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6 **Stratham Zoning Board of Adjustment**
7 **Meeting Minutes**
8 **October 27, 2015**
9 **Municipal Center, Selectmen's Meeting Room**
10 **10 Bunker Hill Avenue**
11 **Time: 7:00 PM**
12

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14 **Members Present:** **Arol Charbonneau, Chairman**
15 **Bruno Federico, Board of Selectman Representative**
16 **Jim Elliott, Secretary**
17 **Garrett Dolan, Full Time Member**
18 **Chris Cavarretta, Full Time Member**
19 **Deidre Lawrence, Alternate**
20 **Phil Caparso, Alternate**
21 **Chris Brett, Full Time Member**
22

23 **Members Absent:**

24
25 **Staff Present:** **Audrey Cline, Code Enforcement Officer**
26

27 **1. Call to Order/Roll Call**

28 The Chairman took roll call and explained the rules of procedure.

29 **2. Approval of Minutes**

30 **a. September 8, 2015**

31 Mr. Dolan motioned to accept the minutes of September 8, 2015 as written. Mr.
32 Cavarretta seconded the motion. Motion carried unanimously.

33 **b. September 9, 2015**

34 Mr. Cavarretta motioned to accept the minutes of September 9, 2015 as written. Mr.
35 Dolan seconded the motion. Motion carried unanimously.

36 **c. September 22, 2015**

37 Mr. Cavarretta motioned to accept the minutes of September 9, 2015 as written. Mr.
38 Brett seconded the motion. Motion carried unanimously.

1 **3. Public Hearing(s)**

- 2 a. **Case #624: Birse Living Trust, for the property located at 313 Portsmouth Ave,**
3 **Stratham, NH, Tax Map 22, Lot 29.** An Appeal from Administrative Decision of Audrey
4 Cline, Code Enforcement Officer, dated June 15, 2015, Non-compliance with ZBA Variance
5 Case #45 reaffirmed via Appeal from Administrative Decision Case #512 (*Continued from*
6 *September 22, 2015*).

7
8 Mr. Charbonneau spoke to the background of Case #624 and that the board was waiting
9 for the legal opinion of town council, which was received just prior to the meeting.

10
11 Attorney Thomas Keane, representative for Mr. Birse, stated they have been through
12 several meetings and a site walk and it has been stated several times that it is not the
13 intention of the Town of Stratham to put Mr. Birse and the landscape company that
14 operates on the property out of business. Mr. Birse has operated a good business for 9+
15 years, they've been a good neighbor and tax payer, and there have been no complaints
16 relative to the business. It wasn't until the Notice of Violation issued in June 2015 that
17 there became an issue, after Mr. Birse sold the business. Mr. Birse responded to the
18 notice asking "why now" to the list of Ms. Cline's requests (i.e. to restrict inventory and
19 material to the original bins, to remove signage, restrict sales, and to restrict office hours).
20 Mr. Birse came forward to resolve the issues with the town. The violation states Mr.
21 Birse "expanded the use" and it appears this hearing has been blown out of proportion
22 and several other issues came into play. Attorney Keane addressed the violation of use
23 that the Town's ordinance in Section 5.1 states "a variance is not required if the
24 expansion is a natural expansion which does not change the nature of the use, does not
25 make property proportionately less adequate, and does not have a substantially different
26 impact on the neighborhood". The Supreme Court, "Hampton vs Birse" in 1982, stated
27 "where there is no substantial change in a non-conforming use's effect on the
28 neighborhood, the landowner will be allowed to increase the volume and intensity of the
29 non-conforming use". Attorney Keane stated that a change of use is permitted by law
30 and Mr. Birse was never notified that other variances may be required, they were told
31 there was an unlawful expansion. Attorney Keane does not believe there is a significant
32 increase in use as was shown during the site walk and pictures submitted. Attorney
33 Keane suggested, as well as in prior meetings, the ZBA hire an attorney to contact him
34 directly to come to a resolution that would solve all concerns. Attorney Keane reached
35 out to Ms. Cline regarding not hearing from an attorney, to which Ms. Cline responded
36 via email that the attorney was hired to give legal opinion to the Board of Adjustment.
37 Attorney Keane suggested the meeting be continued due to lack of adequate time to
38 review the attorney's response and stated Ms. Cline denied the continuance. At 5:00 pm
39 Attorney Keane received an 8 page legal opinion, which did not give him time to review
40 with his client and it focuses on issues that are not in line with the Notice of Violation. If
41 the course of this Notice of Violation has changed from "you've expanded the use too
42 much" to "you're not allowed to have the use there and need to apply for a variance" Mr.
43 Birse deserves to know. Attorney Keane agreed a computer business was discovered
44 renting part of the building during this process and was not the use that was originally
45 approved by the Board of Adjustment; and, if they want to continue there they should
46 come in and get a variance for use of the building. The town's attorney's opinion is that

1 there should have been a variance applied for in 2007, which is not in the Notice of
2 Violation nor is it an issue Mr. Birse has been asked to address. In 2007 Mr. Birse came
3 before the board due to a cease and desist issued by Terry Barnes. Mr. Barnes stated Mr.
4 Birse needed to come before the board for a change of use. Mr. Barnes and the board in
5 2007 told Mr. Birse what to file, the Administrative Appeal was filed not because Mr.
6 Birse knew, but that he was told by the board what to file. Mr. Birse was never restricted
7 on the use of the remainder of the property, he was told he could operate a
8 landscape/construction business.
9

10 Mr. Charbonneau asked the board to vote on continuing the case due to lack of time to
11 review the town attorney's opinion. Mr. Dolan stated he has not seen the opinion and
12 would like time to review and put his questions together. Mr. Elliott agreed with Mr.
13 Dolan. Mr. Caparso questioned whether the calendar time for the continuance can be
14 voted on to be shortened. Ms. Cline stated the next ZBA meeting date is November 10,
15 2015 but the meeting could be moved to November 3, 2015 if board members would be
16 available. Mr. Charbonneau stated he will not be available November 10th. Board
17 members all agreed they are available November 3, 2015. Attorney Keane would like the
18 board to read the violation before reading the attorney's opinion due to the violation
19 being the reason Mr. Birse is before the ZBA and reiterated he would like the town's
20 attorney to contact him to clarify what the town is looking for from Mr. Birse. Mr.
21 Caparso stated the attorney is not empowered to negotiate on behalf of the board.
22

23 Mr. Deschaine stated Ms. Cline rendered an opinion in the Notice of Violation of what
24 she gathered from the records she had at the time regarding the 2007 ZBA decision,
25 which stated, you haven't changed the use, but it falls under the variance granted in 1972.
26 What has occurred between 2007 and today, and is known as a violation, has gone
27 beyond what could be credibly inferred from that decision in 2007. Mr. Birse had two
28 options; appeal that decision, which is what they chose to do, or apply for another
29 variance to get everything they wanted to do approved. In appealing that decision, the
30 decision moves to the ZBA to render a decision on the judicial matter to which they find
31 is still in keeping with the 2007 decision. Attorney Keane cannot ask you to render your
32 opinion of what the ZBA wants to resolve this matter without asking for a decision. Town
33 council and code enforcement discussions can occur, but the board cannot interact with
34 Attorney Keane. When the Notice of Violation was rendered in June a lot has changed
35 between then and now. Once the notice was appealed the board became the code
36 enforcement officer. During the course of testimony and evidence the violations or
37 actions have gone beyond the official notice which Attorney Keane and his client are
38 given ample opportunity in this forum to respond, but the board is free to act as the code
39 enforcement officer and if they chose to further elaborate on items they feel could be in
40 conformance with the finding in 2007, they are allowed to. They cannot grant a variance
41 due to one not being applied for. Attorney Keane argued the Board of Adjustment in
42 2007 approved the use of the property for a landscape and construction business. Mr.
43 Caparso asked Mr. Charbonneau whether negotiating points can be made on
44 administrative appeal or is it a straight vote. Mr. Deschaine stated town council
45 addressed that question in his opinion "you cannot add additional conditions, because by
46 doing so you are granting a variance" but you can have finding of fact that determine or

1 express actions that meet your findings. Mr. Caparso reiterated that Attorney Keane's
2 suggestion of meeting with town council that the board cannot negotiate a settlement due
3 to voting only on the appeal with findings of facts attached. Attorney Keane disagreed
4 and stated Ms. Cline could discuss with council to come to a resolution before the next
5 meeting. Mr. Elliott questioned whether the board will be kept apprised of the
6 negotiations to which Ms. Lawrence stated that would be outside of a public meeting and
7 not acceptable. Mr. Cavarretta questioned Attorney Keane if his client is willing accept
8 conditions tonight. Attorney Keane responded the original 5 bins are not on the property,
9 when Mr. Birse was approved he did not represent he didn't want to grow his business,
10 and he should be entitled to have more inventory than he had in 2007, but if the town
11 doesn't want it overdeveloped than Mr. Birse is willing to talk about restricting where the
12 materials and inventory will be placed; the retail sales Mr. Birse cannot comply with in
13 the violation due to lack of information on Skilling's sales; the signage would also be
14 moved; the hours could be restricted. Mr. Cavarretta and Mr. Charbonneau discussed
15 how to move forward without dragging this case out. Mr. Caparso stated he would like
16 the board to come to a negotiated settlement but has concerns with the change from the
17 landscaping business to a retail stone business which needs to be resolved. Mr. Birse and
18 Attorney Keane confirmed there is less retail product being sold today than when Mr.
19 Birse owned the business and there is no change from 2007 to today. Mr. Birse stated the
20 business is 70+% contractor sales, the average person does not come in to do business
21 and delivery of material is made on a flatbed truck. Mr. Deschaine stated he, and at least
22 one board of selectman, agree that any negotiations would happen through The Town
23 Administrator's office and the land use department because a site plan review needs to go
24 before the planning board. If some accommodation or accord could be reached, then a
25 meeting with town council could be in order on how to structure the decision. Direct
26 negotiations would be difficult trying to predict what the Board of Adjustment might find
27 and it is not productive to have the attorneys involved initially. Town council's role in
28 this matter is actively pursuing the interest of the code enforcement officer on behalf of
29 the board of selectmen and he would have to recuse himself from representation of this
30 board. The conflict of interest has been cognizant all along and the letter was intended to
31 be an opinion of the legal matters before you, not advisory on your actions. Attorney
32 Keane stated if Mr. Deschaine and Planning would like to meet with Mr. Birse and look
33 at a site plan and come to agreement he does not need to be there. Mr. Deschaine stated
34 the administrative offices of the town are willing to make an effort to resolve the
35 situation.

36
37 Mr. Deschaine asked Mr. Birse to prepare a complete and thorough, all inclusive, written
38 description of exactly all the activities the Birses' would like to have, and believe they
39 have the right to have, on that site prior to meeting with Ms. Cline, the Planning
40 Department, and himself.

41
42 Mr. Dolan motioned to postpone a decision on this case until the parties involved have
43 the opportunity to meet with town administrator and the planning department and work
44 out a reasonable agreement between all parties and continue the case to November 3,
45 2015. Mr. Cavarretta seconded the motion. Motion carried unanimously.

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3 b. **Case #627: Patrick & Elissa Simpson, for property owned by Andrew & Christine**
4 **VanDerslice, located at 18 Union Road, Stratham, NH, Tax Map 10, Lot 139.** A Special
5 Exception application pursuant to Stratham's Zoning Ordinance Section 5.4 ACCESSORY
6 APARTMENTS. The applicant proposes to construct an accessory apartment within an
7 existing single family dwelling (*Continued from September 22, 2015*).
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9 Mr. Charbonneau read an email sent to Tracey Cutler from Andrew & Christine VanDerslice
10 regarding the dismissal of application for Case #627, Accessory Apartment, without
11 prejudice. Ms. Cline stated the DES would not allow another dwelling unit due to the
12 shortage of water.
13

14 Mr. Cavarretta motioned to accept the dismissal without prejudice of Case #627, 18
15 Union Road. Mr. Dolan seconded the motion. Motion carried unanimously.
16

17 Mr. Charbonneau stated the board needs to be prepared to proceed at the November 3, 2015
18 meeting and all board members need to read and digest the attorney's opinion in case
19 negotiations fall through. Mr. Caparso raised his concern with the time it took legal counsel
20 to render their opinion. Ms. Cline stated town council, when contacted regarding this case,
21 confirmed he would not be able to look at the case for 1-1/2 weeks and it became more
22 complicated than he anticipated as he proceeded. Ms. Lawrence questioned whether NH has
23 attorney/client privilege. Mr. Deschaine confirmed there is a privilege, but there has been a
24 supreme court ruling that the information is not to be received in non-public session unless
25 council is present. Ms. Cline stated that the legal opinion is town council's opinion of the
26 points of law that he needed to restrict the board. Ms. Cline and Mr. Deschaine reminded the
27 board that they cannot deliberate or speak to the specific issues of the case, but if there is a
28 generic procedural questions it can be answered. Mr. Caparso asked for clarification whether
29 the board will be able vote on the agreement between Mr. Birse, the Town Administrator,
30 and the Land Use Department. Mr. Deschaine confirmed that Mr. Birse will withdraw the
31 appeal and there will be no meeting but it will need Board of Selectman approval since they
32 are technically the enforcing authority through the code enforcement officer. If an
33 accommodation and agreement can be reached, and Mr. Birse agrees to withdraw, the Board
34 of Selectman will be the voting body. Mr. Deschaine explained, for future record, there will
35 be a settlement agreement to which Mr. Birse agrees to withdraw the appeal if he meets the
36 following actions.
37

38 Mr. Cavarretta made a motion to adjourn at 8:07 pm. Mr. Dolan seconded the motion.
39 Motion carried unanimously.