

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

**Regular Meeting**

**May 2, 2012**

**Minutes**

Present:           Members:       Bob Stephens, Russ Nolin, Joseph Crowe, Robert Zewski, Ken Bickford  
                          Alternates:     Jerry Hopkins, Natt King  
Staff Present:   Town Planner, Bruce W. Woodruff; Administrative Assistant, Bonnie Whitney

**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.

**II.     Pledge of Allegiance**

**III.    Approval of Minutes**

**Motion:**       Mr. Zewski moved to approve the Zoning Board of Adjustment Minutes of April 18, 2012, seconded by Mr. Bickford, carried unanimously.

**IV.    Hearings**

1.       Continuation of Public Hearing - Poulin Benoit & Rolande Joint Rev Trust, Poulin Benoit & Rolande Trustees (223-60)  
          (16 Camp Road) Variances from Article III, B (3) and Article VII B (3.3)

Mr. Stephens stated this was a continued hearing for Poulin Benoit & Rolande Joint Rev Trust, Poulin Benoit & Rolande Trustees. James Macleod, agent for the applicant was present for the hearing.

The board reviewed the Draft Notice of Decision prepared by staff, as directed by the board at the hearing on April 18<sup>th</sup>. There were no changes made to the draft decision or further discussion regarding the hearing.

**Motion:**       Mr. Zewski moved to approve the application for **Poulin Benoit & Rolande Joint Rev Trust, Poulin Benoit & Rolande Trustees (223-60)** as detailed in the Draft Notice of Decision, and to authorize the Chairman to sign the Notice of Decision, seconded by Mr. Crowe, passed by a vote of five (5) in favor (Stephens, Nolin, Zewski, Bickford, Crowe), None (0) opposed and 0 abstentions.

2.       Rock Pile Real Estate, LLC (44-13)(84 Gov. Wentworth Highway)  
          Variances from Article VI (F)(6)(e), (F)(6)(g) & E.(1)

Mr. Stephens stated that this was an application for a variance for relief from Article VI (F)(6)(e) of the Zoning Ordinance to permit parking within the setbacks, buffers and vegetative screening.

Attorney Regina Nadeau was present representing the applicant. Kim and Michael Prause were present in the audience for the public hearing. Ms. Nadeau pointed out that included on the Agenda there were four applications pending that were all related. She stated that she would give a general overview depending on what order the applications would be going in. Attorney Nadeau, as a point of order, brought up the fact that there had been some recent developments regarding the property. She noted that the board has heard applications for the property a couple of times, and each time was withdrawn for various reasons. She gave a brief history of the site, what has happened in the intervening months, and would like the board to make a determination as to whether or not some of the applications/variances needed to be heard.

Attorney Nadeau gave a brief overview of the property, noting the intent was to convert the property into a twelve (12) seat bakery. They came before the ZBA and ultimately withdrew the application. One of the issues that was pending was regarding the Town right-of-way (ROW) running through the property. There was an item placed on the town warrant to determine whether or not the town would abandon the ROW. The town did abandon the ROW. There were also zoning changes in effect that might have affected that application.

Since that time, they began preparing the same applications to submit to the board that were submitted previously, which was a change of use from an antique store to the proposed bakery. The site plan was revised to incorporate some of the prior observations and recommendations, one of which was to close off the existing access onto Gov. Wentworth Highway, install a grass berm, extend fencing and add additional parking spaces. While in the process of preparing the applications, it was discovered that in 1993 the ZBA had granted a special exception for an ice cream stand. The minutes from the special exception hearing did not note any durational limits on the approval for the ice cream stand. Under the ordinance a special exception runs with the land, unless there were durational limits placed.

The next question was if the proposed use was a substantial change of use to even warrant a request for a special exception. The proposal is to go from an ice cream stand, changing the product to a bakery. Attorney Nadeau noted there is an approved site plan which does not limit the hours of operation, pre-dated a lot of the buffer requirements, and no other restrictions. Attorney Nadeau asked the board, whether or not, in the Town Planners opinion, their proposal constitutes a substantial change of use.

Mr. Woodruff commented the ZBA first approved a special exception for an antique store in 1993. In 1994 the ZBA approved a special exception for an ice cream shop. It was the opinion of the Planner that since special exceptions run with the land in Moultonborough, it solidified the idea that the lot and structure was non-conforming, so that is moot. If he had known that part of it prior to the applications being accepted and noticed, he probably would have said that they were not needed. However, he felt the special exception to change the use from the 1993 and 1994 approvals to a bakery are sufficiently different to warrant it coming before the board. Mr. Woodruff did not feel the variances were needed as this is a non-conforming lot and structure that was accepted by previous Zoning Boards in their deliberations.

Attorney Nadeau requested that she be allowed to reserve the right to ask for a written opinion, and to proceed forward with the application. Mr. Woodruff continued to say that as the applications were before the ZBA, he has given his opinion, and it is up to the board that they may still require hearing and adjudicating on the variance requests.

Mr. Crowe asked the Planner, that if in his opinion, the abandonment clause in the regulations does not apply. Mr. Woodruff stated in his professional opinion that the intent, what the property was meant to be used for, was never abandoned because the owners always had the property set up for commercial use. They have a special exception and an approved site plan. Once the board approves a special exception for commercial use, it can continue. Attorney Nadeau stated the regulations apply to non-conforming uses. Non-conforming uses are typically things that were in existence before a particular

law changed, which made it non-conforming. This property is different because they are looking at something that under the ordinance is allowed by a matter of right, as long as you meet the special exception criteria. Something that is permitted under a special exception is in fact a conforming use. It is not a non-conforming use, and for that reason the abandonment portion of the ordinance applies.

Attorney stated that in theory, the applicant could come before the board with no other site improvements and not need further Planning Board approval, but they would like to proceed with the plan presented this evening with the improvements as a means to support their requests for the special exception.

Board members discussed and reviewed the 1993 and 1994 approval for special exceptions and site plan and it was their desire to proceed with hearing the variances and the special exception for a change of commercial use to another use.

For the record, Attorney Nadeau reserved her right to object or appeal the decision regarding the jurisdiction for all of the variances. She stated she was more than happy to go through all of the variance requests as she thought the site was an excellent candidate for the special exception under these circumstances.

Attorney Nadeau moved onto address the two variances that would be required for the granting of the special exception. She addressed Articles VI F (6)(g) and VI E. The first criterion for the granting of a special exception is whether or not they could meet the required 50' buffer, and she noted that they cannot. The dimensions of the lot are such that they require a variance from this section of the ordinance. Ms. Nadeau addressed the five criteria for the granting of a variance. Ms. Nadeau read into the record a letter dated May 1<sup>st</sup>, 2102 from Mary-Ann Schmidt Associate Broker/Realtor into the record, which states she was in support of the project and that in her opinion that the use would not have a negative effect on all of the values of the surrounding properties. Attorney Nadeau answered any questions from the board.

Board members had questions regarding the fencing, berm and closing off of the access from Gov. Wentworth Highway. Other members asked if there were parking requirements. It was noted at this time the ordinance requires a minimum of three (3) spaces for commercial facilities. Mr. King questioned if there was a time limit on the hours of operation, or if this was grandfathered. It was noted the applicant is requesting the hours of operation from 6:30 am – 6:00 pm. Clarification was requested if the hours proposed was for operation to the public, or times that an employee may be onsite baking goods etc. prior to opening to the public at 6:30 am. Ms. Prause stated that those were hours open to the public. She also noted that she had been in contact via email with the NH DOT in regards to the installation of the berm and is awaiting her approval in the mail.

Mr. Stephens opened the hearing to the public, first allowing abutters to speak. Abutter Bob Wallace stated that he was not opposed to the green space, but noted his concerns relating to traffic safety. Peter Whelley questioned what the board was limiting comments to at this time. It was noted this was time to comment regarding fencing and the berm. Bev Charest spoke in favor of the fencing. Jim Cahill questioned why they were proposing to close off the access onto Route 109, noting he felt it was safer to leave it open. Members of the public noted their concerns regarding tractor trailer trucks accessing the site. Eric Taussig noted his concerns regarding the berm, and felt that it would create a sight issue if placed too high. Mr. Taussig also commented on an order of procedure. He felt that the special exception should have been heard first, and if the special exception were denied then the request for variances would be moot. Mr. Stephens addressed the comment regarding procedure, noting the board did need to first hear the variances that will arise with the issues of the special exception.

Joanne Coppinger stated that NH DOT is very happy that the entrance is closed off on Route 109 and had recommended it. Attorney Nadeau commented that the applicant did not need a variance for the

berm along Route 109, but that it would be built to State standards. She also noted that the proposed business will not require deliveries made by tractor trailer trucks, and the applicant cannot stop or control trucks from stopping on the road, as they cannot stop them from speeding in town. Mr. King stated that he could see using a fence as a barrier in a commercial zone, but felt that a more substantial buffer was needed in a residential zone.

Mr. Stephens stated the board was going to go into deliberative session, which was to allow them to formulate opinions on the criteria. There will be no input from the applicant or the public at that time. It is for discussion time, opinion time, no voting will take place during the deliberative session and alternates may participate in the deliberations. The board went into deliberative session to discuss each of the criteria for granting the variance at 8:52 PM and came out at 9:06 PM. There was no further input from the board or public. Mr. Stephens noted the voting members were Russ, Bob Z., Ken, Skip and himself.

**Motion:** Mr. Zewski moved to direct staff to draft a Notice of Decision to approve the variance for **Rock Pile Real Estate, LLC (44-13)** for Article VI (F)(6)(g) and to continue the Public Hearing to May 16, 2012, seconded by Mr. Bickford, carried unanimously.

The Board next took up the application for a variance from Article VI E.(1). Attorney Nadeau stated they were seeking relief from all criteria for the requirement of the 50' buffer as they cannot meet a 50' buffer on this property. Attorney Nadeau briefly described the existing lot and improvements. Noting the dimension and layout prevents them from meeting the buffer.

As a point of clarification, the application was amended to strike the wording to permit "a 4' vegetative berm and fencing instead of a 50' vegetative buffer along lot lines" and replace with to "provide relief from the 50' vegetative buffer along all Lot lines."

Mr. Stephens opened the hearing to the public, first allowing abutters to speak. There was no abutter input. Mr. Taussig stated if the application were amended, he felt that the hearing would be improperly noticed and should be re-noticed. Attorney Nadeau stated that the plan is on file at the town and has been duly noticed. Mr. Woodruff stated that this was a clarification on an application, not an amendment.

Ms. Coppinger commented that no matter what entity went on the lot, it would need relief from this section of the ordinance.

The board went into deliberative session to discuss each of the criteria for granting the variance at 8:28 PM and came out at 9:43 PM. Attorney Nadeau addressed a concern regarding issues of headlights shining onto the Wallace property, noting that the driveway has always been there in that location.

**Motion:** Mr. Bickford moved to direct staff to draft a Notice of Decision to approve the variance for **Rock Pile Real Estate, LLC (44-13)** for Article VI E (1) and to continue the Public Hearing to May 16, 2012, seconded by Mr. Zewski, passed by 3 to 2, in favor (Stephens, Zewski, Bickford) opposed (Nolin, Crowe).

The Board next took up the application for a variance from Article VI (F)(6)(e). Attorney Nadeau this was a request to allow parking within designated setbacks. She stated the proposal would provide orderliness to the site and will not adversely affect neighbors, noting this is a pre-existing site and has always been a commercial site. Attorney Nadeau answered any questions from the board.

Mr. Nolin questioned if the applicant had received the required release for their well that is shown located within the required parking setback. Ms. Prause stated yes.

Board members questioned the parking spaces, asking if there was adequate parking, handi-capped parking and noted their concerns regarding proposed parking spot 4, shown as the handi-capped space was blocking access for spaces 7 & 8 designated as employee parking. Mr. Nolin felt this was contrary to the ordinance.

Mr. Stephens opened the hearing to the public, first allowing abutters to speak. Mr. Wallace questioned how the site would be able to accommodate large vans and trucks or contractors towing trailers with the access closed onto Route 109. He reiterated his concerns regarding traffic safety. Carol Robins and Karin Nelson spoke in favor of the project. Ms. Coppinger commented that there was no area on the site in which you could meet the required 50' setback for parking. Cristina Ashjian questioned what version of the site plan was reviewed by the TRC committee. Nancy Wright questioned how overflow parking would be addressed. Michelle Mills commented that vehicles frequently park on Old Route 109 for overflow parking for the Lion's Club. Mr. Taussig commented that it appears that proposed parking spaces 2 & 3 will block the sight line for traffic coming off Old Route 109 and questioned if those spaces were on the plan reviewed by NH DOT. Attorney Nadeau replied yes, the plan in its current form. Al Hume noted his concerns regarding safety. Mr. Hume stated that there is a plan for Safe Routes to School, in which parents will drop off and pick up kids from the Lion's Club parking area, encouraging students to walk or ride bikes to school. Mike Lancor, Superintendent of schools, commented that the Town did look at Safe Routes to School, but that they did not qualify for grant money for funding of the project for sidewalks and it is not going forward without funding.

The board went into deliberative session to discuss each of the criteria for granting the variance at 10:08 PM and came out at 10:14 PM.

**Motion:** Mr. Zewski moved to direct staff to draft a Notice of Decision to approve the variance for **Rock Pile Real Estate, LLC (44-13)** for Article VI F(6) (e) and to continue the Public Hearing to May 16, 2012, seconded by Mr. Bickford, passed by 3 to 2, in favor (Stephens, Zewski, Bickford) opposed (Nolin, Crowe).

The board took a five minute break at this time from 10:17 – 10:22.

3. Rock Pile Real Estate, LLC (44-13)(84 Gov. Wentworth Highway)  
Special Exception – Article VI Paragraph E

The last application acted on by the board was the request for a Special Exception. Attorney Nadeau addressed each of the criteria for the granting of the Special Exception noting the board had previously moved to grant a variance from the first criteria. She answered any questions from the board at this time. It was noted that there were none.

Mr. Stephens noted for the record that he was in receipt of a community petition, with 32 signatures in support of the project and 5 emails in support. Mr. Woodruff stated that he had received late in the day, 1 email opposing the project.

Mr. Stephens opened the hearing to the public, first allowing abutters to speak. Mr. Taussig stated that he was representing the Wallace's as they were unable to stay this late in the evening. Mr. Taussig commented that the 1993/1994 approval was for a seasonal ice cream shop. Mr. Taussig provided members with a copy of his six page letter, dated May 2<sup>nd</sup>, in which he opened with the statement "First, let me state that I would welcome a bakery and coffee shop in town." And then went onto note his concerns and contents of the letter which included paragraphs on the following: Application History, History of Property Use, New Application, Acquisition, The Pending Application for a Special

Exception, Variances and Conclusion. Mr. Taussig questioned if beverages would be served, stating that this would be more than a “retail bakery”. He also questioned if the goods were to be baked on premise or brought in daily. Attorney Nadeau replied the majority would be baked on site. Mr. Taussig commented that he felt one of the variances granted was improper as it was improperly noticed. He went on to say that he felt the applicant fails to meet criteria’s 1, 2, 3, 4 and 6. (variance received for 1). Jim Cahill stated he was in favor of a bakery, just not at this location. He stated that he has been a realtor for 40 years and feels that this would negatively impact the abutter’s. He even noted that Mary-Ann Schmidt was not present this evening for the hearing, in support of property values. Ms. Ashjian provided members with a copy of her letter dated May 2<sup>nd</sup>, with attachments, and read it into the record opposing the project.

Shannon Fairchild, Mike Mills and Andy Coppinger spoke in favor of the project. Mr. Coppinger noted that the property already has a special exception that was granted in 1993 to serve food and ice cream.

Jim Morrison commented that the hearing should be on Zoning issues and not a popularity contest.

Mr. King stated that he believed that this was a poor application, did not address hazards or the inappropriateness of the location and was strongly opposed to the special exception. He commented that the owners could open with the prior approvals granted by both the Zoning Board and Planning Board.

Mr. Zewski commented that in reviewing the 1993-1994 decisions, he did not see that the approval was for a “seasonal” ice cream shop, it only stated ice cream shop.

There were no further comments or questions from the board or public at this time.

The board went into deliberative session to discuss each of the criteria for granting the variance at 10:55 PM and came out at 11:12 PM.

Mr. Stephens questioned the Planner, if staff could prepare one Notice of Decision that would include the actions of the board on all four applications in one Notice of Decision. He stated yes.

**Motion:** Mr. Bickford moved to direct staff to draft a Notice of Decision to approve the Special Exception for **Rock Pile Real Estate, LLC (44-13)** and to continue the Public Hearing to May 16, 2012, seconded by Mr. Stephens, passed by 3 to 2, in favor (Stephens, Zewski, Bickford) opposed (Nolin, Crowe).

## **V. Correspondence**

- 1) Planning Board Draft Minutes of April 25, 2012, were noted.
- 2) Board of Selectmen Draft Minutes of April 19, 2012, were noted.

## **VI. Unfinished Business**

## **VII. Adjournment**

**Motion:** Mr. Zewski made the motion to adjourn at 11:16 PM, seconded by Mr. Stephens, carried unanimously.

Respectfully Submitted,  
Bonnie L. Whitney  
Administrative Assistant