

# MEETING MINUTES

## ZONING BOARD OF ADJUSTMENT PUBLIC MEETING

**Barrington Annex Building**

**(next to Elementary School)**

**(NEW LOCATION) 572 Calef Highway**

Barrington, NH

December 17, 2014

7:00PM

### ROLL CALL

Karyn Forbes, Chair

George Bailey

Meri Schmalz-Alt

George Schmalz-Alt

Raymond Desmarais

Gerard Gajewski

Dawn Hatch

K. Forbes explained that J. Gajewski recused himself on item #2. G. Schmalz would sit for J. Gajewski on item #2. J. Gajewski had not been present at the prior months meeting to discuss item #2.

### MINUTES REVIEW AND APPROVAL

1. Approval of November 19, 2014 Regular Meeting Minutes.

*A motion was made by R. Desmaris and seconded by G. Bailey to approve the November 19, 2014 meeting minutes. The motion carried unanimously.*

### ACT ION ITEMS

2. **121-18-GR-14-ZBA (Hugh & Michele Hawkins)** Request by applicant for a variance from Article 11.2(1) reference made to Articles 11.3 (1) & (2) to build an 8 x 10 deck landing and stairs. Appeal to allow the issuance of a building permit on a private road, under RSA 674:41 on a 1.15+/- acre lot at 49 Acorn Point (Map 121, Lot 18) in the General Residential (GR) Zoning District. By: Stonewall Surveying; PO Box 458; Barrington, NH 03825

J. Pohopek represented the applicant. He explained that Mr. Hawkins had received a permit by notification from NHDES and did not realize that he still needed to receive a permit from the Town. Mr. Hawkins realized at the time of the building permit he would need to go for a Variance for encroachment into the 75' setback from the lake.

J. Pohopek explained that at the prior meeting the Board had suggested changes. The applicant had looked at different options. Mr. Pohopek expressed that a culvert would be an issue with movement of the deck. The point behind the reconstruction of the stairs was for safety. He expressed that Article 5.2.1 allowed

expansion for certain existing nonconforming structures. Mr. Pohopek believed the deck fell within this Article.

K. Forbes expressed that she did not believe Mr. Pohopek's interpretation was consistent with Article 5.2.1. J. Gajewski expressed that the ordinance was ambiguous.

K. Forbes explained that Mr. Pohopek should have the discussion on interpretation of the Zoning Ordinance with the Zoning Administrator if he believed they should not be there for a variance.

J. Pohopek expressed that this was also a financial burden to Mr. Hawkins. He had spent \$3,000 on a landing and stairs and an additional \$3,000 on surveying and application to the Board. If the variance was not granted Mr. Hawkins would have to move the deck to a more compliant location, which would change a \$3,000 project into a \$10,000 project which was undertaken initially for safety reasons. There was no malicious intent the applicant had started at the Building Department.

Mr. Pohopek then went to explain they had looked at relocating the deck but there was an issue with snow removal, safety and a culvert that would be interfered with. He believed there was justification for a variance.

K. Forbes asked for those in the public in favor to speak.

No one spoke.

K. Forbes asked for those opposed to speak.

No one spoke.

K. Forbes closed public comment.

R. Desmaris expressed they had asked for a plan at the prior meeting to be more conforming. The applicant had not changed anything.

D. Hatch expressed that the applicant had expressed he was going to come back and try and modify the location to be more conforming.

K. Forbes reviewed the conditions for a variance.

1. Special conditions exist such that literal enforcement of the Ordinance will result in unnecessary hardship to the applicant as defined under applicable law.

*The Board expressed that they had not heard any unnecessary hardship.*

2. Granting the variance would be consistent with the spirit of the Ordinance.

*The Board did not agree.*

3. Granting the variance will not result in diminution of surrounding property values.

*It was expressed that they did not believe it would diminish property values.*

4. Granting the variance would do substantial justice.

*The Board expressed "no".*

5. Granting the variance would do substantial justice.

*The Board expressed it would not.*

*A motion was made by R. Desmaris and seconded by G. Bailey to deny the application. The motion carried unanimously.*

3. **256-43-GR-14-ZBA APPEAL (Owner/Applicant-Stephen Jeffery)** Request by applicant for Appeal of Administrative Decision of the Code Enforcement Officer, John Huckins (RSA 676:5) Notice of Violation of the Zoning Ordinance Article 3.1.6 Site Plan Review Regulations on a 75 acre lot at 128 France Road (Map 256, Lot 43) in the General Residential (GR) Zoning District. By: Justin L. Pasay. Esq.; Donahue, Tucker & Ciandella, PLLC 111 Maplewood Avenue, Suite D; Portsmouth, NH 03801

J. Gajewski recused himself and G. Schmaltz sat for the application.

K. Forbes expressed the Board had been provided with further documentation and asked Mr. Pasay to go forward.

Justin Pasay expressed that both the Town and Mr. Jeffery agreed the use was permitted. The sole question was whether Mr. Jeffery needed a site plan review in 1983. One issue was that development meant constructing improvements on a track of land in 1983 and he had not proposed development on the land. Mr. Pasay acknowledged Mr. Nichols and John Huckins, Code Enforcement Officer had both submitted letters to the Board. Mr. Pasay discussed other properties exist in Town that had not gone through site review.

Mr. Pasay mentioned the property of Bruce Ricker, of 210 Young Road. Mr. Ricker was a cabinet maker and general contractor who operated a business out of his house. He appeared before the Planning Board in 1983, asking if he needed site review to construct a barn to support his commercial operation. The Planning Board determined he did not.

Coot Farm on Canaan Back Road had not received site plan review, they had been incorporated in 1983.

Union Lake Peach Farm, which was established in 1981, had not received site review.

The Maple Syrup Business on Route 9 had not come for site review. In the case of the maple sugaring business, syrup was collected offsite and brought in and processed at the Route 9 location. The operation brought more than 17,000 gallons of sap onto the site for processing. Mr. Pasay expressed that this was a more recent operation that had not come for site review.

Mr. Pasay explained that in the letter from Mr. Huckins it was expressed that site approval was sought for some sawmills. Mr. Huckins had accurately pointed out some of the issues which were discussed during site review. Mr. Pasay explained of the applications reviewed all called for development on the site; either a slab, structure or access road. Mr. Pasay believed these operations were significantly different from Mr. Jeffery's. The operations proposed were much larger than Mr. Jeffery.

Mr. Pasay expressed that if Mr. Jeffery's business was to change or expand it would require site review in the future.

Mr. Nichols had expressed in his letter that if this was grandfathered he did not object but the operation should go for site review.

Mr. Pasay expressed that Mr. Jeffery was being treated different, that pursuit of this issue by the Town would be considered discriminatory. He expressed that under case law the individual is specifically targeted or there is a systemic lack of enforcement or conformity of something that represents a policy of, "we are not going to enforce it". Mr. Pasay believed this was discriminatory enforcement.

K. Forbes asked at what point of expansion would Mr. Jeffery need to go for site review. What volume of logs would that entail?

Mr. Pasay expressed he was reticent to answer the question; he did not believe Mr. Jeffery's business would be changing.

K. Forbes sought clarification on the current operation.

Mr. Jeffery explained he grossed \$12,000 in 2013 and in 2014 it might be closer to \$20,000, but it might of included inventory that he had made last year.

K. Forbes asked the value in 2012.

Mr. Jeffery responded that he did not know. He expressed that his operation was pretty much a hand operation and they were speaking 20 to 40 logs per year and they might be 8 foot logs.

K. Forbes asked how many days out of the month Mr. Jeffery operated his sawmill.

Mr. Jeffery explained the process would take 10 to 20 days per year if he was just doing clapboards. If he was sawing lumber it would take less time.

K. Forbes asked if Mr. Jeffery would operate for an eight hour day.

Mr. Jeffery explained that the sawmill might only operate for five hours. He expressed he was 64 years old and had arthritis.

K. Forbes expressed she was trying to get a clear understanding of what his operation was, because as Mr. Pasay had stated at some point site review would be triggered if his operation was to expand. The Board needed to have an understanding of what Mr. Jeffery was doing now.

K. Forbes summarized that Mr. Jeffery processed 20 to 40 logs a day during 10 to 20 days per year. She surmised that the work was done mostly in the warmer months.

Mr. Jeffery expressed it was not practical to operate in the winter when there was a lot of snow.

Mr. Jeffery explained he was the only employee. He got his logs in the winter when they are dormant and needed to process them before the bugs become an issue.

K. Forbes asked what the ratio was of logs from onsite verse those that Mr. Jeffery brought in from off-site.

Mr. Jeffery expressed that the ratio varied considerably depending on the amount of commercial timber harvests that he did. He currently had a timber harvest scheduled. Timber harvests may only occur every ten years.

K. Forbes asked if the harvest was in addition to what he received from off-site.

Mr. Jeffery expressed that it depended upon what was available to him. There were years when he did not need to bring in any logs. It was not something that could be predicted.

K. Forbes asked how often a truck brought logs to the site from off site.

Mr. Jeffery explained that a truck may deliver logs to his site once a year.

K. Forbes asked how often a truck would take logs, milled lumber, or cord wood off Mr. Jeffery's property.

Mr. Jeffery said that 20 to 30 trucks would leave the site for the current cut, which is scheduled.

K. Forbes asked if the cut would occur in 2014.

Mr. Jeffery explained that the cut may occur in 2015 due to the muddy conditions which currently existed.

K. Forbes asked if there would be any additional trucks in addition to the 20 to 30.

Mr. Jeffery explained that last year six customers came to the property and pick up and 3 customers he delivered to. He clarified that they may have come to the adjacent lot. In addition hundreds of people came to his property each year to go swimming and hiking.

G. Schmaltz asked how large Mr. Jeffery's truck was that was used for delivery.

Mr. Jeffery explained it was a pick-up truck, which he could put approximately 3000 linier feet of clapboards in.

G. Bailey asked Mr. Pasay how many other properties that he mentioned had conservation easements on them.

Mr. Pasay said that he did not look for that detail. He had provided language that agriculture and forestry were allowed. He was not sure if any of the properties were certified tree farms or had conservation easements on them.

G. Bailey expressed that the language in the easement on Mr. Jeffery's property was very specific. It spoke to planting and harvesting Christmas trees. The easement discussed protection of the water.

Mr. Pasay expressed that they had submitted language in the original submittal which was much broader than what Mr. Bailey had expressed. The general point of the conservation easement was to restrict development. It specifically allowed Mr. Jeffery to harvest wood.

Mr. Jeffery expressed that the certified tree farm had to be managed in a specific way. The property was inspected almost yearly by the Forest Society and the Tree Farm Committee. He expressed he did not cut down trees just to use in his saw mill and produce products that there was a silviculture purpose to his activities. He did do timber harvests, but it was not the type of activity that was done every year.

G. Bailey asked about the amendment to the easement in 1991.

Mr. Jeffery explained that the original easement included the property under his house, so he could do virtually nothing around his house without speaking with the Forest Society.

K. Forbes asked if there was anyone to speak in opposition.

Jae Whitelaw representing the Town expressed that the question had been whether site plan review was required in 1983 and that at the last meeting her feeling seemed to be the Board felt site plan approval was necessary, but the Board wanted more information on what may have happened in 1983. A lot of work had been done by Mr. Jeffery, Mr. Pasay, and the staff in the Town office to research what may have happened back in 1983. Ms. Whitelaw expressed the Zoning Ordinance said what it said and the job of the Zoning Board was to interpret the ordinance and make decisions on what they believe it said. If the Board believed site plan review was necessary in 1983, what Mr. Jeffery had said was that the Ordinance had not been acted upon in that way, which enabled the Board to enact a doctrine, called Systematic Nonenforcement, which meant that there was a pattern of behavior that prevents enforcement from being taken. The reasons for follow through were stated in the letter submitted by John Huckins. If you know what the zoning ordinance is there are a lot of violations most unintentional which exist, both large and small. The determination whether to pursue enforcement was a discretionary judgment by the Town. The Town has to make decisions on which violations to enforce just as the police do and how much of their limited resources to expend. The policy had been that if someone filed a written complaint the Code Enforcement Officer would make a determination whether there had been a violation and whether to follow through. There had been no factual determination that Mr. Huckins was discriminatory in the action which he took.

Ms. Whitelaw explained how she believed enforcement was done in the Town. She had been associated with the Town for a number of years, John Huckins had been the Code Enforcement officer for about a year and one half. The unwritten but very clear policy had been that if someone filed a written complaint that someone may be operating in violation of the Zoning Ordinance the CEO would do an investigation and determine whether he feels there has been a violation and then act accordingly. There may be times that the CEO would determine that the activities are not commercial in nature and not worth using the Town's resources to go after the party.

Ms. Whitelaw expressed that in this instance there was a written complaint, in this instance it may have been more distressing to some people because there may have been more behind the complaint, than basic land use concerns, it was a different issue from whether the Town pursued the complaint for discriminatory reasons. There had been no factual evidence that Mr. Huckins had taken action in an effort to discriminate, whatever the basis of the written complaint had been.

Ms. Whitelaw expressed when looking back was the decision based upon a decision not to enforce a violation or was there no knowledge of a violation. In looking back it would have been hoped that in the cases where permits were given that it would have been checked for compliance. Ms. Whitelaw believed it would be helpful information to know what the enforcement policy had been in the past.

D. Hatch expressed that the policy has been around for quite some time and the complainer would have to put the complaint in writing. The reason the policy had been put into effect was to prevent neighborhood squabbles. The complainer had to present their complaint in writing with a signature and the Code Enforcement Officer would then have to deem the complaint to be valid. Ms. Hatch expressed there was no question that there were violations all over town, but that was not the way things have been handled, there had to be a written complaint.

Ms. Whitelaw expressed that when you looked at systematic nonenforcement you had to look at whether there was a pattern of nonenforcement, in other words an intention to not enforce.

Ms. Whitelaw explained that in a recent case; Dembiak vs Holderness the court addressed whether the ZBA had equitable powers. The Supreme Court did not believe the ZBA had any equitable powers, that a regulation cannot be waived by the ZBA just because they do not think it was fair, the ZBA did not have that authority.

Ms. Whitelaw expressed that there were no facts presented that Mr. Jeffery had been signaled out by the Town.

K. Forbes expressed the key question was whether site plan review was required according to the 1980 regulations.

R. Desmaris expressed that he had asked whether farms required site review.

Ms. Whitelaw explained, although she did not like the answer, it had been yes.

R. Desmaris expressed that they had been presented evidence of many farms, which had not gone through site review. He believed forestry was allowed.

Ms. Whitelaw expressed that they agree the use was allowed, but under the Zoning Ordinance site review was required.

Mr. Pasay expressed that the use was not an issue it was whether site review was required. He expressed that under section 5 definitions, development was the construction of improvements on a tract or tracts of land. It did not define improvements; we would assume they were permanent structures that add value to the land. The RSA's enabling the Planning Board to regulate nonresidential uses was years later. The article in 1983 was regulation of the construction of improvements. The main argument by their client was that site review was not required; the argument that it was unfair was secondary.

Jae Whitelaw expressed that the issue was whether site review needed to be done and whether some type of improvements needed to be constructed under the definition and the testimony had been that there were no improvements which had been done. The Board needed to first decide whether site approval had needed to be done and if it had, then you would get to the equitable issue.

K. Forbes expressed that the language was a little ambiguous. Having looked at the language and based upon the four corners of the language was not able to determine whether site review was required, we then went to the history and find where it was not interpreted to require small enterprises to acquire site plan review.

Ms. Whitelaw expressed that if you found the language ambiguous then you are looking at administrative gloss and then you were looking at the history.

K. Forbes asked for any approvals which did not include construction of some type.

K. Forbes read through minutes of the A'lone approval. The A'Lone approval had been in 2000.

Ms. Whitelaw asked if all the activities in exhibit 1 were activities after 1981.

M. Gasses asked to clarify that the list in exhibit one was a response to a request and list was provided by Mr. Jeffery. All staff had done was check to see if there was a site plan review or not.

Ms. Whitelaw expressed that there was no way of determining from the list when the activities were initiated.

Ms. Whitelaw expressed in exhibit two that the Board determined Ricker was not changing his type of use on the property and the Board did not feel site review was necessary.

Ms. Whitelaw expressed for Coot Farm, it was incorporated in 1983 she did not know when it was begun or if it was operational before it was incorporated.

Mr. Pasay expressed that Mr. Jeffery explained to him that the Fogg Farm Site Plan does not discuss the portable shingle mill that was on site that was not part of the site plan approval, which was a very similar operation to what Mr. Jeffery does with his portable sawmill and there was no independent site review for that.

Jae Whitelaw expressed that what they were really talking about was decisions to enforce. If something is in the garage and comes out every once in a while then somebody had to see it being used and know that it



needed to come for review in order to even report the issue. She believed the Board had the facts and the arguments from both parties.

Kathleen Seymour of France Road expressed Mr. Jeffery had an easement on his property and it said no development and she wanted to remind the Board that multiple truckloads of dirty dirt from the side of the road following spring road cleaning was brought onto the property. She believed that although she did not know where the material was on Mr. Jeffery's property that it was some kind of development of the property.

K. Forbes expressed that the issue would be one to raise with the Society for the Protection of Forests, since they held the easement.

Chris Dundorf of McDaniel Shore drive expressed he shared over 900' of property line with Mr. Jeffery and it was a very small mill. Although the business was a good part of Mr. Jeffery's income it was a very small mill. He was quite happy that the mill was there. The mill was about 20' long and on wheels. In addition, Mr. Jeffery opens his property for people to walk down to the lake.

K. Forbes closed the hearing portion.

G. Schmaltz expressed that enforcement was arbitrary, that if someone complained then there was a reaction. He had been a police officer for 25 1/2 years, you did not go looking for calls, you waited until they came in. From the list provided no review was necessary at the time.

K. Forbes expressed that it was a question of how the ordinance was being interpreted at the time.

R. Desmaris expressed that site review had been required with development, that site review did not take place without development. He believed no site review was required.

G. Schmaltz agreed with R. Desmaris.

D. Hatch believed if it would clean up a situation it would be worth having site review. She expressed many items on the list provided were no comparison to what they were looking at, and was not of great value to support or deny.

D. Hatch expressed that Jae Whitelaw was correct in the case of Mr. Ricker, he had moved from his basement to his barn, he had not changed what he was doing.

R. Desmaris expressed that farming did not get site review years ago, and forestry was in the same section of the ordinance. He believed after thirty years unless they had a clear case it would be hard to require review.

D. Hatch expressed she did not remember ever doing a site review for farming; a slaughter house would be different. She had goats for 50 years and couldn't image doing a site review for farm animals, if it was a dairy or beef critters it would be different. If it was questionable, she would clean it up.

G. Bailey believed that nothing was required back in 1983. He did express that complaints were addressed when submitted and he believed that was what had occurred here. He had wished the individual who had looked at it had gone further before saying site plan review was required.

K. Forbes expressed that the ordinance was ambiguous and it was always difficult to look at something today and try and determine how it was interpreted 30 years ago. The ordinance was not clear when there was no development.

K. Forbes expressed that the ordinance was very ambiguous. The Board had gone over and over the Ordinance at the last meeting and now they had evidence that when there was not a structure review was not required.

*A motion was made by R. Desmaris and seconded by G. Bailey to grant the appeal. The motion carried unanimously.*

- 4. 121-40-GR-14-ZBA (Owner: David Newhall)** Request by applicant for a variance from Article 4, Section 4.1.1, Table 2 to demolish both structures and allow the proposed house and garage to be located within the front and side setbacks. Also, from Article 11.2 structures constructed within 75' of the shoreline from Swains Lake located on a .22 acre site on Rosemary Lane (Map 121, Lot 40) in the General Residential (GR) Zoning District. By: Christopher R, Berry-President, Berry Surveying & Engineering; 335 Second Crown Point Road; Barrington, NH 03825

Christopher Berry represented the applicant. Mr. Berry described the proposed new buildings. The deck would have pervious surface underneath it. They were asking for encroachment closer to the lake to allow for the deck. They were asking that the garage be widened to 16'. The applicant would need a Shoreland permit and a septic permit. The 3' stairs and platform would not be needed.

K. Forbes expressed a new plan would be needed showing measurements from the overhang and without the stairs.

G. Gajewski expressed that the Board does not usually support decks on the front closer to the water.

K. Forbes expressed that they did not want the deck to come any closer than 31.9'.

K. Forbes took public comment.

Eugene Russo expressed concern with where the septic would be located.

*A motion was made by R. Desmaris and seconded by G. Bailey to continue the application to January 21, 2015. The motion carried unanimously*

*A motion was made by R. Desmaris and seconded by G. Bailey to adjourn at 9:00 pm. The motion carried unanimously*

Respectfully submitted,

Marcia J. Gasses  
Town Planner & Land Use Administrator