

Applicant: Brian Daigle
128 Winnicutt Road

Members Present: John Dold, Neil Rowe, Mike Smith, David Short, Kirk Scamman and
Arol Charbonneau

The Board of Adjustment held a Public Meeting on Tuesday, November 10, 2009 at 7:30PM (continued from October 13, 2009) to discuss a Request for a Rehearing received from Attorney John Simmons on September 10, 2009.

Chairman Dold stated that this case has already been heard. For the record, he added that tonight's meeting is not a public hearing, it is a request to rehear Case # 538. Chairman Dold asked the Board members if they wanted to mention anything before they get started. David Short stated he owns Stratham Circle Nursery and, since the original hearing, Mr. Daigle has stopped by to purchase trees from the nursery in an effort to meet some of the concerns of the abutters, in case someone had an issue with his impartiality. Chairman Dold read from the Rules of Procedure, Section 3, "When there is an uncertainty as to whether a member should be disqualified to act in a particular application, that member or another member of the Board may request the Board to vote on the question of disqualification. Any such request shall be made before the public hearing gets under way. The vote shall be advisory and non-binding." After David Short stated he could be impartial, the Board determined it was not necessary to vote.

Secretary Arol Charbonneau read the minutes from the October 13, 2009 meeting.

Chairman Dold stated since this is not a public hearing and the Board is to decide whether this appeal has merit, the Board should go through the appeal. He then asked Secretary Charbonneau to read the appeal.

The second paragraph on page one concerning testimony from neighbors states it is significant to note that there were two people at the hearing who spoke very highly of the Daigles, what they have done to improve the property and the respectful way in which they use their property. It also states that it is not apparent from the record that this was given much weight by the Board at all and asks the Board to reconsider this valuable testimony. Neil Rowe stated he took the neighbors' testimony into consideration along with everything else that was said at the meeting when he made his decision. Kirk Scamman added he also took all the neighbors' testimony into consideration. Neil Rowe then read from the minutes of the August 11, 2009 meeting in which David and Jennie Jordan spoke very highly of the applicant. All Board members agreed they heard and considered all testimony in arriving at their decisions.

Secretary Charbonneau then read through the concerns raised from neighbors and Attorney Simmons' response listed on page two: 1) Commercial trucks being used to access the property: This concern is not reasonable as the ordinance allows for this as the intended purpose. Neil Rowe stated he doesn't believe the ordinance allows for this as the intended purpose. 2) Vehicles being in the open: My clients are proposing to comply with the ordinance by erecting a building to house vehicles. This should be the Board's focus. Chairman Dold said if someone

requests approval for a home occupation, it should take up no more than 25% of the square footage of the finished floor space. Neil Rowe read from the ordinance, "and utilizes an area less than 25% of the total floor area of finished floor space of the dwelling". Mike Smith stated, if he remembered correctly, the intended structure to house the vehicles was going to far exceed the 25% allowed, which would violate the ordinance as written.

3) Maintenance of vehicles occurring on the property in the open: My clients are willing to comply with whatever reasonable conditions the Board has in mind. This doesn't occur very often anyway and should be able to be addressed quickly at a rehearing. Neil Rowe said when an applicant comes before the Board, they should be telling the Board what they are going to do, not asking what they can get away with. He added the intent of going before the Board is to present what their needs are and be sure they comply with the requirements of the Ordinance. The Board then determines whether or not they meet the requirements. Chairman Dold stated he feels the reason this is addressed in this request for rehearing is because some of the abutters did complain about the maintenance work that was being done in the yard. Mike Smith stated he doesn't have an issue with simple maintenance being performed as long as it's low noise and doesn't create a visual, safety or environmental impact, but feels this goes beyond that.

4) Activity not occurring inside the dwelling/accessory building: My clients will erect the building as quickly as possible once approval is in place. Neil Rowe stated from testimony at the August meeting, the building could cost between \$5,000 to \$50,000 and, depending on the cost, could take up to two years to build. Chairman Dold passed around a photo received today showing a structure on the property that was put up since August and that was taken today by Terry Barnes, Building Inspector. Attorney Simmons stated his objection for the record, adding that this is just being submitted and he has had no chance to respond to the photo. He added it is now almost impossible for it not to have a prejudicial value in the discussion.

5) Mud and dirt being tracked into the road: This concern will be alleviated with the paving of the driveway and perhaps some minor re-grading of the lawn by the road. Neil Rowe stated it appears to him, in passing by, that some portion of the driveway going out behind the house and the driveway going up to the garage door have, in fact, been paved. He does not know if it is a finish pave or a temporary pave.

6) Dust: This concern will be alleviated with the paving of the driveway.

7) School bus stops/children safety: My clients are responsible for driving safely just as any other vehicle on the road is. Any violations of the law would be an issue for the Police Department. With a daycare business in the neighborhood that generates thirty cars per day (see minutes), it is worth mentioning that business is allowed and that my clients don't generate that kind of traffic. Mike Smith said when the Board went through the criteria for the Special Exception, all Board members agreed there would be no traffic safety hazard.

8) Number of vehicles on the site: My clients are willing to live with whatever reasonable conditions the Board has in mind. Mike Smith said that may come back to the size of the building to house the vehicles. If the ordinance only allows for 320 square feet based on the finished floor space of the residence, that would dictate the number of vehicles on the site. Mike Smith asked if the applicant had a paved or gravel parking area next to it, and the vehicles are parked properly and out of site, would that be an issue and not allowed. Neil Rowe quoted from the definition of a Home Occupation, "Any individual business or profession conducted entirely within a dwelling or accessory building which is incidental to the dwelling and which does not change its character, etc.". Neil Rowe concluded it does state that it cannot be scattered all over the property. David Short stated the other limiting factor is that it not employ more than two people outside the immediate family. He could potentially have two vehicles for two employees who were outside the immediate family plus a vehicle for every

member of the immediate family who was working for the business, which would be a maximum of four vehicles. 9) Hours of operation: My clients are willing to live with whatever reasonable conditions the Board has in mind. Kirk Scamman said the Town of Stratham has a noise ordinance in their zoning with reasonable hours of operation. David Short said for seven or eight months out of the year, the hours of operation are easy to set. When plowing in the winter months, there are no reasonable hours of operation. Chairman Dold said Attorney Simmons is suggesting that if Mr. Daigle is granted the Special Exception, his regular occupational hours would be the normal hours that the Board would expect, except in an emergency snowstorm. Neil Rowe said Mr. Daigle could be mixing sand and salt at 1:00am or 2:00am in the morning. 10) Buffers: My clients are willing to live with whatever reasonable conditions the Board has in mind. Additionally, my clients testified that they will be installing additional fencing and landscaping to improve the already very good existing situation with regard to low impact as to what can be seen from off-site. Mike Smith said he thought they already added some buffers on the front left side of the driveway facing the house which does improve visibility from the neighbors. Neil Rowe quoted from the October 4, 2009 letter from John Golter, 127 Winnicutt Road, "Mr. Daigle has done some landscaping to the front part of the property which has no effect on our view of the property. No improvements have been made to the driveway situation so will be returning to the mud and dirt being dragged from the property onto Winnicutt Road in the near future." Neil Rowe stated since October 4, 2009 the driveway has been improved, whether or not it's long enough and all the mud comes off the tires on that short length of driveway remains to be seen.

The last paragraph on Page 2 states, "There was discussion during the meeting from Board members, which is not reflected in the draft minutes I was able to obtain, that the size of the structure being proposed will not house all of the vehicles that my clients have. I stated then and ask you to consider that if this is so, my clients will fully comply with what is allowed under the Ordinance." David Short said it is not up to the Board to design the business or the building.

Secretary Charbonneau then read the first three paragraphs on Page 3 which mentions other home occupations in Stratham, many of which have not obtained ZBA approvals and are much bigger and more invasive than what the Daigles propose. Chairman Dold asked if anyone was familiar with the Holt property. Kirk Scamman said it is a substantially larger piece of property, adding that he does both landscaping and agricultural. Concerning Attorney Simmons list of other home occupations in Stratham, David Short stated it just muddies the water. Neil Rowe said it would depend on when they came into existence, what rules were in effect at the time, what was said for testimony, etc. Mike Smith stated he understood that since the conditions vary from case to case, each one is taken on its own merits. Neil Rowe added they have always tried to judge a case based on the testimony provided for that case. He stated he personally doesn't feel it's appropriate for the Board to go outside the Daigles' case to make a judgment on their case.

Secretary Charbonneau read the paragraph entitled "The Board's Vote" from Page 3. Criteria 1) All Board members still agreed that the standards have not been met. Criteria 3) Kirk Scamman stated he still agreed that in August the Board heard testimony that was detrimental to the neighborhood. Chairman Dold agreed at the time he was convinced that there was not only dust, but unsightly outdoor storage of equipment, vehicles and materials. Mike Smith and Neil

Rowe also agreed. David Short said the Board wasn't convinced that the scale of what was being proposed would allow Mr. Daigle to mitigate these issues that are under Criteria 3. Mike Smith stated what was being proposed was a building to house a lot of the vehicles and equipment and a building of that size would far exceed what is allowed under the Ordinance. He stated the Zoning gives the applicant a broad scope of what is allowed and it is up to the applicant to present what he is going to change about his business so that it complies with the Ordinance. Criteria 6) David Short stated there is no indication that the minority of the Board was directing the majority opinion in any way, shape or form throughout this entire thing.

Secretary Charbonneau then read the last two paragraphs on Page 4 entitled "Conclusion". Chairman Dold stated when the Board runs a meeting, besides reading the information in the file, they allow the applicant to make his case. He added that he feels the applicant made his case. Then the Board allows those who are opposed or in favor to make their cases and they also allow the applicant to rebut those that are opposed and make any comments otherwise. Chairman Dold said he doesn't feel as though the Board didn't allow that to happen or that the Board did not engage in a conversation with his client. Chairman Dold felt the Board gave the applicant every opportunity to make his case on the night of August 11, 2009.

Chairman Dold stated the Board must now decide whether the applicant has made his case for the Board to rehear. David Short questioned if the Board decided to not grant the Motion for Rehearing, does that mean he cannot come back before the Board at some future time. He added if someone was to come before the Board with a definite layout of what they proposed to take place on the property with a carefully defined scope of operation, vehicles, structures, driveway layouts, buffers, etc., he would be willing to look at it again. Mike Smith said the number of conditions that would be required would be so large and too vague for the Board to really feel comfortable with allowing the Special Exception. Neil Rowe stated if the Board denies this request for a rehearing, they can go to Superior Court with the existing case that has been filed or they can regroup and come up with a new plan that meets the requirements and come before the Board again.

Attorney Simmons stated what will happen if the Board rejects the Request for Rehearing, is that they will set in motion a lawsuit that he has to do within thirty days. He added what his client is interested in is having an opportunity to address the Board, to show a proposal that would be different than what originally came in. He suggested if the Board would grant the Request for Rehearing, that would be the opportunity for them to come in with a new proposal, but he can't do that if they deny the request tonight because he has to sue the Town first to preserve those rights. Attorney Simmons stated if the Board denies tonight, he is forced to sue the Town while simultaneously coming in with another proposal. What he suggests is to grant the rehearing under the condition that his client is going to come in with a different and more detailed plan taking into account all of the Board's comments. David Short asked, in fairness to the abutters, if operations would continue during that time period. Attorney Simmons responded he would have to consult with his client about that. David Short stated the operations have continued throughout this whole process and if allowed to stretch out to some other undetermined time, he doesn't feel it would be fair to the abutters. Attorney Simmons said the timeframe would be short. He could have a new application submitted within a month to a month and a half.

Mike Smith asked if the Board were to rehear this does it have to be done within one or two months. Chairman Dold responded it's up to the Board, but it would certainly have to be as quick as possible. David Short added he doesn't think they can let it drag out with the business operating for some undetermined amount of time. Mike Smith stated that is enforcement of the Ordinance and, as the Board, he is not sure that's their responsibility. He added there are lots of cases in this Town where the Board hasn't been involved with enforcement. David Short said he would be very receptive if they came back as long as they come back quickly and comprehensively with some sort of plan. He added he doesn't think continuing or granting a rehearing is the answer, they need to start fresh. Mike Smith asked if they could grant a rehearing with conditions, such as coming back with a comprehensive plan in a reasonable amount of time. Chairman Dold asked the Board if they were interested in the applicant coming back with a comprehensive plan. Mike Smith said he was open to that idea to avoid a lawsuit. David Short then asked if the Board could continue this Request for Rehearing with the condition being that they want to see something concrete when they resume this discussion. Neil Rowe stated if they allow a rehearing it has to be based on new information. Mike Smith stated that by providing a rehearing, they understand that they need to come back with a strong case. At that point the Board decides to approve or not approve the Special Exception. Neil Rowe stated there are rules to granting a rehearing. One is that there has to be new information and the other is that the Board thinks they made the wrong decision. Attorney Simmons said that's not what the statute says. The statute says for good reason therefore as stated in the motion. What he stated in the motion is that he would like the opportunity to submit alternative plans. He suggested the Board grant the rehearing on the condition that the new submission will be materially different and will address the concerns that the Board has stated. Mike Smith stated the Board has heard new information; they've paved the driveway and they've done some landscaping. He added there is some evidence that it's moving in the right direction. Whether they will be able to address the issues the Board has laid out tonight in terms of the other things, he would like to hear by providing the rehearing. Then the Board can either approve or disapprove. Chairman Dold stated if the Board allows a rehearing and the applicant does some improvements in the meantime, they are at his own risk.

Paul Deschaine, Town Administrator, stated it disturbs him that the Board is discussing providing a rehearing with conditions and other elements as if they are hoping to have a second hearing on the matter, where new information may come out that may change the Board members' minds. He added that is not the purpose of a motion for a rehearing. He read from page 45 of the handbook entitled The Board of Adjustment in New Hampshire, "The coming to light of new evidence is not a requirement for the granting of a rehearing. The reasons for granting a rehearing should be compelling ones; the Board has no right to reopen a case based on the same set of facts unless it is convinced that an injustice would otherwise be created but a rehearing should be seriously considered if the moving party is persuasive that the Board has made a mistake. Don't reject a motion for rehearing out of hand merely because there is no new evidence. To routinely grant all rehearing requests would mean that the first hearing of any case would lose all importance and no decision of the Board would be final until two hearings had been held. The rehearing process is designed to afford local Zoning Boards of Adjustment an opportunity to correct their own mistakes before appeals are filed with the court. It is geared to the proposition that the Board shall have a first opportunity to correct any action taken, if

correction is necessary, before an appeal to court is filed. Mr. Deschaine stated the Board's purpose is deciding if there was an injustice or mistake made. He stated if the Board has nothing in the motion before them that indicates that they made an incorrect decision or they didn't have all the information before them, they are not required to have a rehearing. The purpose of a rehearing is to decide and correct an injustice from the first hearing. He added if no injustice has been made, then normally a rehearing is not held. The applicant is certainly allowed to then reapply with a totally new plan, which is much improved and significantly different from the first application. Mr. Deschaine stated the abutters and the applicant have some right to some certainty when the Board makes a decision. Only if a clear injustice has been made should the Board be rehearing it. He cautioned the Board to think seriously if they are having a rehearing that has conditions and other extraneous things because he is not sure that the law really supports that type of an action done by a Board. Attorney Simmons stated what Mr. Deschaine read actually supports their cause, his conclusions and his interpretation of it missed the mark a little bit. Attorney Simmons added statute is law and can be argued apparently in the wrong direction. He stated the statute says if good reason therefore is stated in the motion. The discussion they had before Mr. Deschaine's comments allows everyone the opportunity to get to a point where an application is put before the Board that addresses their concern without lawsuits and further delay. Attorney Simmons said the purpose of the statute is to allow the Board to correct situations before they become lawsuits and that's what granting a rehearing would accomplish this evening. Neil Rowe said if the original evidence was all-inclusive. He added the Board has to determine if they made a mistake based on the evidence they heard on the prior case. If the applicant brings in additional evidence or new evidence, then that may also be a reason. He stated he doesn't think the Board made a mistake based on the original evidence that was presented to them. David Short read from the Board of Adjustment handbook, "The Board and those in opposition to the appeal should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them."

Attorney Simmons stated the size of the building is one of the main issues and as he said at the hearing in August, they would be prepared to live with the calculations that were made that evening. He stated the Board overlooked that portion and has held against them, up to and including this very moment, the fact that what Mr. Daigle would like to do is something bigger. Attorney Simmons feels that is a significant issue that needs to be re-addressed by the Board and it certainly is what the Board would like to see. He added the Board has their commitment that it will be swift, prompt, thorough and address all of their concerns. Attorney Simmons said he thinks the Board should grant a rehearing and see the new application.

Chairman Dold stated he thinks the Board heard all the evidence during the first case, he feels that no new evidence has come to light and he doesn't feel they made an error in the first case. He added he doesn't think it should be reheard. Chairman Dold motioned to rehear Case # 538. Kirk Scamman seconded the motion. Chairman Dold, David Short, Kirk Scamman and Neil Rowe were not in favor of rehearing Case # 538. Mike Smith was in favor of rehearing it. Chairman Dold stated the Board is not in favor of rehearing Case # 538 and advised the applicant of the thirty-day appeal period.

Respectfully,

Norma Corrow, ZBA Clerk

The tape of the meeting is available at the Town Office Building for review during regular business hours.