

ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053

DATE: JUNE 15, 2011

CASE NO.: 6/15/2011-1

APPLICANT: RYDER DANIELS
DEBORAH LACK
22 KELLEY RD
LONDONDERRY, NH 03053

LOCATION: 28 KELLEY ROAD, 12-34, AR-I

BOARD MEMBERS PRESENT: JIM SMITH, ACTING CHAIR
VICKI KEENAN, VOTING MEMBER
MICHAEL GALLAGHER, VOTING ALTERNATE
JAY HOOLEY, VOTING ALTERNATE
NEIL DUNN, CLERK

ALSO PRESENT: RICHARD CANUEL, SENIOR BUILDING INSPECTOR/ZONING OFFICER

REQUEST: APPEAL OF AN ADMINISTRATIVE DECISION OF THE PLANNING BOARD

PRESENTATION:

J. Hooley requested a recusal from hearing or voting on the case because Paul Beal of 28 Kelley Road is his employee. The consensus was to allow J. Hooley to recuse himself.

NEIL DUNN: It does change the number of members, if you want to bring that up to the applicant.

JEFF SPEAR: It's not a problem.

JIM SMITH: Okay. You understand you have to get three (3) positive out of four (4) for your case to go forward?

[The applicant's attorney acknowledged he understood].

CASE NO. 6/15/2011-1 WAS READ INTO THE RECORD WITH THREE PREVIOUS CASES LISTED.

43 JIM SMITH: Before we go any further, I'd like to ask the Senior Building Inspector, Richard Canuel, if he had
44 any legal advice on this case.

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46 JEFF SPEAR: Mr. Chairman, I'm sorry, I think I can short circuit things on this, if I could speak. That might
47 make things a little easier.

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49 JIM SMITH: Okay, go ahead.

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51 JEFF SPEAR: I'M Jeff Spear from Orr & Reno. I'm here for Mr. Daniels. We filed this appeal as part of a belt
52 and suspenders approach. I'm sure you're familiar with this with other issues. When you're appealing from
53 the Planning Board there's a "structural ambiguity," I'll call it, built into the statutes regarding the appeal. For
54 some certain issues, you get to appeal directly; you file a petition for cert with the Superior Court. On other
55 issues that involve the interpretation of the zoning ordinance, you can't appeal that to Superior Court, you
56 have to appeal it to the Zoning Board. In both, the petition for cert deadline is thirty (30) days, the appeal to
57 this Board is thirty (30) days. So it's a common practice when you're dealing with a decision of a Planning
58 Board, unless it's absolutely certain, and sometimes even then, even when it's absolutely certain, you file
59 both. You file the appeal in Superior Court or you file a petition for cert, which the Court can then accept or
60 not, and you file the appeal to the Zoning Board. And if you note the way we phrase the appeal was that it
61 was sort of conditional and today I'll tell you that I think the issues we've raised properly do belong before the
62 Superior Court, not before this Board. I did it because I didn't know what the court was going to do. I didn't
63 know whether the court would accept the petition for cert. It did and your Town Counsel, Matt Serge at the
64 Upton firm, has accepted service. I communicated with him today. He agrees with me about that and he
65 authorized me to represent that to you. Obviously, you can confirm it if you want. But I think I'm in an
66 unusual position of asking you or telling you today that I think you don't have jurisdiction over this appeal;
67 that it should be in Superior Court. And if you gave us that ruling, we'd be perfectly happy.

68
69 JIM SMITH: Okay. Richard, is that...?

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71 RICHARD CANUEL: Yeah, that's pretty much it in a nutshell. Basically, I'm sure the Board realizes this, when
72 the Planning Board renders a decision on a site plan approval, unless they specifically make a decision based
73 on a criteria of the zoning ordinance itself, their decision is not appealable to this Board. It's appealable
74 directly to Superior Court and I think that's a situation we have here. So I think my suggestion would be, just
75 to sort of set things in line here, is the Board should probably make a decision that it is not in their authority to
76 grant or even hear the appeal based on the statute stating that appeal goes directly to Superior Court.

77
78 NEIL DUNN: If I may, Mr. Chairman? I've been on the Zoning Board for seven (7) years and this is the first
79 time I've heard anybody talk about a belt and suspenders approach and the fact that we would even review a
80 Planning Board case, so I'm a little bit confused. Would it make more sense to withdraw the case for a month
81 or until you have more information or...? I mean, I don't know that, unless we go through a long process, that
82 I'm comfortable that we do or do not have authority to rule on it if, indeed, he had to come in front of us and
83 make the appeal.

84
85 VICKI KEENAN: Didn't Upton, our Town Attorney, confirm that we can't hear the case?

87 RICHARD CANUEL: I haven't spoken to our Town Attorney about this case in particular...
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89 VICKI KEENAN: Okay.
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91 RICHARD CANUEL: ...because it's a Planning Board matter, but as I can say, and I think the applicant has
92 stated that, too; unless the applicant can show tonight before the Board that the Planning Board erred in
93 making a specific decision based on a section of the zoning ordinance, then this Board doesn't have authority
94 to hear the appeal.
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96 VICKI KEENAN: Can the applicant choose to withdraw its application?
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98 RICHARD CANUEL: I'm not sure if that's the applicant's choice.
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100 JEFF SPEAR: What we try to protect against, and I think...[to R. Canuel] did you and I speak? I can't remember
101 who I spoke to and I know Mr. Daniels was dissuaded from filing this, but we'd like to have a ruling that there's
102 no jurisdiction because then that option, that possibility, is sewn up because it really, ultimately, is this Board's
103 decision as to whether there's been an interpretation of the ordinance that you have authority to review. And
104 before I put all my eggs in the basket of the Superior Court, I'd like to make sure that that is the appropriate
105 way.
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107 VICKI KEENAN: I guess then, to Neil's point, we don't have official ruling from our Town Attorney, therefore,
108 we can't really make a decision.
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110 NEIL DUNN: I mean, we'd be spending some time here to get to the point, so I think...which is fine, I mean,
111 that's what we're here for, but...
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113 VICKI KEENAN: My suggestion is that we continue it.
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115 JEFF SPEAR: If it's at all possible to, if the matter is continued, we won't have anything substantive to say,
116 probably, unless you decide that you do have jurisdiction to hear it, in which case, we reserve our right to
117 come back and talk about the merits. But for the moment, our position would be that you don't and Superior
118 Court will resolve it, so...
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120 JIM SMITH: So at this point you're saying Superior Court has accepted your case?
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122 JEFF SPEAR: Yes.
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124 JIM SMITH: So you're gonna pursue that avenue and you really don't need this other than having a decision
125 that we have no authority over this particular issue?
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127 JEFF SPEAR: One way or the other.
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129 JIM SMITH: Yeah.
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131 JEFF SPEAR: I mean, as I told you, I think Matt's agreed with us, our position on that, but it's perfectly natural
132 for you to want to confirm that with him and talk about it with him. And if you did agree with him, if you were
133 to issue a written decision and spare us another trip down here, that would be great. On the other hand, if
134 you did decide you have jurisdiction, then you'd continue it and we'd come back and we'd talk about the
135 merits.

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137 NEIL DUNN: Mr. Chairman, we do have a letter here from Jeffrey C. Spear, Esquire, regarding the case, that it
138 has been essentially..."enclosed...acceptance of the service...matter above...on behalf of the Town."

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140 JAYE TROTTIER: That's from Town Counsel.

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142 NEIL DUNN: From the Town Counsel. "Acceptance of Service...Service within Orders of Notice, Certiorari
143 Order, Verified Petition For..." how do you pronounce that?

144
145 JEFF SPEAR: Certiorari.

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147 NEIL DUNN: Thank you. "And request for Declaratory Relief is hereby accepted on behalf of the Defendants
148 of the Town of Londonderry and the Planning Board. By accepting service, the Defendants do not waive any
149 defenses other than matters related to adequate service." For what it's worth, if you want to look at it.

150
151 JIM SMITH: This proves that the case has been served on the Town. So it's a viable case at this point.

152
153 JEFF SPEAR: Exactly. The Superior Court has accepted the petition.

154
155 VICKI KEENAN: I mean, what happens if we determine that we don't have jurisdiction over this case and
156 things at the court level fall through and then you come back and appeal our decision again? Is that what
157 happens?

158
159 JEFF SPEAR: Well, one of the reasons we do this is because I think most cases go according to expectation but
160 sometimes, there's always the possibility that in the Superior Court, someone could argue or the Court could
161 decided itself that this isn't an issue for it to decided, it's a decision for the Zoning Board to decide. I guess it
162 could be a little hot potato situation under those circumstances. I've never experienced it but those are the
163 kind of nightmare scenarios that we lawyers sort of...

164
165 JIM SMITH: I think if that were to happen as you suggest, then I think the Superior Court would order you to
166 go back to the Zoning Board and then we would then have to hear it.

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168 JEFF SPEAR: That's a possibility.

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170 JIM SMITH: So, in that case, our ruling tonight wouldn't have any bearing one way or the other.

171
172 JEFF SPEAR: On the other hand, you interpretation of your own jurisdiction would be highly persuasive to the
173 Court. And in most cases, what we protect against, as I said, the petition for cert, I'm not gonna appeal form
174 this Board, which is of right to the Superior Court. You're right of appeal of a Planning Board is discretionary

175 with the Superior Court and sometimes they don't grant those petitions but it has in this case, so I would think
176 the chances are very, very small that the Court would do something like that.

177
178 VICKI KEENAN: So it seems as though we'd be putting ourselves in a better position if we actually had a ruling
179 from Upton that this is not our jurisdiction.

180
181 NEIL DUNN: Either that or we have to find a whole lot about the whole Planning Board decision and whether
182 we thought there was a zoning ordinance in it, so...Do you have enough information to continue tonight and
183 persuade us one way or the other whether the Planning Board made an error on zoning or not? I mean, short
184 of reading all these pages, I mean, are we there yet? Are we maybe better to continue and leave the door
185 open?

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187 JIM SMITH: I think at this point, I'd accept a motion either to continue or deny it, one way or the other.

188
189 VICKI KEENAN: I'll make a motion. I make a motion to continue Case 6/15/2011-1 to the next meeting while
190 we get more information from our Town Attorney.

191
192 JIM SMITH: Do I have a second?

193
194 NEIL DUNN: I'll second that.

195
196 JIM SMITH: Okay. All those in favor of the motion?

197
198 NEIL DUNN: Aye.

199
200 VICKI KEENAN: Aye.

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202 MICHAEL GALLAGHER: Aye.

203
204 JIM SMITH: Aye.

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206 JEFF SPEAR: Thank you.

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208 RESULT: THE MOTION TO CONTINUE CASE NO. 6/15/2011-1 TO JULY 20, 2011 WAS APPROVED, 4-0-0
209
210

211 RESPECTFULLY SUBMITTED,

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216 NEIL DUNN, CLERK

217 TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY

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APPROVED JULY 20, 2011 WITH A MOTION MADE BY NEIL DUNN, SECONDED BY JAY HOOLEY AND APPROVED
4-0-1 WITH LARRY O’SULLIVAN ABSTAINING AS HE HAD NOT ATTENDED THE MEETING.