

MEETING MINUTES
ZONING BOARD OF ADJUSTMENT MEETING

Barrington Annex Building
(next to Elementary School)
(NEW LOCATION) 572 Calef Highway

Barrington, NH
August 27, 2014
7:00PM

BOARD TO MEET WITH LEGAL COUNSEL AT 6:00PM

Members Present

Karyn Forbes, Chair
George Bailey
Meri Schmalz-Alt
George Schmalz-Alt
Raymond Desmarais
Gerard Gajewski

Members Absent

Dawn Hatch

ACT ION ITEMS

- 1. 238-4-TC-14 Appeal of Decision of The Town of Barrington, New Hampshire Planning Board** Pursuant to New Hampshire R.S.A. 676:5 (III)/George A. Calef and Arvilla T. Calef, Trustees of The George A. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 and Arvilla T. Calef and George A. Calef, Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 v. Town of Barrington, New Hampshire. **Appeal of Planning Board Decision Case # SR12/240 (Owner: The Three Socios, LLC Map 238, Lot 4)) Conditional Approval on April 15, 2014 based on alleged violation of the Zoning Ordinance.**

Meri Schmaltz to sit for Dawn Hatch

K. Forbes stated they would hear the joint motion to dismiss first.

Jae Whitelaw represented the Planning Board and spoke on behalf of the Three Socios. She expressed that she knew the Board had the basic facts, where they have approved a variance for a well in the open space of an adjacent lot. The request for motion to dismiss was based upon lack of jurisdiction. Jae Whitelaw referenced 676:15, 676:5. The applicant was there to protect their right to appeal. She expressed the facts were basically the same in both appeals, the one to the ZBA and the appeal filed in Superior Court. The appeal at the Superior Court had been staid pending action at the ZBA. Jae Whitelaw contended that none of the issues raised questions of the zoning ordinance.

Jae Whitelaw expressed that if the Board wanted to go forward in reviewing the motion to dismiss, the appellant did not quote any of the provisions of the zoning ordinance in the appeal document. The issues raised were with the Site Plan Regulations, appeals to those regulations went to the Superior Court not the ZBA.

Jae Whitelaw expressed Mr. Calef's objection to dismiss included several references to the Zoning Ordinance. The references were not asserted in the appeal itself but only in response to the motion to dismiss. Ms. Whitelaw did not believe the ZBA should look at the references to the ZO in the response but to the appeal document itself. The very end paragraph, thirty nine finally made a general claim. The objection to the motion to dismiss was not the opportunity for Mr. Calef to amend his appeal.

Jae Whitelaw asked that the Board first look at whether they need to look beyond the original appeal document. If they decided not to look beyond the original appeal document they did not need to have a discussion about the further issues which were raised in Mr. Calef's objection to the motion to dismiss. The objection to motion to dismiss was not filed until six weeks after the appeal was filed with the ZBA.

K. Forbes expressed they would first hear the motion to dismiss then they would close the hearing portion and would have discussion among the Board.

K. Forbes asked Jae Whitelaw if she had information to add to the motion to dismiss.

Jae Whitelaw expressed that even if the Board chose to go forward to consider the motion to dismiss Mr. Calef failed to identify any provision of the Zoning Ordinance which would give the Board the jurisdiction to hear the appeal. Ms. Whitelaw did not believe the ZBA had to look beyond the four corners of the appeal to look to whether the ZBA had jurisdiction to hear the appeal. Mr. Calef had not provided any evidence where the Planning Board failed to interpret, apply or misconstrued any provision of the Zoning Ordinance.

Jae Whitelaw went on to look at the following Zoning Ordinance provisions.

Jae Whitelaw expressed first cited in the appeal was 2.2.5. Section 2.2 addresses statements of purpose. A statement of purpose it is not a regulatory control except in variances. They were provided to give insight into the underlying intent of each zoning district; requirements are in the other segments of the ordinance. Almost all of the zoning articles stated were statements of purpose and did not apply.

Ms. Whitelaw expressed that in regard to 3.1.6 of the Site Plan review regulations Mr. Calef argued that the site plan review regulations were inferred by reference as part of the zoning regulations, which would make appeal of the Site Plan Regulations to the ZBA. Mr. Calef did the same with other State regulations, inferring they are incorporated into the Zoning Ordinance, which was not consistent with legislative directive or the Site Plan Review Regulations or the Zoning Ordinance.

Ms. Whitelaw expressed in regard to 2.2.5 of the site plan regulations again was being referenced as part of the Zoning Ordinance. Jae Whitelaw expressed that Calef argued all NHDES regulations are part of the Zoning Regulations by reference, which was not consistent with statute.

Ms. Whitelaw expressed that Mr. Calef cited 3.1.5 "All water supply and wastewater treatment systems, whether they are intended for use as a single user system, a community system, or any other type of user or usage, shall be

constructed and maintained in accordance with the standards established by the New Hampshire Department of Environmental Services (NHDES)”. Again this was incorporating State regulations into the Zoning Ordinance.

Ms. Whitelaw discussed 4.2.4(1) of the Zoning Ordinance Standards for the Town Center District, which discussed State standards for lot size for septic and compliance with State regulations. Barrington Zoning Ordinance Article 4.2.4(1) states that, “all newly created or improved lots must be of adequate size to accommodate an on-site septic system and/or water supply system as specified by the New Hampshire Department of Environmental Services (NHDES) regulations. The minimum permitted lot size shall be increased in accordance with NHDES requirements to accommodate wastewater loading capacity of the site. Community wastewater and/or water supply systems, as well as other innovative or alternative technology systems, may also be employed in this district provided they comply with all State requirements and the Planning Board determines that there will be no adverse impact on water quality or public health.” Same issue and water quality was not raised as an issue, water quantity was. This was raised in a private property rights versus land use regulation. There was an issue between the Calef property and the Millo property and what their contractual obligation was. There was a personal property issue. Neither the ZBA nor the Planning Board had the authority to make decisions regarding personal property rights. Mr. Calef could have asked the court to make a decision regarding those property rights. The Planning Board approval does not give the applicant Three Socios the right to erroneously interfere with any contractual rights Mr. Calef might have.

Ms. Whitelaw addressed 6.2.2(8) & (9) ZBA addressed when they granted the variance it was a dead issue.

Ms. Whitelaw addressed 7.1, which talked about the intent of the section.

Ms. Whitelaw addressed 7.1(1) which prohibited vibrations beyond boarders’ .There are no facts presented about vibrations, there was not discussion or evidence presented during hearings.

Ms. Whitelaw then moved to 12.1 Purpose and intent statement.

Ms. Whitelaw stated 12.2 Ground Water Protection District Defined was a purpose clause and not applicable on its own.

Ms. Whitelaw expressed that Mr. Calef had not cited any part of the Zoning Ordinance the Board based its decision on or failed to apply or interpret when it made its decision. The appellant sites site plan regulations which are appealable to the Superior Court. She urged the Board to find there was no jurisdiction and to grant the motion to dismiss.

Attorney Arnold who represented the Three Socios expressed to the Board that first there needed to be a misinterpretation of the Zoning Ordinance and secondly to have any jurisdiction the appeal had to have been filed timely. The decision by the Planning Board was on April 15, 2014 the appeal was filed on May 13, 2014, which was fine and within the 30 days. John Arnold went on to say the initial appeal document did not identify any articles of the Zoning Ordinance that were violated. Any references to violations of the zoning ordinance were in the July objection, which was well beyond the thirty day appeal period. The appeal also needed to provide specificity. There had only been one general reference to the zoning ordinance in the final paragraph. He expressed if the Board looked at the original appeal they would find they had no jurisdiction to hear the appeal.

Attorney Wirth spoke on behalf of George and Alvia Calef as trustees of their respective trusts. He expressed the statute indicates 676:5(1) is specific the appeal document specify the grounds there of. In 676:5 it does not require you specify the article needed for the appeal. The appeal which was timely filed, fully complied with the statute. The facts supplied were more than sufficient to survive a motion to dismiss. What was said to be required was the filing of a legal memorandum at the time the appeal was filed and he had never done that before nor would he have. He stated he would provide a memorandum when appropriate. Mr. Expressed that under compliance with 676:5III the appeal clearly referenced the Zoning Ordinance. It placed the Planning Board and the Three Socios on notice and gave them opportunity to respond. In reference to the Zoning Ordinance itself they had referenced 12 separate parts of the zoning ordinance that were implicated in the appeal. He understood that the appeal references the Site Plan Regulations and that they were appealable to the Superior Court. The zoning ordinance specifically referred back to the site plan regulations and he was required to use the ordinance, the ordinance specifically states you must comply with the Site Plan Regulations which makes it a violation of the zoning Ordinance. There was no objection to what the Three Socios wanted to do on their property. Mr. Calef, a nonapplicant had found himself in the situation where his property rights were being extinguished based upon a site plan review. The only things that related to Calef were the statement on the plan "well abandoned." The site review approval is based on the abandonment of a well that Mr. Calef has gotten water from since 1966. Mr. Wirth expressed this was a highly unusual situation. He expressed that this was a situation of an abutters rights to water were being abandoned without his consent. The motion to dismiss should be denied.

K. Forbes closed the hearing portion of the motion to dismiss.

K. Forbes first preliminary issue was whether the Calef's are limited to what was initially filed. Attorney Wirth had pointed to 676:5 such appeal should be taken in reasonable time, as provided in the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. "It did not specify you have to give the specifics.

R. Desmaris expressed the Board has considered additional material in the past.

K. Forbes stated the board was in agreement with R. Desmaris. The Board would consider the petitioners memorandum in support of appeal. It was stated there were twelve sections of the ordinance which were cited, she saw eleven. Attorney Wirth would have to show the twelfth. There were site plan regulations cited which are not part of their jurisdiction.

A motion was made by R. Desmaris and seconded by G. Bailey to take the motion to dismiss under advisement and hear the merits of the appeal. The motion carried unanimously

K. Forbes expressed the Board would hear the merits of the appeal itself. She expressed to Mr. Wirth to start with 2.2.5. There had been site plan regulations and an article which a variance had been granted from.

Mr. Wirth expressed those item would be disregarded.

Gregory Wirth wanted to reiterate this was not the standard appeal. He was not there to appeal what the applicant wants to do. What he was there appealing was what was done by the Planning Board in order to allow the applicant to do what he wants to do. The gas station needed underground storage tanks for gas and diesel on site. The well which Mr. Calef had gotten his water from since 1983 and the prior owners since 1966, was within the radius of the underground storage tanks. The applicant would not be able to get a permit for the UST's with the well still there.

In order for the UST's Mr. Calef needed to lose his well. The Zoning Ordinance said to be sensitive to property rights, shutting off ones well is not sensitive. 2.2.5 requires all applications in the Town Center comply with the Site Plan Review Regulations, but for the argument at hand he was sticking to the Zoning Ordinance. 3.1.5 required compliance with NHDES standards, but the NHDES standards required the abandonment of a well which was not that of the applicant, did the Planning Board have the ability to terminate property rights of someone who was not before them with an application in hand. He submitted the answer to that was no. 4.2.4 required onsite septic and or water supply system, the applicant has a water supply system when all is said and done the applicant did not. He questioned whether that complied with the zoning Ordinance. The Planning Board must determine that there was no adverse impact on water quality. Mr. Wirth expressed if Mr. Calef's water was turned off Mr. Calef had no water quality because he had no water. Mr. Calef was serving the public; he could not do that without water. The site plan stated Mr. Calef's well was to be abandoned. The burden was not on Mr. Calef to find another water supply; the burden was on the applicant to show there would be no adverse effect on the quality of water. Mr. Calef would have none, so the quality has been affected. 12.1 The Ground Water Protection District was to protect groundwater resources. The site plan approved by the Planning Board shuts off water rights which had been in existence since 1966. He understood the argument made that Mr. Calef should go out and sue Mr. Millo's. Mr. Calef was not before the Planning Board, someone else wanted to put up a gas station and make money. There was no contractual obligation between Millo's and Calef that he had seen. Not going to turn this into two non-applicants suing each other for someone else's site plan. There was a document establishing water rights but no contract that he had seen. 12.1.3 To provide for future growth, and ensuring the future supply of water, again he expressed we just shut it down. In March 2014 the Town Planner recommended the Calef property be included in a minor site plan review because they were losing their well, it was never included. Three properties were included, The Journey Baptist Church, Barrington Village Station, and Millo's. Calef's was the only one not included and they were the only one losing their water without a replacement. Mr. Wirth submitted to the Board that what the Planning Board did by terminating those rights without the consent and approval of Mr. Calef or without it being a condition that Mr. Calef provide his consent and approval they violated the zoning provisions in several different ways. It was unreasonable; unjust it was erroneous and just plain wrong.

John Arnold expressed the common theme that the Planning Board was somehow going to shut off water to Mr. Calef. The Planning Board has taken no action on shutting off water. Millo's had agreed to discontinue use of the well. The well was going to be moved a few hundred feet and the water would continue to flow through the same lines to the same location it did now. The question was what rights does Mr. Calef have to use the Millo's well, that was a property rights issue, not a zoning issue. The Planning Board was requiring separate site approval for the community well, if there was not site approval for the well nothing changes. Fundamental to the issue was whether Millo has the ability to discontinue the well on his property and what legal obligation Millo's had to supply water to Calef. If Millo's well was not discontinued the Three Socios would not get their permit from NDES for the Underground storage tanks. The entire project contemplates supplying water to the surrounding properties. This should not be phrased as the Planning Board was shutting off water to a site.

K. Forbes asked if he wanted to supplement the arguments to the references in the ordinance.

John Arnold explained most of the provisions Attorney Wirth referenced were incorporating were site plan regulations and state regulation in the Zoning Ordinance. That could not be taken to mean that anytime a site plan regulation was referenced in the Zoning Ordinance that the challenge of that regulation then went to the Zoning Board, it would completely eliminate the Statutory framework that Planning Board decisions not based on the Zoning Ordinance go to the court. The remaining sections referenced were purpose statements. With attorney with

abandoning 6.2.2 provisions there really was not anything else in the Zoning Ordinance provision which was in play.

M. Schmaltz asked if Mr. Calef and Mr. Millo's share a well.

John Arnold explained that Mr. Calef and Mr. Millo have been sharing a well on Mr. Millo's property for a number of years. Mr. Calef has a well on his property which had been abandoned. Mr. Millo's had agreed to join the new well, which would be larger and monitored by the state. His understanding was that Millo's would continue to supply water to Mr. Calef in much the same way they did now, the well would just be moved a few hundred feet away.

M. Schmaltz asked why they had not asked Mr. Calef to join the well and be part of the site plan approval.

John Arnold expressed they had asked Mr. Calef to into those discussions and had spent a great amount of time trying to reach agreement with him, as they had with Mr. Millo's and The Journey Church. The planner had initially recommended a site plan approval for Mr. Calef's property be part of the conditions of approval, but that was based upon a plan which had proposed site changes to Mr. Calef's, including parking, lighting, drainage, and a new water line across his property. The final conditionally approved plan had none of those improvements, so site plan approval was not necessary for the Calef property.

Jae Whitelaw addressed the argument by Attorney Wirth that the Zoning Ordinance incorporates the site plan regulations into the Zoning Ordinance. She had never seen a Zoning Ordinance in her 25 years of municipal work that does not have that requirement, but it does not incorporate the provisions of the site plan regulations into the Zoning Ordinance. The Church property, The Barrington Village Place, and Millo the properties will require site review because they will have changes on their properties. The Calef property would have no changes.

Greggory Wirth in terms of the negotiations Mr. Calef never asked for cash. Mr. Calef wanted what he had now, which was an uninterrupted flow of water and they never got there. The provision provided to Mr. Calef he believed was; you are limited to distilling and selling 12 gallons of water per day, which is what he did now. If he used more he would be in violation of the agreement. Mr. Calef only wanted what he had and he did not get it. He invited the Board to review of the site plan and Notice of Decision which was issued. The only change was the well for Mr. Calef was to be abandoned and nothing was in there to replace it. They were forced as an abutter to defend their property rights, which should not be at issue because our neighbor wants to put in UST's. That was at least a violation of one if not more of the Zoning Ordinance provisions. He believed it was a little unusual, but it was why it needed to be sent back to the Planning Board.

K. Forbes explained they were opening to public comments, clarifying they were only here to address the allegation in Attorney Wirth's memorandum, the sections he cited, he had withdrawn 6.2.2 (8) & 6.2.2(9). They were only there to discuss those items left.

Bob Ott of 8 Lee Road expressed he was confused on the issue between the ZBA and the Planning Board. He asked whether rules were being changed for specific people. He asked if we were over ruling the State rules on it.

K. Forbes explained the Zoning Board was there to hear Mr. Calef's appeal of alleged zoning violations of the Planning Board in their conditional approval the site plan for Three Socios.

Paul Mausteller Washington Street expressed he wanted to rebut the Town Attorney, John Arnold., regarding the site plan review. He wanted to bring up 2.2.5, 3.3.4.

K. Forbes expressed are concern is the 9 sections of the zoning ordinance those are our concern.

Paul Mausteller asked if the alternates were up to speed on the issues. He asked if the Board was comfortable with all the information. He wanted to rebut Attorney Arnold.

K. Forbes expressed the Board members were all familiar with the case, they were all there. They have heard all the information. She stressed the items to discuss were the 9 alleged violations Attorney Wirth stated in his memorandum.

Paul Mausteller explained he wanted to bring the Board up to speed on issues the Planning Board missed, such as no sidewalks shown on the plan.

K. Forbes explained those were site plan issues which the ZBA did not have jurisdiction over and that Mr. Calef has already filed appeal in the Superior Court.

Ken Grant 372 Parker Mountain Road, he was making statements on the water well he heard the state regulations mentioned, the state when it comes to septic and water it allows the Town to make tougher regulations and the Town participated in that. They protected open spaces, now they wanted to put water well in one of them. They have water now to Millo's, all water well drilling is experimental there was no guarantee they would hit water. There was a point at which the deeper you go the less return there is.

K. Forbes expressed most of this relates to site plan review regulations and not to the Zoning Ordinance.

Ken Grant expressed he had not heard the Planning Board vet and hear the issues he was talking about.

K. Forbes explained the Planning Board would be hearing three more site plans related to topic.

Doug Kahl 50 Province Road expressed the whole thing came down to common sense, that if Mr. Calef was being penalized he must have done something wrong. You only got penalized if you did something wrong and he had not heard of anything Mr. Calef had done wrong but run his legitimate business. It just didn't seem right or fair.

Steve Saunders of 28Mast Road was most concerned that if the Planning Board makes reference in an approval to a site plan that takes rights away that by itself includes the site plan and all the regulations that go with it. He expressed that if the Zoning Board did not feel they had the authority to rule on that, it would be a misinterpretation.

Bob Stock 29 Wellington Way expressed the Site Plan Regulations and Zoning Ordinance sometimes doesn't meet even though we think they should. There was talk of guidelines and performance standards that was not the way he written them, they gave a very good idea of how they should apply the following rules and regulations.

K. Forbes closed the public hearing portion so the board could consider the appeal.

K. Forbes explained they were going to go over the merits of the appeal.

K. Forbes identified M. Schmaltz as voting.

K. Forbes started with 2.2.5 explaining a lot had been said about general purpose statements, site plan regulations, and State regulations, none of which apply or the variances which had already been granted.

R. Desmaris expressed a lot of them were very general purpose statements he did not see any of the Zoning Ordinance which was violated in any of the nine. It was a personal property rights issue as far as he was concerned.

K. Forbes asked they go through one at a time. 2.2.5 was a general purpose statement, 3.1.6 just stated you had to comply, 2.2 states, "From an overall perspective, the zoning districts are intended to promote a hierarchy of development opportunities that offer a variety of development densities, for both residential and non-residential development, in order to achieve balanced approach to future growth that is sensitive to property rights as well as the future land use goals of the community, as stated in the 2004 Master Plan.

R. Desmaris expressed no regulatory component, purpose clause.

K. Forbes 3.1.5 "All water supply and wastewater treatment systems, whether they are intended for use as a single user system, a community system, or any other type of user or usage, shall be constructed and maintained in accordance with the standards established by the New Hampshire Department of Environmental Services (NHDES)"

R. Desmaris expressed compliance requirement, up to NHDES to enforce.

K. Forbes 4.2.4(1) "In addition to the provision set forth in the following paragraphs, all newly created or improved lots must be of adequate size to accommodate an on-site septic system and/or water supply system as specified by the New Hampshire Department of Environmental Services (NHDES) regulations. (regulatory) The minimum permitted lot size shall be increased in accordance with NHDES requirements to accommodate wastewater loading capacity of the site. Community wastewater and or water supply systems, as well as other innovative or alternative technology systems, may also be employed in this district provided they comply with all state requirements and the Planning Board determines that there will be no adverse impact on water quality and public health."

R. Desmaris expressed to be determined by further site reviews.

K. Forbes 6.2.2(8) and 6.2.2(9) were withdrawn already received Variance

K. Forbes 7.1 "The intent of this section is to prevent land or buildings from being used or occupied in any manner that would create any dangerous, injurious, noxious, and hazardous or nuisance conditions"

K. Forbes Purpose clause no regulatory power.

K. Forbes 7.1(1) "No use or structure otherwise permitted under this Ordinance shall be permitted by right or special exception which unreasonably and adversely affects the quality of air, water supplies, water bodies or other significant natural or artificial resources of the Town of Barrington."

K. Forbes Conditional approval was granted on the basis of three site plan approvals which have yet to be determined. This would be premature.

The Board agreed.

K. Forbes 12.1”In the Town of Barrington, where water is drawn almost exclusively from wells, protecting groundwater from contamination and preserving the capability to recharge this water supply are issues of town-wide importance. (Purpose Statement) Therefore, the intent of the Groundwater protection District is to protect, preserve, and maintain groundwater resources within the town. The establishment of these regulations is also intended to address the following specific issues ;... (3) To provide for future growth and development of the town, in accordance with the Master Plan, by ensuring the future availability of public and private water supplies...”

K. Forbes asked if the Board agreed this was a purpose clause. The Board agreed.

K. Forbes 12.2 The Groundwater Protection District Overlay (GPO) consists of the entire area within the municipality boundaries of the Town. The provisions of this Article are intended to protect both groundwater quantity and water supply quality on a town wide basis. There are specific overlay areas within the GWPDO that have been identified as being of particular importance or concern and for which specific provisions are given within this article”

K. Forbes asked purpose clause. The Board agreed it was a purpose clause. She went on to say most of these issues would be addressed at the Superior Court.

A motion was made by R. Desmaris and seconded by G. Bailey to deny the appeal of the administrative decision and ask counsel to draft an opinion based upon the reasons cited. The motion carried unanimously 5(five) in favor 0(zero) opposed. The appeal was denied for the reason cited.

A motion was made by G. Bailey and seconded by R. Desmaris to continue to a meeting on September 24, 2014 to review the draft Notice of Decision. The motion carried unanimously

A motion was made by R. Desmaris and seconded by G. Bailey to adjourn. The motion carried unanimously

Respectfully Submitted,

Marcia J. Gasses
Town Planner and Land Use Administrator