

Wolfeboro Zoning Board of **RECEIVED AND RECORDED**  
Public Meeting Dec 22, 2011 M  
December 20, 2011 Book No. \_\_\_\_\_ Page No. \_\_\_\_\_  
Minutes \_\_\_\_\_  
*Patricia M. Waterman*  
WOLFEBORO, N.H. TOWN CLERK

Members Present: Alan Harding, Chairman, Suzanne Ryan, Vice Chairman, Steve McGuire, Clerk, Kathy Barnard, Member, and Mike Hodder, Alternate

Members Absent: David Senecal, Alternate, David Booth, Member

Staff Present: Rob Houseman, Director of Planning & Zoning and Robin Kingston, Administrative Assistant

Alan Harding called this meeting to order at 2:00 PM in the Wolfeboro Public Library Meeting Room. A quorum was present. The Board was introduced. The Rules of Conduct for the public meeting as opposed to a public hearing were reviewed.

Consideration of Motion for Rehearing

TM# 59-1

Case # 07-RSA-11

Applicant: Corey A. Eastman, III

Appeal from NH RSA 674:41

Submitted by Jonathan Doherty, Gordon Land and Stephen Lang on a decision made November 7, 2011 as follows and received on December 6, 2011

Mike Hodder was seated for the meeting.

On November 7, 2011 the ZBA made the following decision:

*The Board voted by at least three members to grant the application for Case # 07-RSA-11 to allow for the construction of one dwelling on a lot having no road frontage but a deeded access over TM# 59-2 for TM# 59-1, with the conditions that there will be no further subdivision or any subdivision of this property, the conditions indicated on the memo Deputy Fire Chief dated September 13, 2011 be added as a condition, the acknowledgement regarding the building permit on a private way be completed to reference this property and be filed the appropriate county office, based on the criteria being met, including practical difficulty.*

Alan Harding noted the one of the following findings must be made under RSA 677:2 in order to grant a motion for rehearing.

1. The Board must determine if the applicant has standing
2. Has the petitioner claimed or demonstrated a technical error has been made.
3. Has new evidence produce that was not available to him or her at the time of the first hearing

Chairman Harding noted there will be no input from the public.

Chairman Harding commented he feels the petitioner has standing, there has been no technical error, and the petitioner has produced no new evidence that was not available to him at the time of the first hearing.

Steve McGuire commented the he believes the Lang's and Doherty's have standing as they are abutters, the Board may have made a technical error in particular to practical difficulty, so some discussion may be necessary and no new evidence was submitted.

Kathy Barnard commented she believes the petitioner has standing. She does not see a technical error and it actually it struck her the petitioner sort of wanted a second bite of the apple. The information he had, had already been received there is no new evidence.

Suzanne Ryan commented the applicant has standing. She strongly believes there was a technical error and further the ZBA is allowed to rehear a case to correct any errors they may have made and feels the ZBA should rehear this case. There is no new evidence.

Mike Hodder noted it is not as simple as the applicants having standing. You need to separate out the applicants. Mr. Doherty has no standing at this point even as an abutter. He did not appear at the first meeting as he was unable to for health reasons but did submit a 3 page document in his place. That document covered his objections to the permit issues in the first case. He has had his chance to speak there. Of the other two applicants the Lang's, Gordon was here and had his chance, made his statement and lost his case. He does not get a second bit of the apple even though he is an abutter. Stephen Lang was not at the meeting and did not have a chance to make his case so he does have standing. There is no new evidence presented. As for a technical error, he finds 674:41 difficult. He would like to have some elucidation from a higher authority on its exact application.

Alan Harding asked how that was done.

Mike Hodder responded that he does not do that because he has no higher authority to appeal to but an applicant who is a refused an application for a rehearing can appeal to the

Superior Court in Carroll County. He was not a sitting member at the time of the original hearing so speaking for himself he cannot say yes or no without leaving himself open to be argued either way.

Suzanne Ryan commented she would like to discuss what she feels was a technical error. Note on Page 1, Section 1, a. - *The ZBA approved the Applicant's application based on "the criteria being met, including practical difficulty."* Notice of Decision 10 November 2011. *However, the Applicant made no claim of practical difficulty, but rather claimed only unnecessary hardship in his application. It is unlawful and unreasonable for the Board to find practical difficulty when nothing was presented by the Applicant on this criterion.*

Mike Hodder made a point of clarification as he looked at 674:41, II, it quotes "whenever the enforcement of the provisions of this section would entail practical difficulty or unnecessary hardship." It does not say "and" it says "or" which suggests a fork. You can argue one or the other but the statute does not seem to require you to argue both.

Suzanne Ryan stated the ZBA chose grant the relief and included practical difficulty. We chose to fill out their application for them. When the new provision for variance came - hardship- the ZBA mode sort of made a policy decision on the first application that it's the applicants responsibility to tell the Board which provision they are going under.

Steve McGuire commented he is having trouble where the ZBA introduced, on behalf of the applicant a criteria that he had not claimed in his application and that is the technical error he believes the Board made. The ZBA leaves itself open to a reversal by the Superior Court.

Kathy Barnard stated it is based upon information obtained at the public hearing.

Steve McGuire stated that may be the case but after the hearing was closed the ZBA introduced it.

Alan Harding noted it should have been self evident in the lengthy discussion on this application, but he does not think it is in the minutes, but he knows it was discussed that there are two and you have a choice - practical difficulty or hardship. The function the ZBA is asked to perform at the hearing was to either grant a building permit or not grant a building permit. The discussions that went on revolved around the practical difficulty. Whether the applicant brought it up in his application or not. He is not going to say they were suffering from terminal naiveté but the ZBA is not here to split hairs. The Board is here to discuss a building permit. Alan Harding referenced Page 9 of the minutes dated November 7, 2011.- as follows:

*"Alan Harding noted there is a term "counterfactual" and this describes what is going on with the discussion. That is to say if we had done this, this would have happened, it would have been better or worse, or if he had purchased this, he would not be here. The fact is the application has been submitted to the Board. There has been a confluence of opinion that this is not based on hardship. It is up to the Board to determine practical difficulty. As to the erection of the building, it does not fragment the lot and it does not distort the official map, as there is none. There is a right of way and there is no difficulty carrying out the Master Plan, as there will be one house on 75 acres where in the deed states "no subdivision" so it enhances the Master Plan. As to the hardship of future purchases, there is nothing there."*

This sums up his opinion then and it is now. He does not want opinion creeping into what happened. The application was granted. If there are facts supplied by the applicant that were not there and were not discussed at the meeting, the Board can talk about it, but nothing has been submitted. As to a technical error, they do not say that in the motion for rehearing. Alan Harding reminded the Board he corrected Mr. Lang when he called it a variance. It was not and will not be a variance; this is an Appeal of RSA 674.41.

Mike Hodder does not see why if an applicant is given a choice "either or" and chooses to argue one and the Board finds also the other, then they can award a variance or in this case a building permit, based upon an argument that he did not make but the Board perceived. That is not a technical error; he sees that as being fair to an applicant and attempting to do right by the citizens.

Steve McGuire stated the many times zoning cases and appeals swing on one or two words and the introduction of what the ZBA did and the approval was technically wrong. The statute was designed for this opportunity. It gives the Board a chance to say, wait a minute, it was not structured right, it was not formed right, the approval they gave was not correct and the Board is going to have a rehearing to correct what the Board did not do.

Mike Hodder asked if he would limit a rehearing only to the discussion of Practical Difficulty.

Steve McGuire responded that it would be a completely new hearing.

Mike Hodder commented that although the Mr. McGuire is suggesting the only error is a technical one you are willing to open up the whole case again. Corey Eastman has relied upon the previous ZBA decision by the Board and has gone ahead with his business accordingly, but now go ahead with a new hearing and put whatever he may or may not have

done on the property in jeopardy because of the belief that the statute requires that if he does not argue one he fails on the other.

Steve McGuire stated that any decision made is not final until the appeal period has run out. The ZBA made a technical error in granting the appeal and believes if a rehearing is not granted, this will go to Superior Court and they will say "no the ZBA made a technical error and this application is not approved."

Alan Harding stated they are dealing with counterfactual again. Mr. McGuire's theory is the case will go to court and the judge will say, "Goodbye Mr. Eastman, you're through." That is a rash assumption that should not be made. That suggests the judge is a machine, which he is not, but he is a thinking individual

Steve McGuire stated it is his opinion that a judge will look at this and say the ZBA of Wolfeboro made a mistake.

Suzanne Ryan stated the idea of a rehearing is for the ZBA is to correct a mistake before and if it goes to court. Wouldn't the ZBA be better served to correct its mistake before they have it remanded back? It will only cost the town more money if it goes to court. This is the reason the ZBA has this opportunity to fix this wrong. Just because Mr. Harding stated what he felt was a technical difficulty, the Board agreed there was no hardship, so you had to find a practical difficulty. The application did not produce it and 3 members of the ZBA found it for him. As a PS to the motion, it was Mr. Booth who included practical difficulty. The town would be better served to rehearing the application and cleanup the practical difficulty issue. The outcome may be the same, because the vote would probably be the same because she does not think, you folks, are going to change your mind.

Mike Hodder stated he trying to weigh the cost to town, having it go to court, weighing what Alan said reminding the Board of 677.2 and decisions of ZBA should not be reopened but for fairly serious reasons, and his own concerns for the for the credibility and intuitional status of the ZBA. He does not think the ZBA should reopen a case unless there are some fairly serious errors or procedural problems that have come before us.

Suzanne Ryan stated she sees this as a serious procedural problem.

Kathy Barnard stated that this Suzanne Ryan's opinion.

It was moved by Alan Harding to deny the application for a rehearing based on the facts that the petitioner has not demonstrated a technical error and the petitioner has produced no new evidence that was not available to him at the time of the first hearing. Kathy Barnard seconded the motion.

Alan Harding and Kathy Barnard voted in favor of the motion. Suzanne Ryan and Steve McGuire voted in opposition.

Mike Hodder said he would (may) abstain but asked for the motion to be reread and discussion.

Robin Kingston reread the motion.

Mike Hodder stated that he agrees there was no new evidence. As he said before he was not convinced he understood the statute well enough to apply it correctly so he is having difficulty saying he made no technical error.

Steve McGuire asked for clarification in the comments about understanding the statute.

Mike Hodder stated it is the "either or's" and the requirements and what practical difficulty of unnecessary hardship would entail in the application of the statute.

Suzanne Ryan asked for a call for the vote.

Alan Harding stated it was a tie.

Suzanne Ryan stated a tie vote, the motion fails and the hearing would be granted.

Mike Hodder commented that he has not cast a vote.

Mike Hodder asked the motion should be restated.

Robin Kingston noted the previous was discussion on the motion and the motion stands as read.

Alan Harding called for a final vote on the motion. Alan Harding, Mike Hodder and Kathy Barnard voted in favor of the motion. Steve McGuire and Suzanne Ryan voted in opposition. The motion passed.

Kathy Barnard commented took issue with Suzanne Ryan's comment that she knows how they are going to vote on an application. It is important for people to know the ZBA comes into each hearing, listens to the facts, and then decides on the outcome.

Other Business:

Mike Hodder asked if the ZBA could hold a workshop to discuss various points raised and some of the cases the ZBA has heard of the past year. This way the Board could air their concerns and hear what other people have to say about various issues.

Rob Houseman suggested having the Local Government Center come to Wolfeboro and hold a workshop for Wolfeboro and surrounding towns, have a general overview and then engage in discussion although maybe it is more important to have something very specific to the Boards issues. He has queried his Professional Association and the responses were shockingly silent. There is a case pending in Superior Court against Atkinson, which he will try to provide for the Board.

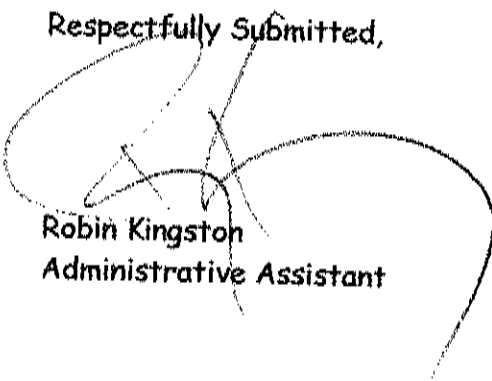
Mike Hodder suggested that he would like to hear what other board members think about the 674:41 off the record.

The Board noted any meeting would be a public meeting unless there was a meeting with counsel regarding a specific case.

Rob Houseman noted he serves on an LGC Advisory Committee and will request this to be placed on their agenda for discussion. He has also done some research and notes that one quarter of the Town's waterfront lots meet the criteria for 674:41.

It was moved by Steve McGuire and seconded by Mike Hodder to adjourn at 2:33 PM. All members voted in favor and the motion passed.

Respectfully Submitted,



Robin Kingston  
Administrative Assistant