

**Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254**

Regular Meeting

October 20, 2010

Minutes

Present: Members: Bob Stephens, Jerry Hopkins, Russell Nolin;
Alternate: Nicol Roseberry, Robert Zewski; Town Planner, Dan Merhalski
Excused: Members: Kevin M^cCarthy, Ray Heal

I. Call to Order

Mr. Stephens called the meeting to order at 7:30 PM and introduced the members of the board to the public and welcomed the newest alternate member, Bob Zewski to the board. Mr. Stephens appointed Bob Zewski and Nicol Roseberry to sit on the board with full voting privileges in place of Ray Heal and Kevin M^cCarthy.

II. Pledge of Allegiance

III. Approval of Minutes

Motion: Mr. Hopkins moved to approve the Zoning Board of Adjustment Minutes of October 6, 2010, seconded by Mr. Nolin, carried unanimously.

IV. Hearings

Ms. Roseberry stepped down from the board at this time.

1. Continuation of Public Hearing - Camp Tecumseh (212-1)(975 Moultonboro Neck Road) Special Exception – Article VI,C (3)(d)

Mr. Stephens noted that there were only four members seated this evening for this hearing and that the applicant was entitled to a full board of five members. If the applicant was willing to proceed with a board of four, they forfeit their right to request a rehearing on a basis of a board of four. Mr. Stephens noted the applicant may request a continuance to the next available date.

Mr. Stephens noted this was a continued hearing for a special exception for Camp Tecumseh and asked the applicant's agent if they wished to proceed with a board of four. Dave Dolan from David M. Dolan Associates, P. C. representing Camp Tecumseh stated for the record that he would proceed with a board of four.

The board reviewed the Draft Notice of Decision prepared by the Town Planner, as directed by the board at the hearing on October 6th. There were no changes made to the draft decision or further discussion regarding the hearing.

Motion: Mr. Hopkins moved to approve the application for **Camp Tecumseh (212-1)** for a Special Exception, as detailed in The Draft Notice of Decision, and to

authorize the Chairman to sign the Notice of Decision, seconded by Mr. Nolin, passed by a vote of four (4) in favor (Stephens, Hopkins, Nolin, Zewski), 0 opposed, and 0 abstentions.

Ms. Roseberry returned to the board at this time with full voting privileges.

**2. J. Craig Moriarty (170-17)(5 Whittier Highway)
Appeal from an Administrative Decision**

Mr. Stephens noted that this was an application for an Appeal from an Administrative Decision.

Attorney Doug Hill was present representing the owner/applicant, Craig Moriarty. Mr. Hill stated there is currently a site plan application that is pending before the planning board. Mr. Hill provided the board with a copy of a portion of the 2010 site plan and a reduced copy of the 2005 site plan which was conditionally approved, but was never finally approved.

Present in the audience for the hearing was Mr. & Mrs. Moriarty, representing the perspective tenant, Peppermill, LLC. Mr. Hill briefly described the site, noting there were no changes to the footprint of the building and no change to the paved parking area, which is the subject of the appeal. Mr. Hill stated the Don Cahoon, the Code Enforcement Officer (CEO) has ruled that the paved parking on the property is a non-conforming use that has lost its rights under the ordinance and cannot be used without a variance. Mr. Hill stated they disagreed and were asking the ZBA to reverse the Administrative Decision. Mr. Hill agreed with the CEO in that the site has not been used as a retail Laundromat for some time. For economic reasons the site has been used for storage and repair of equipment for other sites and during that time Mr. Moriarty has continued to seek a new commercial tenant. Peppermill, LLC is the proposed new tenant, which is why they are before the planning board. In preparation for the new tenant the Moriarty's have spent over \$56,000 in upgrades to the property. Mr. Hill provided the board with a list of expenditures for the continuing use of the property.

Mr. Hill stated the property has not been abandoned as a commercial site, noting neither the building nor the parking has been abandoned. Mr. Hill referred to the May 2010, Pike Industries case, which questioned intent, stating they have no intent to abandon the parking area or to abandon the commercial nature of the property or to abandon the use of the parking for commercial purposes. Mr. Hill stated the use they are proposing is a permitted use in Commercial Zone A, so there is no issue as to the nature of the prior uses. Mr. Hill stated the buildings and the physical features on the site do not lose their vested dimensional status. The site has been in use since the 1940's, and has valid pre-existing non-conformities all over the site. The site is dimensionally non-conforming. Mr. Hill stated the abandonment of the laundry is not in question and agree that they need a new site plan for the new restaurant use. The paved parking area that is the subject of their appeal is a type of valid pre-existing non-conforming use.

Mr. Hill agreed with the CEO in that there was a conditionally approved site plan in 2005. The conditions were not completed because the perspective tenants pulled out. The 2005 site plan shows the re-use of the parking. The 2005 and 2010 plans show the site with dimensional non-conformities, and clearly the site could not be developed from scratch in that fashion. Mr. Hill noted the law states that something constructed on a lot that is in a legal location when it was built, may stay and be used for economic benefit and is a fundamental principal of New Hampshire and federal law and that the basic rule is that retroactive enforcement of dimensional requirements is an illegal of taking of land in violation of the New Hampshire and federal constitutions. Mr. Hill stated there is language that protects pre-existing things that were legal when they were built. Without this savings clause, the zoning ordinance is illegal under state and federal constitutions. Mr. Hill cited RSA 674:19, which says zoning ordinances don't apply to existing structures or the existing use of any building. Past uses of land create vested rights

that are protected from retroactive application of zoning ordinance requirements. There was a continued intent to use the parking. Mr. Hill argued if no parking is allowed then taking of the land occurs, which is illegal. Structures in the statute means man made features, and parking is a man made structure.

Mr. Hill referred to 1984 case law, Dugas vs. Conway in which the Supreme Court found that a sign that was in a location no longer permitted, was a protected right. Mr. Hill stated just as with non-conforming signs other legally constructed man made features, such as paved parking, may stay and be used indefinitely.

Mr. Hill stated the ruling of the CEO is contrary to the law and therefore submit that the paved area is a vested right, a valid pre-existing non-conforming use that may be employed for a lawful purpose. Bases on that, the administrative ruling is in error and asked that the board reverse the decision and determine that the parking area as it exists may be re-used for any legal use.

Don Cahoon, CEO made a brief presentation to the board. Mr. Cahoon presented documentation to the board that included copies of his letters, the building permit and a section of the ordinance. He first commented in regards to comparing a parking lot to a building or sign, structures of that sort, stating he felt you could view pavement that way, but cannot look at parking a car being the same as a building or sign or structures of that sort.

Mr. Cahoon referred to the list of expenditures that were put into the building, noting he would have some questions regarding the legality of work completed without permit. He will review his files to see whether permits were issued for items listed.

Mr. Cahoon quoted Article VII, Section B (1) of the ordinance “All non-conforming properties and uses in the Town of Moultonborough at the time of the adoption of this ordinance may continue in their present use. If such non-conforming use is determined discontinued or abandoned, any future use shall, thereafter, conform to the regulations of the Town of Moultonborough, and the non-conforming use may not, thereafter, be resumed without approval from the Zoning Board of Adjustment.” He noted the issue is that you may not have parking in the setbacks. He does not feel that you can liken a car to a building or sign. Mr. Cahoon stated that he had no communication from Mr. Moriarty, the conditions were never met on the site plan and they never called for a certificate of occupancy for the building. Based on information he had collected, this led to his determination of abandonment.

Mr. Zewski questioned what the time period was for something to be declared abandoned. Mr. Cahoon stated that there wasn't a specific time. There is intent and it differs for each project. There are a number of things taken into consideration.

Mr. Stephens questioned if the CEO's conclusion would have been different had there been some communication updating him on the status of the proposed tenants for the occupancy of the building, keeping him informed that they were not able to complete the interior renovations without knowing who the tenants may be. Mr. Cahoon stated yes, he would have taken that into consideration.

Mr. Hopkins noted that he had read the application and the ordinance and felt that it was clear that this was a use issue and the structures were in place. He questioned why they did not apply for a variance. Mr. Hill stated because they have a vested right that they do not need a variance for, and under the new variance standards it's much more onerous than it used to be. They elected to take the administrative appeal as they have an absolute vested right to maintain the parking in the area where it is.

Mr. Nolin commented that he would be interested in hearing what counsel would have to say about the abandonment issue prior to making a decision. Mr. Merhalski noted that when this issue first

came up during his site plan review for the Peppermill site plan application. He had contacted Town Counsel and the LCG and asked this question and had met with the CEO, Town Counsel and Mr. Hill to discuss this issue. Town Counsel and LCG was in agreement that the use of the parking spaces in the setback was not permitted by zoning ordinance. Town Counsel was also in agreement that the abandon issue was a determination of the CEO as we do not have specific thresholds listed.

Mr. Stephens asked if there were any questions from the public. Pat Moriarty commented that they did not abandon their intent to rent the property and that the economy played a role in this issue, not intent. She noted that the parking lot has been plowed in the winter months.

Mr. Moriarty responded to the comment that the site plan had not been completed or a certificate of occupancy issued. When the tenant(s) backed out he could not decide on renovations until a tenant(s) has been determined. Mr. Moriarty stated he has owned the building since 1967 at that it was historically important to him. It was once part of the wood lodge, a recreation room and a dining room.

Mr. Stephens stated the issue before the board is the CEO's interpretation of the ordinance and he has indicated in his letters that this does constitute abandonment as per the way the ordinance is written. The board must decide whether or not the CEO's interpretation of the ordinance and subsequent indication to the applicant that they need to go before the ZBA for another venue is in order.

Board members made comments relative to the site plan, building permit and lack of communication relating to them. Members felt the CEO made the best decision based on what he knew. Mr. Hopkins noted concerns were raised about the taking of the property, commenting there was no taking in any decision, and the applicant may still seek alternate relief.

Motion: Mr. Hopkins moved that the Board support the Code Enforcement Officers Decision with regards to **Tax Map 170 Lot 17, Craig Moriarty and the Peppermill, LLC**, seconded by Mr. Zewski, carried unanimously.

**3. Charles & Lisa McGee (99-16)(41 Hoshor Lane)
Variance – Article III (B)(1)**

Chuck McGee presented the application for the variance and explained the right-of-way (ROW), known as Hoshor Lane is his driveway. Mr. McGee owns two separate parcels of land that are accessed from Hoshor Lane, which is shown on the Tax Maps as a ROW. His house is located on one parcel and there is an existing 26' x 36' garage on the other parcel which meets the setbacks. The request for a variance is to permit a 20' x 20' addition to the garage, to be located approximately 30' from the centerline of the ROW.

Mr. Stephens asked if there were any questions from the board. Board members were provided with a copy of a portion of a plan depicting the lots and the ROW. Questions were raised regarding the ROW, who owned it, had access and who maintained it.

Scott Stone, abutter and owner of Lot 15 stated that he owns the ROW that accesses Mr. McGee's two parcels. Mr. Stone does not access his house from Hoshor Lane, but has land that is beyond Mr. McGee's property. Mr. McGee maintains and plows Hoshor Lane. Mr. Stone had no objection to the request for the variance.

Mr. Stephens questioned if ROW's had a centerline to them. Mr. Merhalski stated it depends on if it were a private road or an easement (noting there may be language in the deed that is different), but

usually the centerline is the centerline of the roadway surface. Mr. Stephens commented that this was a private way and asked if this was a property line or a deeded easement.

Mr. Nolin referred to the Planners Memo dated October 15th regarding his comment relating to the Article Mr. McGee was seeking relief as it appears that he meets the requirement of the ordinance and questioned why he was before the board. Mr. Nolin questioned if Hoshor Lane was a public right-of-way or an easement for an individual. Mr. Merhalski commented that his concern was that the portion of a plan that was submitted with the application did not show any roadway, and he was not certain who made the determination that Mr. McGee needed to come before the board. Mr. McGee stated the CEO required him to come before the ZBA. Until the board has the deed they were unable to determine what the access way was.

The Board reviewed the original subdivision which depicted the ROW, and a later plan in which it is depicted as an easement/existing common driveway. The ROW appears to be a portion of Lot 15. There is no further notation on the plan regarding the ROW. Without further information regarding the ROW, which may be contained in the deed, the board was unable to determine what setbacks would apply. Mr. Merhalski stated that there is a difference between ROW and an easement and a ROW for public and private access. It would depend on what was in the deed. Mr. Merhalski stated the board needed to find out the distance the proposed addition was to be from the line shown on the plan and if the line is a ROW, access easement and then the board could apply that information.

Mr. Hopkins questioned why the board could not just include the restrictive wording in the approval that would meet everybody's need. The applicant is seeking relief from Article III, B (1) which is 50' from the centerline of the improved roadway or 25' from the edge of the ROW.

The board went into deliberative session to discuss each of the five criteria for the granting of a variance. The board returned to Public Session, noting there was no further input from the board or audience.

Motion: Mr. Hopkins moved to continue the Public Hearing for **Charles & Lisa McGee (99-16)** to November 3, 2010, and to direct staff to draft a Notice of Decision approving the request for a variance, specifying that it is for relief from the 50' provision of Article III, B (1) seconded by Mr. Stephens, carried unanimously.

V. Correspondence

- 1) Planning Board Draft Minutes of October 13, 2010 were noted.
- 2) Board of Selectmen Draft Minutes of October 7, 2010 were noted.

VI. Unfinished Business

VII. Adjournment

Motion: Mr. Stephens made the motion to adjourn at 8:49 PM, seconded by Mr. Nolin, carried unanimously.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant