

**BOARD OF ZONING APPEALS**  
**TUESDAY, APRIL, 25, 2010**  
These minutes are not verbatim

Members absent Fred Jay Meyer, Jim Thibodeau  
Meeting opens 6:30pm.

Minutes for January and February have been approved.

Mr. Berry reserves time for issues of the March minutes at the end of the meeting.

Mr. Farris said the application is complete. The Kurlanski application is here on whether the board has jurisdiction to hear the appeal.

1. **Claudia King & Lindsey Tweed**-are requesting Conditional Use approval under Sections 6.11 & 6.2b to renovate their Single Family Dwelling at 160 Woodville Rd. Parcel R03-033, zoned "FF/SZ".

Mr. Keeler recuses himself.

Mr. Audet is acting chair.

Mr. Phil Kaplan is representing the applicant and presents the plans. Everything that involves this project is net zero. They are reducing the volume and square footage by 15%.

Mr. Kaplan reviews the plans with the board.

Mr. Audet opens comment to public comment. Public comment closed.

Mr. Farris said the application is excellent and meets all the criteria.

Mr. Berry motions to approve the application.

Mr. Russell seconds the motion.

All in favor. Vote is 4- 0 in favor of the application.

2. **Kathleen and Zbigniew Kurlanski** - Are requesting a hearing to appeal a decision of the Code Enforcement Officer regarding parking in an unpaved area outside the parking lot at the Portland Yacht Club, at 40 Old Powerhouse Road, Parcel #U16-083, zoned "RA/SZ".

Mr. Keeler announces why the Kurlanski and the Portland Yacht Club are here tonight to see if the board has jurisdiction under the Falmouth ordinances and under state statutes to hear the appeal. He says this is the first time our jurisdiction has been challenged. It is a legal issue. The board has engaged the service of Michael Pearce to assist the board as needed.

Mr. Russell recuses himself. He has submitted a letter stating why.

Mr. Keeler informs the public when public comment is opened, questions will be only for whether the Board has jurisdiction to hear this application.

Mr. Michael Pearce states the Zoning Board does not have inherent authority to decide questions and in this appeal it has to be conferred on. The starting point is to look at the state statute which provides the source of that conferred power. Statute Section 2691 of Title 30 a. states no board may exert jurisdiction over any matter unless the municipality has by charter or ordinance specified two things. One, the precise matter that may be appealed to the board and two, the official whose action or notation may be appealed to the board.

You have to ascertain whether there is an ordinance provision provides a precise matter to be appealed and officials to be appealed. Falmouth has an appeal section in the ordinance under 8.2. He reads this section. The board's job tonight is to look at 8.2 and see if this appeal falls under this section.

Mr. Berry questions section 8.2 and states his review to include 8.8 a. How does that interact with 8.2?

Mr. Pearce answered that Section 8.8 a supplements Section 8.2.

Mr. David Lourie represents the Portland Yacht Club. With him are Gary Vogel and Chuck Sanders members of the yacht club. He states he is focusing on the language in Section 8.2 It is their position that it doesn't confer power on the Falmouth Zoning Board to decide a decision of the CEO not to prosecute the PYC.

Mr. Lourie also asked the Board to look at the town charter which vests enforcement authority in the Town Manager. Mr. Lourie states that if you do find jurisdiction it's only advisory. You can only tell the Town Manager or the CEO what the board thinks, but you can't compel them to take an action.

The other ordinance is 10.5. Mr. Lourie reads ordinance. He states after the building inspector concludes there is no violation, he wouldn't have to cite them. If the building inspector concluded that there is a violation then the issue is noted. The PYC could be here tonight to appeal a decision on its merits. The question is if someone feels the CEO erred in not enforcing the ordinance, can they appeal that non enforcement decision to the board? Appeals can be made for enforcement of the ordinances.

Section 2691 states the board has vested with precise subject matter jurisdiction. The building inspector concluded after investigation that there was no violation and there is no action for the board to look at. Mr Lourie doesn't think the ordinance can allow anyone to take an appeal from the refusal of the CEO to take enforcement action. Mr. Lourie reads Section 2691. The ordinance has not said that non action can be appealed. Mr. Lourie states that Section 2691 forbids you (the Board) from exercising jurisdiction. It only speaks of enforcement, not non action. If the board decides they do have jurisdiction it is only advisory to the CEO or the Town Manager.

Mr. Berry asked what effect does a letter from the CEO to the applicant informing them that they have a right of appeal or has the town estopped from telling them they don't?

Mr. Lourie said he can think of only two cases where the courts recognized estoppels.

He reviews the cases.

The area of estoppels against municipalities is limited and almost never successful. This board can't be given jurisdiction by estoppel if you don't have jurisdiction under the statute. The CEO can't create jurisdiction by a letter.

Mr. Berry states there is a letter from the CEO back in 1999. Then he asked if this board lacks the authority to hear the complaint of a citizen that the CEO is not enforcing a prior order. What jurisdiction would these citizens have?

Mr. Lourie answered he didn't think they would have any redress. He reviews a case from his town.

Mr. Keeler states Mr. Lourie talked about prosecutorial discretion and about Mr. Farris claiming no violation. Mr. Keeler asked Mr. Lourie to address the difference between finding no violation and not prosecuting and find a violation by making a decision not to prosecute. Is one prosecutable and not the other?

Mr. Lourie answered the first one may or may be prosecutorial discretion. It doesn't make a difference with the jurisdiction of this board. It is still non action, non-enforcement. Your ordinance states only enforcement decisions can be appealed. It doesn't say non-actions can be appealed. Section 8.2 isn't broad enough to cover decisions of non-enforcement of the CEO.

Mr. Keeler asked Mr. Lourie if he thinks 8.2 should be interpreted to mean that this board does not have jurisdiction because it is non-action?

Mr. Lourie answered yes. The board's opinion would only be advisory and no one could appeal this to court. The board shouldn't take jurisdiction even if you think the board has it. It involves a lot of law and facts over a 50 year period. The fact is a non-action or non-enforcement of the ordinance is not something appealable under section 2691.

Mr. Keeler asked Mr. Lourie if he was making a distinction between the CEO deciding not to prosecute because he has made a determination there's not a violation vs. determining that there is a violation and excising his discretion not to prosecute?

Mr. Lourie answered no he was only making the argument for advisory charter for any decision the board does render in this case.

Mr. Keeler asked if a decision is made that there is no violation is that not a decision?

Mr. Lourie answered not for the purposes of 2691. It is not specified under 8.2.

Mr. Keeler states that what if a CEO clearly misinterprets the ordinances are you saying the neighbors would have no path for redress?

Mr. Lourie answers they write to councilors or the manager.

Mr. Keeler reviews the cases submitted and asked Mr. Lourie if the board finds jurisdiction is the boards roll only going to be advisory?

Mr. Lourie answered that it will only be advisory because the charter states you have no power to make the CEO or the Town Manager take action.

Mr. Keeler refers to section 10.7 which states that the CEO shall refer the matter to the Town Manager for appropriate action.

Mr. Lourie refers to the charter section 302 the Town Manager is the chief administrator for the town. Under 302.5 his duties are to see all laws and ordinances are faithfully executed. The charter vests this power to the Town Manager in the end, and then he refers to Section 10.7. In this case there was no notice of demand. The CEO concluded there was no violation.

Mr. Keeler states the CEO under 10.5 is to make the investigation. If the CEO makes a decision that there is no violation and the board determines that he is wrong, the CEO would then send it to the Town Manager. If the Town Manager decides not to prosecute, then there is nothing that the board can do. The question is whether we should be reviewing actions of the CEO?

Mr. Lourie answered the CEO can change his mind. The board has no control over it.

Mr. Given states that Mr. Lourie's interpretation would make everything we do advisory.

Mr. Given looks at the letter from Aug. 6, 2009. The CEO is reversing the decision of a

previous CEO. So it is a form of enforcement. This is an action. He has reversed a decision.

Mr. Lourie states enforcement necessarily doesn't include non enforcement. If there was a violation the PYC would be able to appeal it to this board. His decision not to enforce the ordinance is not reviewable by the board because the ordinances don't say you have jurisdiction over non enforcement. He refers to 2691.

Mr. Berry states that in the ordinance says that appeals shall lie from decisions it doesn't differentiate between enforcement and non enforcement. It seems as a logical conclusion of this argument is that if the CEO says yes to an applicant or complainant then action lies. If he says no then the board has no roll in the process.

Mr. Lourie states that is correct under the state statute. If you do make a decision in favor of the Kurlanskis' and that convinces the CEO or Town Manager to take this case forward and prosecute the PYC, none of the evidence that was heard here can be used in court *nor does your decision?* The whole thing will have to be done over and the town will have the burden of showing a violation.

Mr. Levis is representing the Kurlanskis'. This is a simple question that has been turned into more by referencing statutes. The ordinances submitted do read differently. He reads the Brunswick ordinance. In this town they didn't want the Board of Appeals to be involved in enforcement decisions. You could throw the ordinance away in this town. You have the ability to modify or reverse the CEO's decision. That is not an advisory function.

Mr. Lourie thinks your only advisory capacity and in clear language you have much more power under the ordinance that exists in this town. Secondly, the CEO can't do what he wants. Under 10.5 it is mandatory. After investigation the building inspector shall give written notice of violation, shall demand the violation be corrected, he has no authority to ignore the ordinance. He can interpret what it means but the example used earlier, if he finds an ordinance violation and ignore it is beyond the scope of what he permitted to do.

If this were the case we could throw the ordinance away. He must enforce the ordinance.

The decision by Mr. Farris refers to the Paul Griesbach decision back in 1999. Is it binding, final and vested rights in all parties, or is it something that is not binding, final and vested in all parties. The fact that no appeal was taken means nothing. His decision is final and consequently can not be changed at any point in the future. It was not appealed.

The decision was made in 1999 and it wasn't appealed. Mr. Griesbach states in his letter, you have violated the ordinance with respect to parking. This is a nonconforming use. This would expand the nonconforming use. You need to go to planning for approval if you wanted to expand it. The PYC didn't do this.

The two things that are clear is it was a decision by the CEO, Mr. Griesbach's final decision is not advisory. Second, is the use grandfathered? If so, it should have been appealed when Mr. Farris took the position it was grandfathered. There has been a decision not to enforce because there has been an interpretation there is no violation. Mr. Lourie states the 1999 letter does not meet the standards for a binding decision to be contested later on.

Mr. Keeler opens public comment. There was no public comment and public comment was closed.

Mr. Berry states for the record he has read all materials. He finds the yacht clubs arguments unpersuasive. He states we are here to volunteer to hear issues involving one of the fundamental rights we have, we are talking land. Any time the CEO makes a decision, there is one party who enjoys the benefit of that decision and one is the aggrieved party. The courts have offered those aggrieved a minimal opportunity to be heard. A determination was made. *Our opinions are advisory.* ??? The only way this would end up in court is if the PYC disregarded an order from the CEO. To suggest our opinion would only be advisory and have no affect because they would have to go into court and retry this matter is not persuasive for him.

There are provisions and if the town decides this was a difficult case to prove, the Kurlanskis' could ask for a letter of authorization to pursue the matter independently. He finds the PYC to persuade the board that they do not have jurisdiction was not successful.

Mr. Audet refers to 8.2 and asks Mr. Pearce about the lack of non enforcement? Mr. Pearce states he thinks it is up to the board. He used Mr. Berry's example that he focused on the words order, requirements, decision or determination made by the building inspector in connection with Mr. Farris' job as CEO.

This is how Mr. Pearce construed this language. Enforcement of the ordinance is everything the CEO does. It is up to the board to determine what makes sense.

Mr. Given states he goes back to 8.2 the decision of the building inspector. The authority a decision was made and is not convinced by the PYC regarding jurisdiction. Mr. Keeler states that we have the state statute and we have Section 8.2. We have the authority to hear appeals. The enforcement of ordinances covers a yes vote and a no vote. He reads Section 8.2 to cover a decision by the building inspector in connection with his job enforcing and interpreting the ordinance. He is also un-persuaded by the argument that we do not have jurisdiction.

Mr. Berry motions to formalize a determination by the board that there is jurisdiction to hear the full appeal of the Kurlanskis' as originally filed Sept 1, 2009 and re-filed April 13, 2010 with supplemental materials.

Mr. Given seconds the motion.

Vote is 4 to1 in favor. The board has jurisdiction to hear this appeal. This will be held over to the next meeting.

Mr. Berry states what we will actually hear at the next meeting is the appeal.

Mr. Keeler states we should characterize this as a hearing that has started tonight and is held over until the next meeting. There is no clock ticking. This is the beginning on this appeal and will continue at the next board meeting.

Mr. Levis informed the board the Kurlanskis will be away in May.

Mr. Keeler states there will be several levels to this appeal; one being the 1999 letter from Paul Griesbach. What impact this will have on any discussions may depend on whether it was a decision. Could it have been appealed?

The next level of discussion is whether the use is grandfathered. Do we want witnesses; should we allow witnesses?

Mr. Berry states we have only reached the jurisdiction issue.

Mr. Farris added the first step would be his defense of his decision and go on from there.

Mr. Audet would like to know if they could subpoena Paul Griesbach.

Mr. Farris states personally he did not think it's necessary under Title 30A, Section 4452, not bound by prior decision of a CEO.

Mr. Audet states a long history and for us to look back.

Mr. Pearce states the board may receive any oral or documentations as evidence but shall provide as a matter of policy for the exclusion of irrelevant material. Every party has the right to present the parties case or defense by oral or documentations evidence submit rebuttal evidence, conduct cross examination as required for full and true disclosure of the fact . You can't cross examine a witness that isn't here.

Mr. Keeler references the letter from Paul Griesbach in 1999. There are positions taken on both sides regarding the letter. We would like to get the party views and the impact of the decision. We have to get to this first.

Mr. Berry understands the process the Kurlanskis have appealed Mr. Farris' decision. The PYC is the interested public they are not negatively impacted. They don't carry the right to cross examine a witness.

Mr. Audet do we hold a special meeting?

Mr. Keeler states the next meeting would be on the impact of the 1999 letter.

Mr. Berry we can hear this at the next meeting if we stick with the regular agenda and address the letter.

The board decides to keep the regular agenda.

Mr. Keeler states the board should address the 1999 letter and have counsel.

Mr. Levis would like to consult with Mr. Griesbach.

Mr. Audet would like to have an earlier start time.

Mr. Keeler said the issue could be decided that the 1999 letter would end it.

Mr. Berry reviews the March 23 meeting; there was an issue with Mr. Woods, Tidesmart application.

Meeting adjourned 8:55pm.

Mr. Berry read a newspaper article stating Mr. Woods would employ 100 people. The board questioned Mr. Woods at the March 2010 meeting asking him about the number of people he would be employing. He answered 25-30 people.

Mr. Farris looked into the issue with planning. Please see Mr. Farris' response below:

After last night's meeting I spoke with Ethan Croce, Sr. Planner about the Steve Woods site. He had also seen the newspaper article and felt that the higher number of employees at that site was in reference to the future expansion possibilities, as required for site plan approval on site over 5 acres. Any additional expansion will require at least Planning Board approval and perhaps Board of Zoning Appeals approval if there is expansion of the current facility or a new Conditional Use request. I have left messages for both the landscape architect and engineer on the project as the owner/developer is out of state at this time.

**Note-** PLEASE SEE THE ATTACHED: regarding Other Legal Issues Related to Permits from Al Farris