MINUTES OF THE MEETING
LEE ZONING BOARD OF ADJUSTMENT
June 26, 2013
7:00 PM

MEMBERS PRESENT: Tobin Farwell, Acting Chairman; John A. Hutton, III; Philip Sanborn; Frank Reinhold, Alternate; and Peter Hoyt, Alternate.

OTHER MEMBERS PRESENT BUT NO INPUT: Jim Banks; David Allen; Craig Williams, Alternate.

OTHERS PRESENT: Attorney Sharon Somers, Donahue, Tucker & Ciandella; Caren Rossi, Planning/Zoning Admin.; Bill Humm; Peter MacDonald; James P. Daley, Jr.; and James P. Daley, III.

Tobin Farwell, Acting Chairman opened up the meeting at 7:00. He explained that the Town has new counsel, Donahue, Tucker & Ciandella, Sharon Somers. The Board had a meeting prior to this meeting to discuss general procedures for the zoning board to follow.

John Hutton clerked and read the notice and abutters into the record.

The Town of Lee, New Hampshire Zoning Board of Adjustment will conduct a public hearing on Wednesday, June 26, 2013 beginning at 7:00 P.M. in the first floor meeting room of the Lee Public Safety Complex located at 20 George Bennett Road. The Board will consider a motion for rehearing filed by Peter MacDonald, representative, the Veteran Resort-Chapel, relating to a Variance request that was denied, as well as an Appeal to an Administrative decision that was also denied. The aforementioned hearing was on May 29, 2013. Although this is a public meeting, the Board will not take any input from the public while deliberating on this matter.

Attorney Somers explained for the Board and the members of the public that she will talk about a few things. 1.) What is involved in a rehearing as this board doesn't do many of them. 2.) Summarize the rehearing request presented to provide a framework to tackle this. 3.) Talk about the RLUIPA statute and how that bears upon the Board's job here. 4.) What the options are as part of the deliberation.

What a rehearing request is all about. Once a ZBA has made a decision, a person, and the applicants in this case, or abutters have the option within 30-days following the decision to file a motion to rehear. The basis for the motion is one of two things; either there is new evidence which was unavailable at the time of the original proceeding or a claim that the decision of the Board was unreasonable or unlawful. These are the two classifications for a motion to rehear. Once this motion is submitted in a timely basis, the ZBA has 30-days in which to decide whether they will grant or deny the motion. If the Board grants the motion to rehear, then a public hearing is then set up by the Board. Abutters get noticed again; at this subsequent public hearing basically the Board starts all over from scratch. The

applicant will then make a presentation again, all of the evidence is resubmitted and the Board makes another decision. For purposes of deciding whether or not to grant the rehearing, that is not a public hearing. There is no public participation, the Board takes the written request for the rehearing and discusses and deliberates amongst themselves and determines. a.) If there is a claim that there is new evidence that was unavailable, does the Board agree to it? b.) If the claim is that the decision is unreasonable or unlawful, does the Board agree to this? The general idea behind the whole rehearing process is to not admit any error, but to simply allow the Board to try to correct any potential errors. This gives the Board a second chance to look at something in an effort to try to avoid the matter going to court.

Attorney Somers framed/paraphrased the request for the motion to rehear. (In file)

The contention is that a Board of Adjustment can grant a variance without finding hardship where there is a recognized physical disability. This is referenced as homeless and disabled U.S. Military Veterans living at the property. The motion indicates that it is the Chapel's belief that using compost toilets commonly known as "Crapper" in county, is a way to treat various conditions or disabilities. The American With Disabilities Act (ADA) clearly protects the disabled veteran and cannot be ignored as the Lee ZBA has done in this case. This is related to the use of the compost toilets, along with the Chapel's belief.

There are a number of other statements made on the first page including the fact that the Lee Building Inspector has improperly used government authority to stop the construction as well as various other statements.

The applicant states on the second page that there is no new evidence. This removes this item from consideration. Then it is stated that mistakes have been made: the ZBA didn't correct government wrongs that would have kept ~~eping~~ the BOSs control in- ~~control~~ ~~in~~tacked of the Lee Residents.; the ZBA ignored U.S. Title 42 and discriminates against the VRC; they ignored the American with Disabilities Act to stop the religious belief that the Crapper may help the disabled U.S. military veterans; the ZBA chose to ignore that the Lee Building Inspector misused the power of his office to mislead and delay at great expense, the efforts of the VRC. The ZBA chose to ignore the letter of the Lee Planning Board member asking for penalties and fines. The Lee ZBA chose to ignore the Lee Building Inspector's letter reaffirming the demands to get art removed as well as various other allegations about the Lee Building Inspector's actions. The Lee Site Review Committee used delays and expense to harm the VRC. The Lee Building Inspector misrepresented laws and rules at the VRC hearing. The Chairman of the ZBA stated the Board would ignore RLUIPA and ADA and that Attorney Somers stated they should do this. The ZBA chose to ignore other lots on the same body of water, Wheelwright Pond, which have recently altered or constructed wells, septic systems and wetlands. Discriminating to keep a religious chapel whose sole purpose is to help homeless U.S. Military Veterans to have a better life is a wrong that can never be tolerated. In conclusion, on the last page, the allegation is the Town of Lee (missing words) that it would be clear in any reasonable person's mind that the Town has violated and continues to violate the Constitution and the N.H. Constitution to intentionally harm the U.S. Military Combat Veteran.

Attorney Somers then explained the Federal Statute RLUIPA. This is a statute that had a couple of predecessors and came about in the early 2000's. The original purpose was to try to balance local land use control against the impact of those controls on the free exercise of religion. To try to create framework or structure and to balance those two objectives are something that we all strive for. One is appropriate land use controls, zoning regulations, planning and free exercise of religion. What the statute does is that it prohibits a government from imposing or implementing certain land use regulations relative to religious assemblies or institutions. It does so in a couple different ways: 1.) Looking at the regulation to see if it is facially neutral. Is the land use regulation going to be targeted towards specifically a religious institution as opposed to the regular population? 2.) Will it have a discriminatory impact? A regulation on its face is neutral and applies to everybody but for some reason it has an impact which is discriminatory against some type of religion.

The rule is that there can be no imposition of land use regulations on religious exercise of a person, including religious assembly or institution in a manner in which it has a substantial burden on those, unless that regulation is in furtherance of a compelling governmental interest, and that regulation is implemented in the least restrictive means possible.

Attorney Somers stated to get to this conclusion, the first question that needs to be asked is whether or not the point of discussion is in fact a religion and is this a religious exercise. The burden to show this is on the person who is making the allegation. That question is something that ultimately is going to be a question of law. She couldn't find any case law that shows you have an obligation to make a finding on that. She does find case law, from Virginia that talks about the RLUIPA claim has threshold elements that the issue/activity that you're talking about be a religious exercise. The institution needs to be a religious exercise before you go any further and having a discussion about this statute. She stated that if this statute was going to have any meaning, there is an obligation on the part of the applicant to prove to somebody that there is in fact a religion we are talking about and a religious exercise. If this is shown, then a burden does shift, in this instance to the Town, to show that there is a compelling interest; it is the least restrictive means possible. She then explained that there is no definition of this in the statute, it has however been explained in case law to mean an interest of the highest order. She provided a few examples. A case in Michigan that involved septic tank sizing requirements that involved a group of Amish people that objected to those. The court in this instance found that the ordinance that regulated the sizing, furthered a compelling governmental interest, which was the safety, health and welfare of the community, and the Amish themselves and it was narrowly tabled to this interest. It talked about the fact that grey water disposal is still the disposal of bacteria and other contaminates and there was compelling governmental issue to control the discharge of bacteria virus and other contaminates in the ground water and waterways of this particular county. The other example is a case from 1980 in Westmoreland, N.H. Again, Amish Community. In this instance, the Town cannot prohibit compost toilets. The reasoning that was given was the state allowed a compost toilet, unlike here. And the Town was unable to indicate there was public harm with the use of compost toilets. For this reason, the Supreme Court in 1980 said there was no basis to preclude the compost toilets and some respect need to be shown for the lifestyle of the Amish, even though it's

unusual and a simpler lifestyle than most people would choose. She feels it is important to note the factual differences between this case and the case we are talking about here. If you look at the N.H. case law on this topic and some of the discussion as to what a compelling interest is all about, you'll be better served going forward and talking about this particular statute. The other element of the statute is, even if there is a compelling interest, the compelling interest has to be implemented in the least restrictive way possible. She stated she feels these are the key elements to this statute. "In the context of what we are talking about here tonight and to decide whether or not to grant the rehearing. It seems to me that you have two essential courses of action to take. The claim for the rehearing is the Board acted unreasonably or unlawfully in making their decision. You can decide tonight that you don't feel you made a mistake and that you want to uphold the decision. It is entirely possible if you do this that the VRC may choose to appeal this decision to the N.H. Superior Court, possibly to the Supreme Court, or they may decide to bring an action in Federal Court. Or they may do both in some combination. If a rehearing is granted, you would then have an opportunity to have further discussion and a presentation will be made all over again on all of the evidence. In addition to all of the things previously discussed, you would also have an opportunity to talk about compelling interest." She noted that in the original hearing you did make a very brief finding of compelling interest. "A rehearing would allow you the opportunity to have a greater level of detail/discussion of whether there is or is not compelling interest and to be more elaborate in creating a record for this purpose. It would also enable you to ask additional questions of the use of the compost toilet and what the role the state may or may not approve in any kind of circumstance. If you do decide to grant the rehearing, this does not constitute an admission of an error on the Board's part, it simply is an indication that you would desire another opportunity to take a closer look or examine your decision to create a more complete record and to have further discussion to talk about other potential scenarios in which a compost toilet might be able to be used in accordance with local and state regulations. This may result in something positive for all concerned. The rehearing also gives the opportunity to have an additional discussion to create another element of the record which could have a bearing in terms of how this matter, if it does, go forward to court. The minutes and the evidence presented are going to have a bearing on how the court views the actions of the Town. The completeness of the record and the thoroughness of your discussion could help to serve the Town's interest in having any kind of litigation dealt with successfully and quickly."

She explained that she feels the Board's job isn't to decide what is being discussed is a religious exercise or institution. You do have an obligation to determine whether there is a compelling interest involved, simply assume for the sake of argument that you are talking about a religious exercise. It is then up to the applicant in court, to present evidence that a religion or a religious exercise is involved. All she is suggesting is simply, don't ignore it, just assume for the sake of argument that a religious exercise is involved, so you can then get on to the next step of the analysis and talk about compelling interest is or is not involved. That would solely be your job.

Frank Reinhold asked with regard to Mr. MacDonald's accusations towards the Town of Lee. Is it the Board's job to correct Governments Wrong as stated?

Attorney Somers stated if you grant a rehearing, this would be the opportunity to address this specifically. If you were to grant a rehearing and she was asked at such a public hearing, she would tell you it is not within the domain or jurisdiction of the ZBA to address these kinds of issues. Your job is to deal with the Zoning Ordinance before you.

Tobin Farwell, Acting Chairman asked the Board members for their feeling on the rehearing.

John Hutton stated he does not see any new evidence, thinks what the Board did was fair and reasonable and consistent with how all other applicants in Town are treated. He doesn't see a need to rehear this.

Frank Reinhold stated he feels they should rehear the case in relation to the composting toilets and the location of the septic system.

Philip Sanborn stated that this discussion and concerns were with the following of the land. If Mr. MacDonald leaves and sells the property, and it was approved, you have a septic and a well too close together. He also stated if we rehear the case we can clearly state our reasons for the denial. This would make it clear if it goes to court.

Peter Hoyt stated, if we rehear it there may be something that was overlooked that is pointed out in the letter. Possibly more information will be provided that will make sure that all of their bases are covered and all unanswered questions are covered.

Tobin Farwell, Acting Chairman, states that he doesn't feel they did anything wrong in the first meeting but in the interest of being thorough and it is a complicated issue, and the Board doesn't deal with RLUIPA, we should review it, hear the case again and be thorough with how we came to the conclusion we come to and beef up the background. He continued to state he would not be voting on the motion unless there is a tie.

Peter Hoyt made a motion to rehear the request filed by Peter MacDonald, representative, the Veteran Resort-Chapel, relating to a Variance request that was denied as well as an Appeal to an Administrative Decision that was also denied. The aforementioned hearing was on May 29, 2013.

Vote: Peter Hoyt; Frank Reinhold; Philip Sanborn

No: John Hutton

Motion carried.

The Board discussed with the applicant the date for the rehearing. The date chosen was July 31, 2013 at 7:00pm at the Public Safety Complex.

(Z1213-12)

A continued application for the Veteran Resort-Chapel, Peter MacDonald applicant. The property is known as Lee Tax Map # 12-03-0300 and is located on 101 Stepping Stones Road. The applicant is requesting the following.

-A continued application for a Variance to Article IX, Minimum Building Standards, Section -E, Wells, to allow the well to be approximately 44+- feet from an existing or proposed septic system leach bed where 125' is required. The variance request is to the 2007 Town of Lee Building Regulations.

Tobin Farwell, Acting Chairman read the notice into the record and explained, he believes where the Board last left off, Mr. MacDonald was going to look into the possibility of relocating the well. He asked Mr. MacDonald if he had any new information.

Mr. MacDonald asked that the Board accept his written statement (In file) as opposed to having him read it into the record. Briefly it explains why he thinks the Town is wrong with their decision. He continued to explain that a new well has been drilled and the old well has been decommissioned. But he still wants the Town to take a vote on denying or accepting his variance request for the well. He doesn't want it just thrown out because he drilled a new well. He would like a decision as if he hadn't drilled a new well. Because he wants to get going on building, to help homeless veterans', he went and drilled a well and decommissioned the other one; this doesn't mean he accepts the Town as not being wrong. He would like the Board to make a decision on his variance and take a vote.

Tobin Farwell, Acting Chairman, clarified that the well is no longer in that location.

Peter MacDonald replied, "yes. the well has been moved to a legal distance and the other one has been capped/decommissioned." He would still like a vote to see what the Board's decision was.

Attorney Somers commented that if she understands the applicant correctly, what he is asking the Board to do is make a ruling on his variance request to have a well located in this desired spot. He is saying he has done these things now but he wants you to pretend as if he didn't do them. This is fine, but if that is the case, you have to make sure the necessary presentation has been made on this particular request on all of the 5 criteria. She doesn't know if that was done at the last hearing sufficiently with regard to this particular request. Before the Board acts on this request, they need to be comfortable to know whether or not there has been evidence submitted for those five criteria on the location of the well, not the compost toilets, not the administrative decision. On this particular variance application.

Tobin Farwell, Acting Chairman, asked Mr. MacDonald to address the 5 criteria as it relates to this application.

Peter MacDonald read into the record his previously submitted statement. (In file)

Peter MacDonald stated that the 5 criteria for a variance no longer exist under RLUIPA. He wants to point this out to the Board. He then continued that if Attorney Somers had researched RLUIPA, the court cases clearly state that RLUIPA override the 5 criteria and the applicant doesn't have to prove the 5 criteria in order to grant the variance.

Attorney Somers replied that for the record that is incorrect.

Public Comment/none floor closed.

Tobin Farwell, Acting Chairman, summarized that what he is asking for today is a variance from the septic system of 44' where we require 125'. This is for a well. The State of N.H. requires 75' from the well to the septic. The reason the State of N.H. has this setback is for the protection of your drinking water supply. There are many scenarios where pathogens and bacteria can go from your septic system into your well. The State of N.H. has found that 75' is a good number, sometimes less, but without groundwater testing type of situation we have no way of knowing that 44' is adequate. Therefore, it is a compelling state interest for the protection of his water supply that he not be allowed to be within 44' where a minimum, by the state requirements is 75' and the Rown is 125'. It is possible for him to meet the setbacks as he has already installed the well that does make it. He can make the requirement. The compelling state interest is that there could be cross contamination and contaminates in his own well. For his own safety, his safety is a concern of the state's; he thinks they should deny the variance request. The applicant has not provided any evidence or he has not heard any evidence that this would not be the case. He has not said the well will not get contaminated. In the variance criteria, it will be contrary to the public interest as there is a possibility of contamination by bacteria or pathogens.

Philip Sanborn stated for him it is not so much the VRC, it is the property. Peter MacDonald could be gone in a year and we have granted this property a 44' septic variance. He may never use this septic as he is stating, but the property would now have a variance that would be contrary. There is no need for this for the safety of the property and the consistency of the ordinance. He feels for this, there is no reason for the variance. There is an approved septic design for this tract of land.

John Hutton commented that per the State of NH, if he has a water system, he has to have septic system or some form to treat the grey water.

Frank Reinhold stated the applicant's responsibility was to bring information forward to justify installing a well to get the variance. No information in his mind was produced to justify the variance period.

Peter Hoyt commented that he has a well that he has capped and the new well is now in the approved location, he doesn't see the need for the variance.

Tobin Farwell, Acting Chairman, stated for the record that they did look for a way to find the least intrusive means and he feels that at least meeting the state's requirements of 75' would be the least and not having any evidence that cross contamination would occur. Given that RLUIPA could apply, 44' does have a possibility of contamination.

The Board determined the following Findings of Fact.

PRELIMINARY FINDING

After reviewing the petition and having heard the presentation by the applicant, it is found that the Board **has (majority)** sufficient information available upon which to render a decision. If there is sufficient information, the application will be deemed accepted and the public hearing will continue. If it is found that the Board does not have sufficient information, the public hearing will be postponed to a date certain on _____.

FINDINGS AND RULINGS

After reviewing the petition, hearing all of the evidence, and by taking into consideration the personal knowledge of the property in question, the Board of Adjustment for the Town of Lee has determined the following findings of fact:

1) The variance **will (all)** be contrary to the public interest because: he has a viable plan, he's already drilled a new well and closed the other down. Health issues, to avoid cross contamination in the future for all on the land.
2) Special conditions **do not (all)** exist such that the literal enforcement of the ordinance results in unnecessary hardship. In deciding this criteria, you must decide whether: Because he has recourse, has already taken care of this issue. It is a new property that didn't have any existing conditions.
3) The variance **is not (all)** consistent with the spirit of the ordinance because: no control over this property after we pass this, whether it is a religious retreat for the next 250 years or a 10 minutes it runs with the property. We create a problem down the road.

4) By granting the variance, substantial justice **will not (all)** be done because: alternative solutions are available.

5) The value of surrounding properties **will (all)** be diminished because: a well next to a septic system which is 44' and the septic system is on the boundary line and could go on the other property. If this lot was an old lot and not a new lot that is one thing, but this a brand new lot, a brand new well, a brand new septic system and there is the room to do it correctly. There could potentially be impact on the neighbor's property.

John Hutton made a motion that the continued application for a Variance to Article IX, Minimum Building Standards, Section -E, Wells, to allow the well to be approximately 44+/- feet from an existing or proposed septic system leach bed where 125' is required be denied. The variance request is to the 2007 Town of Lee Building Regulations.

Philip Sanborn second.
Vote: All

Tobin Farwell, Acting Chairman explained the 30-day appeal process to the applicant.

MINUTES TRANSCRIBED BY:

_____
Caren Rossi, Planning & Zoning Administrator

MINUTES APPROVED BY:

_____ _____
Tobin Farwell, Acting Chairman Philip Sanborn

_____ _____
John A. Hutton, III Frank Reinhold, Alternate

_____
Peter Hoyt, Alternate