

1/17 2017 RECORDED
Wolfeboro Zoning Board of Adjustment
Regular Meeting
9 January 2017

Book No. Page No.

[Signature]
WOLFEBORO, N.H. TOWN CLERK

Minutes

Members Present: Fred Tedeschi, Chairman, Mike Hodder, Vice- Chairman, Chris Franson, Clerk, Hank Why and Suzanne Ryan, Members, Susan Raser, Alternate, David Senecal, Alternate and Sarah Silk, Alternate

Staff: Matt Sullivan, Director of Planning & Development, Robin Kingston, Administrative Assistant

Chairman Tedeschi called this meeting to order at 7:00 pm in the Great Hall at the Wolfeboro Town Hall. A quorum was present.

TM# 201-80

Case # 01-AAD-17

Applicant: Joseph & Cynthia Melanson

Appeal of Administrative Decision

The Melanson appeal scheduled has been withdrawn.

Continued Public Hearing

TM# 218-150

Case # 25-AAD-16

Applicant: Gregory Cantwell

Appeal of Administrative Decision made by the Planning Board 10/4/2016

Sarah Silk, David Senecal and Mike Hodder stepped down from the hearing. Susan Raser was appointed as a voting member.

Fred Tedeschi noted the Board received two legal opinions from counsel. The first opinion deals with the two issues raised at the last meeting and the second deals with Rules of Procedure as to how long you have to file and appeal. The Board reviewed the opinions.

It was moved by Chris Franson and seconded by Suzanne Ryan to release the legal opinions the Board sought from Laura Spector-Morqan dated 11-15-2016 and 11-18-2016. All members voted in favor. The motion passed.

The Board took a five-minute recess to allow for review of the released opinions by the applicant and Brewster Academy and their legal counsel. The Board reconvened.

Continued Hearing from December 5, 2016 for an Appeal of Administrative Decision of the approval of the site plan for Brewster Academy Case # 201621, granted on October 4, 2016 by the Wolfeboro Planning Board for the construction of a dormitory to house existing student population and house two faculty families per wing for a total of four faculty families. This property is located off Clark Road.

Fred Tedeschi reviewed the legal opinions for the record. Both opinions are now part of the file.

Fred Tedeschi asked if the public hearing should be re-opened. The Board discussed re-opening the public hearing however limiting the scope of response to the legal issue as to which zoning district the parcel is in.

The Board agreed to reopen the public hearing under the limited scope.

Fred Tedeschi summarized the two issues: The appellant has said the Planning Board made an error in not applying the VR zoning criteria for Special Exception because the property is in the VR zone and not the ROI.

Mr. Cantwell asked procedurally if Mr. Hodder stepped down for the entire hearing? He asked if there is a separate communication between Mr. Hodder and the Planning Board's Attorney.

Fred Tedeschi responded there was a question as to whether a Planning Board Member also serving as a Zoning Board Member is obligated to step down. That opinion has not been released.

Mr. Cantwell stated he is concerned there is another opinion.

Chris Franson explained there is nothing else.

Mr. Cantwell objected to the effective recusal in the second session as Mr. Hodder spoke in the first session; as he spoke it is not an effective recusal and he objects.

Fred Tedeschi stated the objection is noted for the record. Further the ZBA has traditionally allowed all members, voting or not to participate in the deliberations but not voting if they recuse themselves.

Attorney Walker stated a procedural objection. The Board should not consider the documents submitted on the 21st of December 2016 from Mr. Cantwell as these documents came in between the two hearings. It is not appropriate to send the board information outside of the public session. The documents do not relate to the issue of the appeal. The appeal is specific and the applicant is attempting, through the 21 December 2016 documents to bring up unrelated issues. The Board should not consider these documents. Further the Municipal Association has rendered an opinion on Motion for Rehearing which is effectively the same; that you cannot inject new issues after the 30-day appeal period. Mr. Cantwell in his letter states "This evidence is submitted to support that whatever district the proposed dormitory is in, the Town's intent was that it go through the special exception process in the ZBA". That was not his argument in his application. His argument is the property is in the VR district and not the ROI Overlay District. The only reason Brewster Academy submitted a package is to respond to what Mr. Cantwell submitted.

Mr. Cantwell responded and stated the initial application states the application is being brought forward because the school needs a special exception because it is in the VR Zone. He asked that he not be limited to the issues in which the ZBA sought legal opinion. Mr. Cantwell went stated the Town of Wolfeboro has a lot merger ordinance and Brewster Academy did not take the procedural steps to effect it. You cannot merge a conforming lot with a non-conforming lot and proper steps were not taken, meaning the lot in question cannot become part of the lot that is located in the ROI Overlay District and a special exception is required. The procedural processes were not followed. NH Law 4.23 does not permit the eraser of a boundary line.

Attorney Walker responded the 11-18-2016 legal opinion suggests Mr. Cantwell's appeal was not submitted in a timely manner which is another reason to deny the appeal. Mr. Cantwell stated the initial lot consolidation is not effective but even if it was not, which Attorney Walker believes it is, there are 2005, 2008 and 2013 Notice of Mergers of other lots into merged into TM# 218-150 which would have cleared any defect. All of these would have reaffirmed this. Further a letter in 2010 from Rob Houseman, after the ROI was created, clearly states that Brewster Academy is a permitted use including all dorms.

Mr. Cantwell noted the argument that other lots were merged in 2005, 2008 and 2013 and are part of the ROI is not accurate. Nobody, not even the Planning Board would believe this lot was in the ROI because two maps did not represent it until Brewster Academy wanted to put a dorm there. It is not and never has been in the ROI. Further the ZBA's legal counsel rendered an opinion, who is also counsel for adverse party (Planning Board) and this presents a conflict which is not allowed by NH Bar Association. Mr. Cantwell stated he can fax an opinion from the NH Bar Association regarding this subject. It is uncommon but there is a conflict and it is the obligation of Attorney to bring out the conflict.

Chris Franson stated the Planning Board knew it was in the ROI district contrary to what Mr. Cantwell stated previously.

Attorney Walker responded:

1. Notice of Decision in 2013 states the parcel is in the ROI and this is reflected in the minutes.
2. The Zoning Map is not controlling, it is the written language in the ordinance that controls.
3. Tax records in the assessing records note the merged lots.
4. The boundaries of the ROI are clearly defined on Section 175.37.
5. Two Planner Reviews clearly define the zone and state the graphic does not control over the written language.

There being no further comment, the public hearing was closed.

Suzanne Ryan noted the legal opinion relating to appeals being filed in a timely fashion may have been referring to another case. The application was date stamped on 10-6-2016 so this is a timely application as the applicant is appealing a decision made by the Planning Board on 10-4-2016. Further the information submitted by the applicant should be accepted as the ZBA did it for the FIT application. State law takes precedent over town law. RSA 95A – Tax Maps, states the Town has a duty and shall accurately represent the physical location of each parcel and the TM shall be updated at least annually to indicate ownership and parcel size and change. The town was negligent in its duty. The lots are legally merged, but the judge will have to decide that. The number of years lapsed and the town has not updated their map, it is no wonder it is confusing.

Fred Tedeschi stated there is confusion however the issue was raised with counsel and for the purpose of zoning, not tax stated the description in the zoning code is what controls.

Matt Sullivan stated the Tax Map correctly shows the parcel and the tax cards are an independent issue.

Fred Tedeschi stated the Tax Map issue is a separate and it is clear the parcel is in the ROI District.

Hank Why stated changes continually occur and maps can never be 100 percent accurate due to continual changes.

Chris Franson noted when the Planning Board is reviewing and considering changes they are reviewing multiple proposals for the same area and cautioned it is easy to take a power point presentation out of context.

Susan Raser stated based on the evidence presented at the December meeting and counsels opinions, she believes the lot is in ROI Overlay Zoning District.

It was moved by Fred Tedeschi and seconded by Susan Raser that the Zoning Board deny the appeal on the grounds that the appeal is based on the location of this lot and the testimony and legal opinions received have clearly indicated two things, first, the mergers effected by Brewster Academy, with the consent of the town were properly recorded and all the steps needed to be taken to merge those lots have been taken and secondly that the fact that the zoning map on the towns website shows this property is not in the ROI district but is in the VR district is irrelevant for our determination because what is controlling is the description in the town code. All members voted in favor. The motioned passed.

Consideration of Minutes:

5 December 2016

Corrections:

Page 5

1st Paragraph – Sarah Silk cited the NH Planning & Land Use Regulation Book; the 1999 Law Lecture # 3; the November 2016 Handbook; disqualification under RSA 500-A:12; and a handout needs to be included with the minutes: Kimberly Hallquist, New Hampshire Town and City Magazine, May 2006, regarding Multiple Board Memberships.

The first sentence should read after Sarah Silk stepped down; The written information was for both Mike Hodder and herself.

Insert a line before the motion made by Suzanne Ryan as follows:

Suzanne Ryan referred to the handout NH Town and City – Multiple Board Memberships Serving on More than One Board at the Same Time; NH Town and City, May 2006 by Kimberley Hallquist, Esq. and read the following from the document:

“no member of a land use board shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity”

“ZBA is acting in a judicial capacity when it decides the appeal of administrative decision. As such, any member of the ZBA who has already made a decision in the case by acting in a

preceding on the same case would be disqualified for any cause to act as a juror upon the trial of the same matter”

“As discussed above, RSA673:14 prohibits a member from participating in a case that he or she would be disqualified from hearing if he or she would be disqualified as a juror. A ZBA member who participated in the planning board’s decision, therefore would be disqualified from participating in the ZBA’s judicial determination of the correctness of that decision:

“same would be true of a planning board member who participate in a case as a ZBA member, that later comes before the planning board”

Page 6

6th paragraph – change and to an

Page 7

Line that starts with Jim Rines presented - change Alter to ALTA

4th paragraph from bottom – remove the word map before accurate

Last paragraph – add a period after later and begin a new sentence – change second to last word from the to then

Page 8

5th paragraph – after Jim Rines stated it was not their best work the examples cited should be included

1. ??? shown incorrectly
2. Episcopal Church sold lot in error
3. Citizens Bank incorrectly delineated
4. Three Sisters Gas Station needs correction

The Board discussed adding this info and verifying the references are correct. The Board requested staff review the tape to confirm accuracy of the lots cited.

(In reviewing the tape staff notes Jim Rines at 1 hour and 49 minutes into the ZBA Meeting gave some examples of inaccuracies noted in the zoning map as follows: Three Sisters, Citizens Bank, both of which are in the ROI zone. Pointing to the map - The Glidden parcel is shown, next to this which is not in the ROI zone; that was purchased after the ROI zone was created. Portions of the Episcopal Church that were sold by boundary line adjustment, the boundary line was changed; we respect the boundary that was created after this ROI zone was adopted, so technically there is a shore lot that has no frontage on Main Street but by the literal

interpretation of the zoning ordinance a portion of that lot is in the ROI. Those kinds of unfortunate errors are reasons why almost every zoning ordinance says, the written description controls.

7th Paragraph – 4th line should read – As to the school issue, the Planning Board knew they were talking about Brewster Academy.

8th Paragraph, third line change effective to effect

Page 10 – 1st line change it to is

The Board agreed to table the approval of the 5 December 2016 minutes to enable staff to review the tape to verify examples of changes to be made to the zoning map referred to by Jim Rines on page 8.

Other Business:

Work Session

Work Session with Attorney regarding Recusals & Conflicts of Interest. It was requested the meeting date does not conflict with any other town meeting.

The Planning Department will send out some date options.

ZBA Meeting Dates

In the event there is a holiday on the first Monday of the month, it was decided the ZBA will hold their monthly meeting on the third Monday of the month. The only Monday this is effected by is the September meeting. The new date shall be September 18, 2017 instead of September 11, 2017.

RSA – 91-A:3,II(I)

Suzanne Ryan stated RSA 91-A:3, II(I) is new and allows the Board to enter non-public session to allow discussion of opinions from the Boards attorney. There is also a change on how to keep non-public minutes.

Planning Staff will review this and update the Board.

Woodbine File

Suzanne Ryan submitted an email dated June 13, 2016 from Suzanne Ryan to Suzanne Ryan titled "Woodbine Time Line: June 30, 2014 ZBA Approval" she had submitted it previously and it is not included in the Woodbine file and asked that it be placed back in the file.

Town & City Magazine

Sarah Silk requested she receive written copies of the Town & City Magazine. Mike Hodder noted they are available on line.

Matt Sullivan will look into the request.

FIT Court Case

There is no update as to the court proceedings of January 9, 2017.

Microphones for All ZBA Meetings

The Board requested there be microphones for all future ZBA meetings as well as Wolfeboro Community TV recordings.

Attorney Conflict of Interest

Sarah Silk stated it is very bad to have one attorney for multiple Boards. The Board of Selectmen has a different attorney as has the Conservation Commission done in the past.

The Board discussed this.

There being no further business, this meeting was adjourned at 8:32 pm.

Respectfully Submitted,

A handwritten signature in black ink, consisting of the letters 'RK' in a stylized, cursive font.

Robin Kingston
Administrative Assistant