

ZONING BOARD OF ADJUSTMENT
TOWN OF PETERBOROUGH
Monday, May 2, 2016 – 7:00 p.m.
1 Grove Street, Peterborough, New Hampshire

Board Present: Sharon Monahan, Loretta Laurenitis, Peter LaRoche, Peggy Leedberg and Seth Chatfield

Staff Present: Laura Norton, Office of Community Development

Vice Chair Monahan called the meeting to order at 7:00 p.m. “Good evening” she said “this is the May stated meeting of the Zoning Board of Adjustment.” She then introduced the members and appointed Ms. Leedberg and Mr. Chatfield to sit.

Minutes: Next month

Training Session:

The purpose of this training session is to discuss planning and zoning case law updates and handout that were distributed to the Board for review.

The members began with Regarding the *Agritourism Is Not Agriculture: Forster’s Christmas Tree Farm v. Town of Henniker* case, Mr. Chatfield told the members he was doing some research on the case when he stumbled onto a Facebook page dated April 28th that “looked like they were saying their application passed, their site plan was upheld by the voter.” He then questioned a part of the post that said it must be allowed “but I thought maybe it should have read must *not* be allowed given all the discussion before that” and asked “could it be a typo? They seems to be claiming a technical victory.” A brief discussion about the ambiguity in the definition of *agriculture* not including *agritourism* followed.

Ms. Monahan noted there would be a few sessions on this subject at the Spring Planning and Zoning Conference in June. “It is a work in progress, the towns have to work it out” she said. Ms. Leedberg interjected “it seems it stops with the Planning Board” with Ms. Laurenitis adding “yes, with Conditional Use Permits.” Ms. Monahan told the members part of the reason she was stepping down from being a full member was so that she could have more time to research and challenge “the way things are written.”

The members briefly discussed the appeal processes of both ZBA and Planning Board decisions and how case law becomes just that by going to Superior Court. “It is a lengthy and costly process” said Ms. Monahan. Citing long term planning Mr. Chatfield asked “is everything going to go to the Planning Board?” Ms. Monahan replied “Seems so, most towns only have one or two Conditional Use Permits, in this town that is all they are proposing.”

With respect to the other case law decisions the members had on the agenda Ms. Monahan expressed her disappointment that the Code Enforcement Officer was not present. It was noted that with no applications to be heard (this meeting was posted as a training session) Mr. Carrara had another obligation for the evening. She reminded the members of the two Zoning and Planning Case Law updates from the New Hampshire Supreme Court (*Accurate Transportation, Inc. v. Town of Derry and Daryl and Mary Dembiec v. Town of Holderness*). She also encouraged the members to commit to the conference in June and to be thinking about future training needs.

Getting started, Ms. Monahan noted affinity for case law decisions. “It is better than Newsweek” she said with a smile.

Accurate Transport, Inc. v. Town on Derry: This case involved Accurate Transport seeking to operate a dumpster depot in the town’s industrial zoning district. While the members reviewed the logistics of the case Ms. Monahan pointed out the Code Enforcement Officer (a member of the Technical Review Committee) had expressed his opinion that the proposed use of the property was permitted. The application was ultimately approved by the Planning Board followed by an administrative appeal stating the Code Officer’s decision on the use was in error. This appeal was found to be **untimely**. “That is why I wanted Dario (Carrara) here tonight, to get his insight on this” said Ms. Monahan.

As the members discussed the case and the appeals process Ms. Monahan concluded that they found that the substance of the appeal contained questions about the Planning Board’s *interpretation of the zoning ordinance* thus converting the appeal to **timely**.

The New Hampshire Superior Court disagreed but the New Hampshire Supreme Court determined this appeal could be converted. Ms. Monahan noted the practice pointer of the article was that “a Planning Board decision is only appealable to the ZBA if an interpretation of zoning has been made.” She added “RSA 674:33 gives

the ZBA the authority to hear and decide appeals on subjects within its jurisdiction.”

The members briefly discussed RSE674:33-1. *Powers of Zoning Board of Adjustment*

Ms. Monahan noted for the RSA the ZBA has the power to “hear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 764:16.” The members’ main concern was just *who* was considered an administrative official, all Boards? All Committees?

Ms. Laurenitis interjected “maybe we could ask John Ratigan (Town Counsel) to come and talk to us.” Ms. Monahan mentioned another attorney (Christopher Bolt) in Mr. Ratigan’s office as well. “It would be good to get training on how to use the town attorney as well as the issue of confidentiality and what triggers open things up to the public at hearings” said Ms. Monahan. A brief discussion about attorney/client privilege and confidentiality followed with Ms. Laurenitis noting “I think it would be helpful to have our attorney at meetings.” Ms. Leedberg asked about a ZBA member serving on the Planning Board and after a brief discussion of the board and committee election process it was determined an individual may serve as an alternate on both Boards but they were unsure if one could be a member on both Boards. “Another question for Mr. Ratigan” interjected a member with Ms. Laurenitis adding “we really do have a lot of questions for him.” Mr. Chatfield also agreed noting “like how to interpret words like *consider*.”

Daryl and Mary Dembiec v. Town of Holderness: Ms. Monahan gave a brief review of how administrative remedies need not be exhausted before bringing equitable estoppel claim. She went on to note this was a case where a permit from the town of Holderness was issued to build a single-family home on property which at the time consisted of a two-story boat house equipped with living quarters. The members had a brief discussion about the definition of living quarters (typically no kitchen facility) and dwelling. Mr. Chatfield noted “it sounds like the claim is when they said *living quarters*, what was reasonably heard was *dwelling*.” In the end the Code Officer would not issue a Certificate of Occupancy (CO) because the boat house contained a dwelling unit and their zoning allowed only one dwelling per lot. The Dembiecs applied for an equitable waiver which they received, then lost on rehearing. They were also denied a Variance. In Superior Court they filed suit seeking the declaration that the town was estopped from enforcing the one-dwelling per lot zoning restriction because they had previously

issued the building permit. The town in turn, moved to dismiss because the Dembiecs had failed to exhaust their administrative remedies and the case was dismissed in Superior Court. In Supreme Court it was ruled the exhaustion of administrative remedies is flexible and does not prohibit judicial relief.

The members discussed the Dembiecs' attempt to retain their grandfathered right for a boathouse with living quarters. "They do not want to lose that" said Ms. Monahan adding "if grandfathered they have the right to maintain and repair it." Ms. Leedberg interjected "but not to improve it" with Mr. LaRoche replying "that is a gray area."

Ms. Monahan reviewed the two important legal principles that came out of this case: *first* a ZBA has only the authority conferred upon it by statute and does not have general equitable jurisdiction and cannot hear claims such as equitable estoppel claims and *second* although the exhaustion of administrative remedies is the general rule, there are exceptions, such as where the administrative board is not empowered to hear the claims raised, making further administrative appeal useless.

In closing Ms. Laurenitis asked about updates for the ZBA Handbook (her latest copy is dated 2014). She also made a motion concerning the status of Vice Chairman Monahan:

"This is Sharon's last meeting as a full member" she said adding "and I would like to make a motion that she be appointed an alternate on this Board when her membership ends next week." With the motion made/seconded (Laurenitis/LaRoche) all were in favor.

Ms. Monahan asked a participatory e-mail be sent out regard the training on June 4th and reminded the members they could get reference material regarding the Law Lecture Series online at the New Hampshire Municipal Association Library.

The meeting adjourned at 8:20 p.m.

Respectfully submitted,

Laura Norton
Administrative Assistant

