



Stratham Zoning Board of Adjustment

Meeting Minutes

August 4, 2010

Municipal Center, Selectmen's Meeting Room

10 Bunker Hill Avenue

Time: 8:00 PM

Members Present: **John Dold, Chairman**
 Arol Charbonneau, Vice Chairman
 Kirk Scamman
 David Short
 Michael Smith, Alternate
 Jeffrey Karam, Alternate

Member Absent: **Bruce Barker**

1. Call to Order/Roll Call

Chairman, John Dold called the meeting to order and explained that Mr. Jeffrey Karam will be sitting in for Mr. Bruce Barker who is absent from tonight's meeting. Mr. Dold further explained that he choose Mr. Karam to sit in for Mr. Barker because Mr. David Short was not present at the June 8, 2010 meeting and Mr. Karam was.

2. John Golter and Linda Golter, 128 Winnicutt Road – Motion for Rehearing in relation to the Application for Home Occupation Special Exception of Mr. Brian Daigle, Daigle v. Town of Stratham (Rockingham Superior Court #09-E-0508), Litigation Settlement Agreement Approved by the Zoning Board of Adjustment.

Mr. Dold began the meeting by explaining that Mr. John and Linda Golter who resides at 127 Winnicutt Road, Stratham requested a motion for a Re Hearing of the June 8, 2010 decision on Zoning Board of Adjustment case number 538.

Mr. Charbonneau proceeded to read the first issue listed on the motion which reads, "The Applicant's proposed "accessory" structure is not actually accessory to the property's primary purpose, which is a residential dwelling". The Board discussed and compared the Town's Ordinance definition of an Accessory Structure to the actual proposed Accessory Structure.

1 Mr. Scamman stated that he sees no evidence so far to consider a Re Hearing regarding this
2 issue.

3
4 Mr. Dold proceeded to state that the proposed Accessory Structure is in fact an Accessory
5 Structure. Mr. Dold, further added, that is exactly what was presented at the June 8, 2010
6 Zoning Board Meeting. In conclusion, the Board still accepts the proposed Accessory
7 Structure as being an Accessory Structure to the main dwelling with the condition that the
8 Accessory Structure is no greater than 25% of the primary floor space of the main dwelling.

9
10 The Board moved on to the next issue, which reads “the applicant’s proposal actually
11 requires Variance relief, not a Special Exception, to conduct a Commercial Use in a
12 Residential/Agricultural Zone”.

13
14 Mr. Dold responded and stated that he does not see that point in the Zoning Regulations and
15 then asked the Board for their comments on that issue.

16
17 Mr. Deschaine approached the Board and stated that he thinks what the Golter’s are trying to
18 say is when the Board allowed the Home Occupation to go into a separate structure from the
19 main dwelling that then made the Home Occupation no longer a Home Occupation business.

20
21 The Board responded, and explained that the Home Occupation Ordinance was re written to
22 allow Home Occupations to be in an Accessory Structure. The Board, further explained, that
23 they do not view this Home Occupation any different than the other Home Occupations they
24 have granted, such as, Fat Code and several others.

25
26 Mr. Karam stated that the definition of a Home Occupation is the same in the new Ordinance
27 as the old Ordinance. Mr. Karam then proceeded to read the definition, which states, “in any
28 individual business or profession conducted within a dwelling, or accessory building....”

29
30 Mr. Dold responded and stated that the Ordinance is clear to him. Mr. Dold further
31 explained that he thinks Mr. Golter’s point is that the Board should have required Mr. Daigle
32 to apply for a Variance, not a Special Exception, because Mr. Golter views Mr. Daigle’s
33 business as a Commercial Use. In conclusion, Mr. Dold stated that this is a Home
34 Occupation and the Board agrees that this is a Home Occupation.

35
36 The Board moved onto the next issue on the motion, which states, the applicant’s proposed
37 construction activities also require Variance relief to expand a Nonconforming use”. Mr.
38 Charbonneau then referred the Board to pg 2 and continued reading the motion. Mr.
39 Charbonneau then referred the Board to page 8 sections B of the motion titled Unlawful
40 Expansion of Nonconforming Use Requiring Variance Relief. Mr. Charbonneau proceeded
41 to read the facts, which state, the Zoning Board of Adjustment
42 overlooked the significance of the fact that the Applicant’s property comprises just over one
43 acre (33,610 square feet) of land. The dimensional requirements set forth in Ordinance
44 Section 4.2 for the Residential/Agricultural Zone, i.e. two acre zoning, render the Applicant’s
45 property a nonconforming lot and, thus, is residential use itself is nonconforming as a matter
46 of law. See 15 Loughlin at 8.01 et seq. (Nonconforming Uses). The existing residential use,

1 of course, is “grandfathered.” But the extension and enlargement of nonconforming uses,
2 though generally not per se prohibited, must be done as carefully as an outright change in use
3 via a variance. Id at 8.06; see also RSA 674:19. As is the case in the present matter, an
4 expansion of a nonconforming use can be unlawful for both qualitative and quantitative
5 reasons.

6
7 Chairman Dold responded and stated that it is his understanding that what Mr. Golter is
8 saying is this property is grandfathered in, but for residential purposes only, not for
9 Commercial or Home Occupation uses.

10
11 The Board further discussed the issue of Home Occupations in nonconforming lots. Mr.
12 Barker stated that most residential lots in Stratham are nonconforming, because the two acre
13 lot requirement has only been in effect for the last few years. Mr. Barker further stated that
14 the lot is a lot of record and he feels everything on that lot should be treated the same as a
15 two acre lot, because the lot was an approved structure lot.

16
17 Mr. Smith approached the Board to state that he could see that argument if the location of the
18 proposed Accessory Structure were detrimental to the surrounding neighborhood, but in this
19 case the building they are proposing to construct is behind the home, out of view and less
20 than the 25% coverage. In conclusion, the structure is not intrusive in any way even though
21 the lot is less than the current zoning of two acres.

22
23 Mr. Dold proceeded to clarify that it is his understanding that Mr. Golter feels if you have
24 less than the two acre lot requirement you can’t come before the Zoning Board of
25 Adjustment for a Home Occupation, Special Exception, because you shouldn’t get it. The
26 Board had more discussion regarding allowing Home Occupation, Special Exception on a
27 Nonconforming lot.

28
29 Mr. Dold referred the Board to Section 5.3 Expansion of Nonconforming. The Board read
30 section 5.3 out loud, which states “A Variance is not required if the expansion is a natural
31 expansion, which does not change the nature of the use, does not make the property
32 proportionally less adequate and does not have a substantially different impact on the
33 neighborhood. The Board responded and stated that they feel that the Home Occupation is a
34 natural expansion under the Home Occupation Ordinance. Further explained the Home
35 Occupation application does not change the nature of use under the Home Occupation
36 Permit. The Board does not feel the Home Occupation makes the property less adequate or
37 have a negative impact on the neighborhood based on the plans and discussions the applicant
38 have submitted.

39
40 Mr. Dold responded and added that the Board believes that 5.1.2 does not apply and a
41 Variance is not required. The Board agreed.

42 The Board proceeded to the next issue on the Motion, which states, “The Applicant’s
43 proposal requires Site Plan Review by the Planning Board”.

44 Mr. Scamman asked Mr. Deschaine if it states anywhere in the Zoning Ordinance that a
45 residential lot has to apply for a Site Plan Review. Mr. Scamman added that he has always
46 thought of a Site Plan review a commercial procedure. Mr. Deschaine responded and

1 explained if a residential lot received a variance to construct a commercial use they would
2 not be exempt from Site Plan Review if the Board felt the applicant met the criteria of
3 Commercial Use. Mr. Deschaine further explained if the Zoning Board had an application
4 for a home occupation, but the home occupation was so intense then the Zoning Board could
5 require the applicant apply for a Site Plan Review as well.
6

7 Mr. Dold stated that the Home Occupation is a Commercial Use which is allowed by Special
8 Exception, not a Variance; therefore, Site Plan Review is not required. The Board agreed
9 and stated that Mr. Daigle meets the Special Exception requirements criteria
10

11 The Board asked Mr. Deschaine why Fat code went before the Planning Board for their
12 Home Occupation. Mr. Deschaine responded, and explained that the Zoning Board of
13 Adjustment felt that Fat Cod met the criteria of a Home Occupation, but the Board had
14 enough concern regarding access, visibility of the house and Fat Cod needed more employees
15 then the Ordinance allowed, therefore that meant they needed Planning Board approval. Mr.
16 Deschaine further, explained that the Zoning Board did not feel comfortable evaluating those
17 elements of the application.
18

19 Mr. Dold referred the Board to page 10 paragraphs 2, which states Mr. Golter's argument on
20 why the applicant should go before the Planning Board.
21

22 The Board discussed the proposed changes to the property and the Board feels that the
23 changes that are proposed for what the applicant is trying to achieve in terms of the location
24 of the building and the driveway to the structure are reasonable.
25

26 Mr. Deschaine approached the Board and stated that might not be a determination that the
27 Zoning Board determines. Mr. Deschaine further, explained that Site Plan Review is a
28 Planning Board function.
29

30 Mr. Dold stated that when Mr. Daigle applies for his building permits that will resolve any
31 issues regarding any issues with location of accessory structures and/or driveways, because
32 that is under the Building Inspectors determination.
33

34 Mr. Barnes explained to the Board that he received an application for a building permit and it
35 was not acted on because the application was incomplete due to no structural plans being
36 included along with dimensional measurements and location of the proposed structure on the
37 property. Mr. Barnes then added that an as-built will be required for this application to
38 indicate that the proposed building is exactly where the structure is on the property.

39 Mr. Dold explained that when the building permit application is complete then it would be
40 Mr. Barnes, Building Inspector decision to approve the application or to pass the application
41 on to the Planning Board for Site Plan Review. Mr. Dold then added that at this point Mr.
42 Daigle application does not require Site Plan Review, because he still has to go through the
43 Building Permit application process.
44

45 The Board proceeded to issue five on the Motion, which states The Zoning Board of
46 Adjustment did not ensure that the contents of the Applicant's proposal, under the Settlement

1 Agreement, conform to Section 17.8.2 of the Zoning Ordinance (requirements for Special
2 Exception). As a matter of procedure, the ZBA failed to subject the Agreement and the
3 Application to all applicable provisions of the Town’s Zoning Ordinance (the “Ordinance”),
4 namely Section 17.8.2 this procedural error is not a mere “procedural technicality.” See in
5 re Proposed New Hampshire Rules of Civil Procedure, 139 N.H. 512, 515 (1995). It is to the
6 detriment of the Golter’s and their use and enjoyment of their home. The ZBA must apply
7 the requirements of Section 17.8.2, otherwise it does not have sufficient evidence to support
8 its decision.
9

10 Mr. Deschaine referred the Board to page four, which states: 1. As a Procedural Matter, The
11 Zoning Board of Adjustment unlawfully and unreasonably neglected to subject the
12 agreement to all applicable requirements of the ordinance.
13

14 Ordinance Section 5.13..2 (App. 48) incorporates the requirements for a special exception set
15 forth in Section 17.8.2(“(a) special exception for a home occupation shall be allowed subject
16 to Section 17.8.2 and the following conditions and standards set forth below...” (emphasis
17 added). The ZBA did not address these threshold requirements. App 63-64.
18

19 a. Failure To Apply Ordinance Section 17.8.2 (Special Exceptions)
20

21 It is clear from the Draft Minutes that the Zoning Board of Adjustment, when comparing the
22 terms of the Agreement to Ordinance Section 5.13 (App 63-64), neglected to also review
23 those terms per the six criteria for special exceptions set forth in Ordinance Section 17.8.2.
24 App 51-52. The ZBA must now do so, especially in light of subsection (iii), regarding
25 property values and the need to protect the residential character of the neighborhood.
26

27 Mr. Karam stated that he feels when the Board discussed the Home Occupation 5.13.1.2 the
28 conditions in 5.13.2 are also the same as those under 17.8.2 I and iii. Mr. Karam
29

30 further added that there was a couple of those under 17.8.2 that the Board did not agree with
31 originally last year, but with the settlement agreement the Board went through all those as
32 part of the home occupation accepting both, the old and new ordinance, and the Board felt it
33 complied with both ordinance, even the more restricted ordinance. In conclusion, Mr. Barker
34 feels the Board did go through those.
35

36 Mr. Dold explained to the Board that there are two specific sections that Mr. Golter claims
37 the Board missed, one being property values. Mr. Dold asked the Board if property values
38 were addressed in 5.13 on page 73 or 74.
39

40 Mr. Charbonneau read page 74 section 5.13 b on the Settlement Agreement where the Board
41 addresses the proposed home occupation not to interfere with property values. Mr.
42 Charbonneau further added that he feels that the Board did review and discuss the issue in
43 length and compared it to both old and new Ordinances and the Board feel that it complies
44 with both.
45

1 Mr. Dold stated that the Board does not believe that they error by not making specific
2 reference to Section 17.8.2. Mr. Dold asked if the Board wanted to make any further
3 comments on issue 5 and then moved on to number 6.
4

5 Mr. Charbonneau proceeded to read issue number six, which stated, “The Zoning Board of
6 Adjustment did not make findings of fact as required under Section 17.9 of the Zoning
7 Ordinance”. Mr. Charbonneau then referred the Board to page 4 of the motion in order to
8 continue the Golter’s argument, which further stated, “The ZBA shall present findings of fact
9 for all its decisions and shall enter such findings into its records”.
10

11 The Board discussed issue six and Mr. Dold asked if he was supposed to write down all parts
12 of the decision from that night. Mr. Charbonneau asked Mr. Deschaine if it was necessary in
13 a case like that when the purpose of the meeting was to just approve the settlement
14 agreement. The Board and Mr. Deschaine further discussed the process of the Zoning Board
15 of Adjustment presenting findings of facts in the meetings and what the Ordinance states.
16 The Board determined that they did present the findings of facts, which states such in the
17 approved meeting minutes and in the approved settlement agreement.
18

19 Mr. Dold approached the Board and stated that he believes the Board has gone through the
20 six elements in the Motion for Re Hearing and asked the Board if there were any other issues
21 that need to be discussed with regards to this Motion for Re-Hearing
22

23 Mr. Dold then began to summarize the finding of facts from tonight’s meeting in order to
24 make a decision on the Motion for Re Hearing. Mr. Dold began with issue number one on
25 the Motion for Re Hearing, which stated:
26

- 27 1. That the proposed structure is not an accessory structure to the main dwelling.
28

29 The Boards response is, the Board believes the proposed structure is accessory and in
30 accordance with the Zoning Ordinances. This issue was discussed at length during the
31 meeting of June 8, 2010 and the accessory building was limited to 25% square feet of the
32 main structure lastly the accessory structure meets the definitions of a accessory structure in
33 the Zoning Ordinance.
34

- 35 2. The proposal requires a Variance and not a Special Exception.
36

37 The Board explained that it is written in the Zoning Ordinance that a Home Occupation is a
38 Commercial Use which is allowed by Special Exception not by a Variance; therefore the
39 Board disagrees with Mr. Golter on that issue.
40

- 41 3. The proposed construction activities take place on a one acre plus piece of land and
42 therefore require a Variance for a Nonconforming Use.
43

44 The Board explained that there are many lots in Stratham that are lots of record, which are
45 less then two acres. The Board believes that Section 5.1.2 paragraph two of the Zoning
46 Ordinance states that a Variance is not required. Mr. Dold further read section 5.1.2

1 paragraph 2 to the Board, which states, "A Variance is not required if the expansion is a
2 natural expansion which does not change the nature of use and does not make the property
3 proportionally adequate and does not have a substantially impact on the neighborhood and
4 based on that Ordinance the Board does not feel the Variance is not required. Mr. Dold just
5 referred to paragraph 2 of section 5.1.2 of the Zoning Ordinance and determined based on the
6 ordinance a variance is not required.
7

8 4. Required Site Plan Review by the Planning Board.
9

10 The Board stated that the construction of the accessory structure will be addressed in the
11 Building permit process and the Zoning Board did not require Site Plan Review nor do they
12 require Site Plan Review now.
13

14 5. The Zoning Board of Adjustment did not ensure that the settlement agreement conformed
15 to Section 17.8.2, which is the section on Special Exceptions in the Zoning Ordinance.
16

17 The Board responded and stated that they do not believe that they error by not making
18 specific reference and findings under 17.8.2 Special Exceptions, the Board discussed the
19 Sections of 17.8.2 in the process of the Settlement Agreement and some of those sections
20 were specifically reviewed in 5.13.2B with respect to property values.
21

22 6. The Zoning Board of Adjustment did not make findings of fact.
23

24 The Boards stated that they confidentially believe that they did make findings of facts in the
25 approved meeting minutes and in the approved Settlement Agreement.
26

27 Mr. Short made a motion to deny the request for Re Hearing on Zoning Board of Adjustment
28 Case Number 538, seconded by Mr. Scamman. Motion passed unanimously
29

30 Mr. Scamman made a motion to adjourn at 9:45 PM, seconded by Mr. Short. Motion passed
31 unanimously.
32

33
34 _____
35 John Dold, Chairman

_____ Date

36
37
38 _____
39 Arol Charbonneau, Vice Chairman

_____ Date

40
41
42 _____
43 Kirk Scamman,

_____ Date

1 _____
2 Dave Short
3
4
5 _____
6 Bruce Barker
7
8
9
10
11
12

Date

Date