellings, home day cares, plant nurseries, guesthouses, and home occupations. A limited number uses are allowed with a conditional use permit, such as airfields for personal use, bed and breakfast homes, churches, schools, and veterinary offices. Industrial uses are not allowed.
6. Manufacturing and industrial uses are allowed in the M-2 Manufacturing and Industrial District.

7. **Section 50.160** of the GC/BA Zoning Regulation regulates nonconforming uses and structures. Applicable portions of the regulation include:
- A. **Continuation.** Any structure or use lawfully existing upon the effective date of these Regulations may be continued *at the size and manner of operation existing upon such date* except as hereinafter specified, or in the case of signage as specified in Section 65.
 - C. **No Reversion.** When any lawful nonconforming use of any structure or land in any district has been changed to a conforming use, it shall not thereafter be changed to any nonconforming use.
 - D. **Abandonment.** When any lawful nonconforming use of any structure or land is discontinued for a period of ninety (90) days, any future use of the building or structure or land shall be in conformity with the provisions of these Regulations.
 - F. **Changes in Non-Conforming Uses.** 1) A lawful nonconforming use shall not be changed except in conformance with the use requirements of the zone in which it is located. Except, however, a lawful nonconforming use may be changed to another nonconforming use, provided that a conditional use permit is obtained from the commission.
 - I. **Expansion of nonconforming use.** A lawful nonconforming use may be expanded only through the granting of a conditional use permit by the commission...
8. Pursuant to Resolution No. 2001-09, the Gallatin County Commission approved amendments to the nonconforming use language on January 23, 2001. The changes clarified the regulation, but did not change the overall content of nonconforming use requirements.
9. On April 21, 2006, the Code Compliance Specialist received a complaint that business activities associated with Excel Drilling operating at 699 Bozeman Trail violate the GC / BA Zoning Regulation, and that Central Helicopters no longer uses the site for its business operations. The complainant alleges that Excel Drilling did not exist before July 1999, and that their use of the site is not grandfathered as a valid nonconforming use. The complainant alleges that Excel Drilling is excessively noisy and a public nuisance, creates noxious exhaust fumes, and is an eye sore. The Code Compliance Specialist received three more written complaints regarding Excel Drilling in June 2006, and numerous phone complaints.
10. On August 21, 2006, the Code Compliance Specialist determined that the Duffy's do not have valid a nonconforming use to operate/manufacture drill rigs (Excel Drilling) at 699 Bozeman Trail (i.e., the uses were not grandfathered). The Code Compliance Specialist ordered the Duffy's to cease and desist all operations associated with this use.

11. According to the Montana Secretary of State, American Helicopter Drilling, Inc. incorporated on April 23, 1984 and their status changed to inactive on December 31, 1997 due to a merger. The business purpose code is listed as gas, oil, and petroleum drilling.
12. According to the Montana Secretary of State, Excel Drilling incorporated on February 28, 2003, and remains active. The registered agent is listed as Thomas Duffy at 699 Bozeman Trail Road.
13. According to the February 2007 MT Department of Revenue “Business Property Reporting Form” completed by Robyn Duffy, Excel Drilling has been in business for three years and 11 months (approx 2003). The MT Department of Revenue records also show that Excel Drilling acquired two pieces of heavy equipment in 2004, a “buggy” for \$58,688 and equipment labeled as “unknown” for \$85,000.
14. Susan Swimley, representative for the Duffy family, testified that the Duffy business is an ongoing business with seasonal work. The Duffy’s were located on Bozeman Trail Road before Interstate 90 was even built. The family became involved in the drill business in the 1980s. They bought helicopter drilling units, modified drills, repaired drills, built drills, and designed prototypes for new drills. Drilling is completed off site; the Duffy’s do not drill in Bozeman, MT. Ms. Swimley stated that the nonconforming use is multiple components, involving drilling, communications, and helicopters, and that the three components cannot be isolated.
15. Kelly Sironi, representative for the Duffy family, testified that the nonconforming use regulations allow a use to continue past date of the zoning regulation, if it continues in the same size and manner as prior to adoption of zoning. The zoning regulation does not define same size and manner. A CUP may be granted for a use if a use enlarges, grows, or changes from before. The Duffy’s have been drilling all along, even though they may not have the drill on the property at every moment in time. Drilling equipment and technology has evolved with time. Ms. Sironi stated that evolution of technology is not considered an expansion that requires a CUP. Furthermore, the 90-day cessation clause in the Zoning Regulation makes allowance for seasonal use, and that leaving the property to work off site is not a cessation of use.
16. Mark Duffy testified how the family became involved in the oil drill business. They bought their first drill in 1983, and at one point in the 1980s, had over 25 drills in operation. They modify, buy, refurbish, and sell drills. Mark Duffy provided receipts for six drills bought from

Bertram Drilling in 1999. Mr. Duffy stated that activity at 699 Bozeman Trail has always been going on. They started design work for a new drill in 1998. They built a prototype starting in 2000. They built 13 of the HP 400s in 2002. The drill is an evolution from the HP 200 to the XR to HP 400. Mr. Duffy stated that drilling is part of the family's business, is continuous, and has been there almost 40 years.

17. Mark Duffy also testified that the oil drilling business fluctuated over time, and included seasonal work. They have had over 50 employees at one time and as few as 8 or 10. Right now, they have about 20-25 employees. The maximum number of employees was for a job on the South Fork of the Colorado. They had 15 drills on one job in the mid to late 80s. They average closer to 20 employees. They do not employ people in winter when there isn't any work. At that time, they may only have six to eight people.
18. Mark Duffy stated that the site at 699 Bozeman Trail is quiet about 80% of the time, while they are out working. When at the site, they never start the drills all at once, and don't run them all day. Moving most of the helicopter operations to Gallatin Field Airport has reduced activity at 699 Bozeman Trail Road. There are fewer helicopters, but they are not gone.
19. Mr. Duffy stated that they had six drills stored outside at 699 Bozeman Trail Road in 1999, on the north side of the west shop. The drills were being maintained and cleaned outside. The drills were purchased from Bertram Drilling. They were bought with the intent to fix them up and sell them to a foreign company. They were also doing design work on site. They were drilling with other drills off site in 1999.
20. Steve Duffy testified that as the family grew and expanded the size of the aircraft, they required larger facilities for the helicopters and moved to the airport. They still have the helicopter fuel facility on the property. A helicopter just landed there the other day. Moving to the airport resulted in a 90% reduction in noise.
21. Residents of Franklin Hills Subdivision, including G. August Uhl, Dale Curtis, Robert (written testimony) and Sherry Schaefer (written and oral testimony), Walter Rivers, Ann Marie McGrath (written testimony), Jim Hamilton, and Murry Steinman testified that Excel Drilling activities have changed the quiet, peaceful character of their neighborhood, and their quality of life. Their realtors informed them there was a heliport at the Duffy property prior to their purchase, and they didn't mind the helicopter noise and activity. All of them, with the exception of Robert and Sherry Schaefer, purchased and moved into their homes in the year 2000 or later. The Schaefer's have resided on their property in Franklin Hills since 1997. Over time, the

noise level from Excel Drilling manufacturing activities has significantly increased and become a nuisance, especially over the last two to three years. Excel Drilling sometimes works from 6:30 am to 10:00 pm, including weekends and holidays. Residents are bothered by the loud noise and noxious fumes generated by Excel Drilling. When Excel Drilling is working, Ms. McGrath stated that it is impossible to remain outside. Residents identified concerns about the impacts of open burning of unknown substances and groundwater pollution from the power washing of equipment. Mr. Uhl testified that Excel Drilling fumes caused him to feel dizzy and see spots inside his home.

22. George Renner testified that he has resided on his property immediately south of the Duffy's since 1991. He was on the Duffy property approximately twice a year, and even helped finish a helicopter in their shop for them in the year 2000. Mr. Renner stated that he disagrees with the Duffy's testimony. He said, from 1991 to the time Tom Duffy started Excel drilling in 2003, he did not see a single drill rig on the property, or arrive or leave by truck. He stated there is no evidence to support the Duffy's claims for Bozeman Trail Road. Mr. Renner believes the Duffy's are using Steve Duffy's experience and business records from his drilling business elsewhere in different states to mislead the audience.
23. Prior to 2003, Mr. Renner stated that the equipment on the Duffy property was suitable for helicopter maintenance, not fabrication. He stated that the Duffy's shop did not contain industrial fabrication tools prior to Tom Duffy starting Excel Drilling. The Duffy's could have submitted sales receipts, but didn't. Around 1999, Mr. Renner stated that Mark Duffy was a pilot, and had one support mechanic. The nature of employees on site in 1999 would have been very limited in number. Mr. Renner stated that the Duffy's could have submitted payroll records, but didn't.
24. Mr. Renner measured peak sound levels of 100 decibels in his yard and shop. He stated that level of 85 decibels or higher can damage hearing. The noise from Excel Drilling activity renders the property unlivable. Mr. Renner submitted numerous photographs of Excel Drilling Activity showing employees working on drills, power washing, types of equipment, etc.
25. Mr. Renner read a letter into the record from Mark Mahnke, Montana Department of Public Health and Human Services. Mr. Mahnke stated that the noise and fumes from Excel Drilling made conversation with Mr. Renner difficult, and he felt nauseous. He curtailed his visit.
26. Joan and Richard Holborn testified that they have lived on their Bozeman Trail Road property located south of the Duffy's for 20 years (since 1987). Ms. Holborn submitted a July 1995

aerial photograph taken by Murry Duffy that shows the Duffy property without drills/equipment stored outside. Ms. Holborn stated that this picture is representative of the Duffy property from 1987 through the 1990s. She has a clear view of the Duffy property from her residence, and enjoyed watching the helicopters take off. She could see about three people checking the helicopters over. She stated that Murry Duffy ran a clean operation, and that the business was Central Helicopters. Mr. Holborn stated that things have changed since Murry's death. The noise from the drills is more excessive. Ms. Holborn stated the drone from the drills went on all day long during a Labor Day barbeque they had in 2006. Ms. Holborn stated that there is no historical justification to grandfather Excel Drilling.

27. Tommi Hageman testified that she has resided on her property immediately north of the Duffy's since the fall of 1998. She stated that there is always something going on at the Duffy property, and she knew they worked on all kinds of machinery. She could not remember the date, but she remembers the first time she saw a drill because she thought it was a rocket launcher. She stated that the noise is loud, but the fumes don't bother her. Ms. Hageman stated that all the Duffy's have done is make their business grow and passed it down to their sons. In response to a question from the board, Ms. Hageman testified that she has seen the business grow since six drills, but she does not know if the Duffy's own them or and has not reviewed business records. She has seen the drills being serviced, put on trucks, and driven away. She has also seen the drills being taken away by helicopters.
28. Buzz Tarlow, representative for the complainants, testified that the Duffy's have not submitted any evidence to support a drilling business on Bozeman Trail Road. Without evidence, you cannot determine what the business was doing, or determine the size and manner of the business around July 1999. The Duffy's have not submitted any company books, tax returns, business letters, inventory lists, payroll records, bank accounts, photos, advertising, phone records, power bills, calendars of projects they were on, invoices, or financial statements. Records show that American Helicopter Drilling went inactive in 1997, and Excel Drilling started in 2003. Mr. Tarlow stated that the Duffy's may be showing the purchase of drills, not specific to the Bozeman Trail Road location, to show the status of the drilling operation in 1999.
29. In written testimony, Pat A. Yaney stated she has resided on Bozeman Trail Road since 1990. She stated that the Duffy helicopter operation was thoughtful, and she was unaware of a drilling operation when she moved there. With Murry Duffy's death, the operation changed and

expanded. She stated that the cleaning and repairing of equipment is noisy and not suitable for a residential neighborhood.

30. In appellant rebuttal, Mark Duffy testified that they have always stored barrels behind the east shop. They usually contained cleaning fluid for helicopters. At times they stored used motor oil in them, which was collected by an oil collection company. The barrels are currently empty. Mr. Duffy stated that the pressure washing of the drills removes dirt, not toxic materials. He further stated that the six drills stored outside in 1999 were located on the north side of the west building. They would have been out of site of George Renner's view unless he was on the property. They used pressure washing equipment in 1999 to wash drills. They refurbished and stored the six drills in 1999. In 1999, they also had three welders, huge hydraulic equipment, and other equipment in the two buildings. The west building was built in 1969, the east one in 1984. The east building was used for cold storage. Mr. Duffy stated that the drills are noisy, but they don't run that much. The fumes are produced when the diesel engines first start up.
31. Mark Duffy stated that the property is deserted most of the time. When they are on a job site, there may be one person working in the shop. In some years, during the height of the oil exploration, all through the 1980s, business was booming, and they would not bring the drills back to Bozeman unless they were out of work, which was sometimes not for six to eight months. When they come back, they converge with 16 to 20 employees, drills are unloaded, cleaned, drills are started, and stuff is getting moved around. There is really intense activity for a few days. Activity is sporadic.
32. Duffy's representative, Kelly Sironi, stated that everybody's testimony that did not live in the area before 1999 is irrelevant. She stated that George Renner and the Schaeffer's presented conflicting testimony. Ms. Sironi stated that Tommi Hageman's testimony is the most reliable. She moved to the area in the fall of 1998 and has seen drills and command trucks. Ms. Sironi stated that the Duffy's might have some evolution and some growth, but the Duffy's do not have a substantial change in business.
33. Duffy's representative, Susan Swimley, testified that the best evidence is the testimony of their three clients (Mark, Tom, and Steve Duffy), and that the Duffy's do not have time to sit in an office to gather paperwork. They swore and told you what their business is.
34. Steve Duffy testified that in 1999, he (not employees) cleaned, stripped, worked on, and painted the six drills that were on site.

35. After considering public testimony and in board discussion, the GC/BA Board of Adjustment adopts and incorporates the findings contained in Amy Waring's staff report.
36. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that Section 50.160(a) states any structure or use lawfully existing upon the effective day of these regulations may be continued at the size and in the manner of operating existing upon such date except as here and after specified. Direct testimony by the Duffy's indicates that the use of Excel Drilling was expanded from 1999 to present day.
37. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that Section 50.160(i) states a lawful non-conforming use may be expanded only through the granting of a conditional use permit. The Duffy's have not taken advantage of 50.160(i).
38. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that MCA Section 76-2-208 states any lawful use which is made of land or buildings at the time any resolution is adopted by the board of county commissioners may be continued although such use does not conform to the provisions of such resolution. The helicopters and their use is a non-issue in this case. The GC/BA Board of Adjustment finds that the Duffy's use has expanded considerably since 1998. In 1999, there were six drills on site, some paint was removed from the drills, and there might have been some pressure sprayers and other equipment around.
39. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that Excel Drilling perfected the HP400 design in 2002, and manufactured 12 drills. There was direct testimony that this is a business that was made to grow. The Board finds that Excel Drilling expanded from storing 6 drills that were no longer in use, to manufacturing a different kind of drill. The board finds that Excel Drilling did not take advantage of Section 50.160(i) to apply for and be granted a conditional use purpose permit to expand their use.
40. Based on testimony from the Duffy's and Tommi Hageman, GC/BA Board of Adjustment finds that Excel substantially expanded their operation in the designing, manufacturing and repairing of the HP400 drill. The Board of Adjustment finds that Excel Drilling is trying to piggyback their work in different locations in other parts of the world on to the citizens of Gallatin County. The Board of Adjustment finds that there is substantially more use of the property associated with preparing, repairing, manufacturing, testing, transporting and modifying equipment than exists today but did not exist in 1998 or 1999. The current non-conforming use is not a pre-existing non-conforming use.

41. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that the Duffy's living at 699 Bozeman Trail prior to construction of the interstate is relevant to this hearing in the extent that times change. Laws change and laws exist for the greater good of the community at large, were it not so separate but equal would exist. Women could not vote, and children would receive lawful punishment at the hands of their teachers.
42. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that Excel Drilling activity from the creation of the HP400 until now directly violates the intent of 10.010 of the Gallatin County/Bozeman Area Zoning Regulation, which states the "intent of the A-S Agricultural Suburban District is to encourage cluster development so that areas of agriculture and areas of environment concern are preserved."
43. After considering public testimony and in board discussion, the GC/BA Board of Adjustment finds that this law is not a technicality, that the date of July 27, 1999 is no more a technicality than anyone's fifth amendment right to protect themselves from self-incrimination.
44. Any findings contained in the live recording of the appeal hearing dated May 17, 2007 are hereby incorporated in these findings of fact and order.
45. Dissenting members of the GC/BA Board of Adjustment (Pfaehler and Lien) stated that the Duffy's seem to be honest people, and we have to believe them because a lot of these other people were not around. If the Duffy's say they had an operation and drills on the property prior to 1999, then they believe them because nobody has proven they haven't. The Duffy's had 50 employees at one time prior to 1999, and 20 employees now. That is not an escalation; it is a decrease. At the peak of their business in the 1980s, the Duffy's had a business that was substantially greater than what they had in July 1999. Their existing business has not increased from the point of their peak in the 1980s. You cannot judge a business at an exact point in time specifically if the business is cyclical.
46. A motion was made by Member Armstrong, and seconded by Member Miller to affirm the August 21, 2006 decision by the Gallatin County Code Compliance Specialist. The Motion was approved by a three to two (3:2) vote (Members Pfaehler and Lien opposed).

ORDER

Based on the above Findings, the Gallatin County / Bozeman Area Board of Adjustment hereby orders:

1. The August 21, 2006 decision by the Code Compliance Specialist is affirmed; and
2. The Cease and Desist Order for Excel Drilling that was stayed pending this appeal is hereby reinstated.

Gallatin County / Bozeman Area Board of Adjustment

Shirley Nash, Chairman

Date

Ralph Miller, Member

Date

Jason Armstrong, Member

Date

Gus Pfaehler, Member

Date

Allen Lien, Member

Date