

MINUTES
ZONING BOARD OF ADJUSTMENT
TOWN OF PETERBOROUGH
Monday, October 1, 2012 – 7:00 pm
1 Grove Street, Peterborough, New Hampshire

Board Present: Jim Stewart, Bob Lambert, Alice Briggs, Sharon Monahan, Peter Leishman, and David Sobe

Staff Present: Dario Carrara, Code Enforcement Officer; Laura Norton, Office of Community Development

At 7:00 p.m. the Board was represented by the Chairman and two alternates. Chair Stewart explained the situation to Mr. Fernald and asked him if he minded waiting a few moments for the other Board members to arrive. Mr. Fernald agreed and at 7:08 the meeting was called to order.

Chair Stewart introduced the members and staff and reviewed the process of reading the application followed by a presentation by the applicant; questions from the Board; questions/concerns from the audience (in favor then opposed) and closure of the hearing followed by deliberation and decision. He also asked anyone speaking from the audience to please state their name and relationship to the applicant (abutter, concerned citizen) for the record “and please address any questions and concerns directly to the Chair” he said.

Chair Stewart then appointed Alternate Alice Briggs to sit and read the Appeal of an Administrative Decision dated August 29, 2012 from Code Enforcement Officer Dario Carrara to the applicant Richard R. Fernald. Once finished he asked “are there any corrections to this notice?” With no corrections noted he invited Mr. Fernald to begin his testimony.

Mr. Fernald introduced himself and his wife Judy. “I know some of you” he said and noted his residence as being 71 Cheney Avenue. He pointed toward the other end of the room and noted “my neighbors over there live at 77 Cheney Avenue; both of us are on the south side of the street.” He briefly described his neighborhood as one of nice homes (most being built before zoning). He noted the homes were nicely set back from the road much like the surrounding Orchard Hill Road, Lookout Hill Road and Kaufman Drive. He noted the only exception to nothing in the front yards in the area was a children’s swing set in a yard on Kaufman Drive.

Mr. Fernald gave a brief history of the events that have led up to this meeting. He noted he arrived home late one September evening in 2011 to be greeted by his wife who asked him “have you seen what the neighbors are building next door?” He told the members he investigated the next morning and found a structure 6 ½ feet wide, 15 feet long and 8 ½ feet tall on the edge of his property. “I thought it was a garage” he said, adding “I said to myself, they can’t do that, zoning won’t allow that.” He noted he tried to contact the neighbors without success “so I came to the Planning Office to see if they had a building permit for whatever it was they were building in their yard.” He noted that the Code Officer was unaware of any construction and told him he would take a look. Mr. Fernald then noted the structure was “one inch from my property line”

and setback “only five feet from the edge of the road.” He briefly reviewed dimensional requirements and read the setbacks requirements for the Family District. He went on to note “there are 65 definitions in the zoning regulations, and #59 (Setback) specifically says an undeveloped space on the same lot, extending from the property line into the lot which shall remain *open* and *undeveloped*.”

Mr. Fernald noted that a few days later he talked to Michael Teitsch (the neighbor at 77 Cheney Ave.) about moving the structure back. “He told me the Code Officer told him “don’t under any circumstances put a roof on it (which they had initially planned to do). Cover it with a plastic membrane.”

Mr. Fernald told the members he had come to town in 1961 “before zoning.” He went on to tell them he joined the Planning Board in 1962 and served for the next 28 years. “We were the draftsmen of the present day zoning ordinance” he said adding “and it is very clear on setbacks in this town.” He concluded by noting “I am not an outsider trying to impose my will on this Board or my neighbors. I was frankly astonished this happened right beside my house.”

Mr. Fernald referred to the Planning Board Minutes of January 23, February 13, and February 27 of this year. Those minutes were included in the member’s packets for review of both Mr. Fernald’s previous attempts to resolve his problem. He cited the Planning Board Minutes of January 23rd where the members discussed definitions of *setback* and *roof* in the ordinance. He re-read the definition of setback as an “undeveloped space on the same lot, extending from the property line into the lot which shall remain *open* and *undeveloped*.”

Chair Stewart interjected “Mr. Fernald, if I may ask, what does that mean to you? What is your interpretation of that? Mr. Fernald gave a very brief reference to the May 8, 2012 Town Meeting and the amendment of the side and rear setbacks that was adopted. He continued with “I did not major in English “but if you look the words up in the dictionary it is pretty clear.” Mr. Stewart asked “would a lawn be acceptable? a driveway? ” A brief discussion about interpretation followed with Chair Stewart noting “isn’t it fair to say the definition is ambiguous at best?” Mr. Fernald replied “no, open and unoccupied is very clear to me.” Chair Stewart asked “does that mean you cannot step in it? Not use it?” Mr. Fernald relied “no, it means you can’t *put* something in the space.”

Mr. Fernald also briefly discussed the definition of a roof. He began by reading the (redefined) definition of roof from the ordinance. “A rigid building element, constructed of solid material, such as but not limited to wood, metal, or concrete, held up by structural supports, for which the purpose is to protect what is underneath it from rain, snow, and general weather elements.” He then read the definition of a structure (anything erected or constructed with roof and walls or wall supports and is temporarily or permanently fixed to the ground.” He looked at the members and said “temporarily or permanently fixed to the ground, wow where did that come from?” Mr. Fernald also questioned the fact that there was no definition of roof when this all began last September.

Chair Stewart reminded Mr. Fernald that what they have to functionally deal with is what the zoning is today. “Whether this occurred before or after the definition of roof was changed doesn’t matter” he said. Mr. Fernald relied “it still violates that provision.”

Ms. Monahan noted “so whether or not it is a structure comes into play.” Chair Stewart replied “it is not whether it is a structure or not it is whether it has to meet the setback. That is the issue here; we need to determine if it must comply with the zoning. That is what we need to do.” Ms. Monahan asked if the “apparatus” was fixed. Mr. Fernald replied “it has been moved, but that is not their intent.” Mr. Fernald noted “it is not a building because it has no roof but it is certainly something, and it is certainly large.” Mr. Fernald said he was advised to write to the Code Enforcement Officer for his interpretation of whether the structure violated the 30-foot front setback. “So that is what I did” he said.

Mr. Fernald noted the administrative Decision from the Code Officer stated there was no roof so it is not a building and not subject to the front, side or rear building setbacks. He noted the definition of setback once again of “an *undeveloped* space on the same lot...” He noted the decision noted “the key word in the definition is development and standard definitions of development typically refer to buildings or dwellings.” Mr. Fernald asked about placing a swimming pool right in the middle of a front lawn noting “unless you have a roof you do not have a building.”

A brief discussion about what may and what may not constitute a building followed. The members also discussed several of the things that were not subject to the building setbacks that included fences, generators, dumpsters, campers, air conditioning units/equipment, propane tanks and cordwood. Chair Stewart noted the Administrative Decision stated the interpretation was consistent with enforcement efforts over the years. He then asked the Code Enforcement Officer to talk a little about “where he was coming from and how he applied his interpretation.”

Mr. Carrara reiterated his interpretation of the ordinance. He reviewed the definitions of both building and roof and noted that he had written “since the tarpaulin membrane on top of the posts does not meet the definition of a roof, the framing in its current form does not meet the definition of a building, and is therefore not subject to front, side or rear building setbacks.”

Mr. Carrara re-reviewed the definitions and the setback requirements of the Family District. He noted he visited and spoke with the homeowner and found what he described as a structure with posts, but no sides and no roof. Mr. Carrara noted he gave no official opinion in the field and that he further researched the regulations and consulted with town council. Mr. Carrara reported the town attorney had told him his interpretation “looked fine” and added “so I went forward with my finding.”

Mr. Carrara spoke briefly about pipe and canvas structures, plastic membrane tarps, children’s swing sets and pools. He noted that most pools are viewed as having to meet setbacks “because they are big and most have to have a building permit.” In his discussion about specifically exempt items in the setback Ms. Monahan asked about *in-ground* versus on-ground structures. Again dumpsters, propane tanks, generators campers and cordwood were mentioned, with Mr. Carrara noting “they can be moved; they just are not meant to be moved - the setbacks are basically aimed at buildings.”

Chair Stewart asked “why did you have them move it off the property line?” Mr. Carrara briefly reviewed the zoning amendment of May 8, 2012 where a new paragraph (Paragraph D) was added to §245-5 (and deleted from Building Code §207-6 (F)) Shed setback exemption where single story residential storage sheds, playhouses, and similar structures up to 120 square feet in area are exempt from building permit requirements where they still must comply with front setbacks but may be located as close as 5 feet from the side and rear property lines. He reviewed the intent of amendment which was to allow greater flexibility for homeowners to locate such structures such as garden sheds in a back corner of their lot. He noted the language had been in the building Code for several years but to be enforceable under zoning, needed to be moved to zoning (Chapter 245).

Ms. Briggs noted “OK, so the setback was moved to 5 feet in the side and rear setbacks and Mr. Fernald is arguing the front setback must be maintained.” Ms. Briggs went on to note “this may be a dumb question but you talked about structural supports; why isn’t this a building? Mr. Carrara replied “no roof.” The members briefly reviewed their dilemma with Ms. Briggs noting “so you have a building without a roof so it is a structure.” Chair Stewart interjected “we have to apply the actual language of the ordinance in question, review the definition of setback and then go from there *backwards*.” Chair Stewart also noted in reviewing the zoning chapter and looking at all the Districts there seemed to be a lot of variation of the use of the definition *setback*. “My first read on this is that the setbacks apply to the dwelling.”

Chair Stewart asked to hear from Mr. Teitsch and Ms. Adisa Brooks. (Ms. Brooks) introduced herself and her husband. She said “I feel compelled to be brief but must tell you where we are coming from.” She noted her memory was poor but she had kept a timeline of events. She looked at the members and said “about Judy and Dick Fernald, we have nothing but gratitude for them. The way they have maintained that beautiful field was the reason we bought our home. We have no anger toward them. Never had any and never will. I have been a good neighbor and no matter what happens, neighbors are more important to us than a wood shed.”

Ms. Brooks gave a brief review of the circumstances of the winter of 2011. Her husband was facing surgery and would not be able to assist with the stacking/carrying of wood. The wood was dropped there (as in the past) so Mike built the shed. “I think it is a pretty neat looking building” she said. She went on to note “but with the turn of events, it has been difficult. Dario has been great with us.” She apologized for her emotional state saying “I am an artist, not a lawyer” adding “we needed a wood shed and did not want a Job Lots tarp covering the wood.”

Ms. Monahan asked for some general clarification about the amount of times Mr. Carrara visited the property and when exactly the shed was moved 5 feet back. Mr. Carrara reviewed his actions. Ms. Brook interjected “Mike moved it back immediately.” Ms. Briggs asked “why not move it out of the front setback then?” Ms. Brook replied “we would have to have taken the entire thing down.” Mr. Teitsch added “and what you do not see is a very large pine tree to the right of the picture, it could not be physically moved anymore.” “You could cut down the pine tree” replied Ms. Briggs.

Mr. Leishman asked about exploring the possibilities of another area with Mr. Teitsch replying “this is the only space that accommodates it well” adding “we could put it smack dab in the front of the house” Ms. Brooks interjected “but it would block our front door.” Mr. Leishman reviewed some of the testimony presented. He pointed out a structure in the front setback of a property line. “If you put on a roof it leads to a zoning violation” adding “I am troubled that you have a structure that stores something, lived in or not. Mr. Leishman also noted “my read on this is hoping the neighbors can get along.” Ms. Brooks replied “we thought we were doing something great and not in violation of anything, clearly we are not like that.” Mr. Leishman responded “I want to see all the parties happy” with Ms. Brooks replying “we will do whatever we need to.” Ms. Brooks concluded that they had approached the Fernald’s “about 5 years ago about building a wood shed and they said fine but we just did not do it. We knew we would do it someday, and that someday came” adding “you are all welcome to come up and see it.”

Ms. Briggs asked about the size of the lot with Ms. Brooks replying “about $\frac{3}{4}$ of an acre.” Mr. Fernald confirmed by noting the lot was about 140 feet wide by 270 feet deep, “so yes, about $\frac{3}{4}$ of an acre.”

Judith Fernald introduced herself and noted “it is hard for me to speak.” She gave a brief recount of a conversation she recalled several years ago when the neighbors told her since they had no basement and no storage room they intended to build a shed in the back of their home. She went on to say “what is there now is three stories high, so when this showed up it was very upsetting to me, it hangs over into our yard.”

Mr. Teitsch noted that at the beginning of the winter season the woodpile was 10-15 feet long and up to about 4 feet high. “It always looked pretty ugly. We were trying to make an improvement, not create a firestorm.”

Chair Stewart noted “the crux for this Board is that it really goes back to the definition of setback and what applies to what in a setback.” The brief discussion about the definition of the term setback that followed included a reconsideration of permanence as well as the authority of the Board to overrule the Code Enforcement Officer’s interpretation if they felt it necessary. One member asked about the structure being temporary or permanent. Ms. Briggs replied “it sure looks permanent to me. It is functioning as a storage shed and that looks like development to me.” “I agree,” said Mr. Leishman adding “it looks to me like this in violation of the setback.” Ms. Miller introduced herself saying she lived in the neighborhood, drives by often and shares Mr. Fernald’s concerns. Mr. Leishman asked about the BOCA Code with Mr. Carrara replying “that was the first place I looked. We use the ICC Codes not BOCA for all one and two-family homes” adding “but there is no enlightenment there either. They refer not to buildings and structures but uses and occupancies.” Mr. Carrara also noted that town council had weighed in on the matter as well, agreeing with him. Mr. Fernald immediately replied “to my knowledge, he was never over here, never looked at the material. He was operating on the telephone with information given to him by (I believe) Carol (Ogilvie). Mr. Fernald went on to briefly speak about interpretation of the zoning ordinance. “Zoning has always had definitions” he said. Chair Stewart interjected “I asked you what that meant to you and you had some trouble putting it into words yourself.” Chair Stewart continued by reading the definition of setback. “It goes back to developed or undeveloped” he said, “It goes back to building.”

In closing Ms. Brooks interjected “Mike is an engineer, an excellent engineer and the structure is beautifully made.” She added “the only thing that looks bad is the green tarp on the roof. You are welcome to come see it.” Mr. Fernald thanked the members for listening to his testimony and asked them to “look at what the actual definitions are and base their decision on that.”

Chair Stewart closed the Public Hearing at 8:20 p.m. and the Board entered their deliberative session.

Mr. Lambert (the alternate not activated) left the Board and sat in the audience.

Chair Stewart began with “well it seems all buildings are structures but not all structures are buildings.” Ms. Briggs advised the members “look at whether or not the definition of undeveloped space is that it shall remain open and unoccupied.” The members reviewed §245-6 (Family District) language and definitions. Ms. Briggs noted “my take is that when I look at the picture I see a storage shed. It is not like a boat with a cover that you can move around.” She went on to note she saw several different items within the structure that were not cordwood. Chair Stewart did his best to convince Ms. Briggs that it did not matter what was *in* the shed but she remained uncompromised.

The members re-reviewed exemptions such as dumpsters, propane tanks, generators, fences and cordwood. Ms. Briggs noted “but not buildings, we are talking about the fuzzy area between the two. The difference between what is a building and what is moveable.” Ms. Monahan interjected “I agree with that. That is what the issue is.”

Ms. Monahan also noted “this structure was not built to be temporary; they had their woodpile there before.” It was noted that when it was a *woodpile* the wood got used up and the pile disappeared. Now with the structure there and no wood, it looked to be a storage shed. Ms. Briggs noted “no longer seasonal, but a building with the intension of storage of goods.” Chair Stewart asked “but was intended to be more permanent?” “It is permanent” replied Ms. Briggs. “It is not a boat or a dumpster that may come and go.” “Good point” said Mr. Leishman adding and wasn’t there testimony earlier that the intent was to put an asphalt roof on it?” Mr. Leishman went on to note “I appreciate their honesty, but in my opinion this is a clear violation of the setback.”

The members briefly discussed accessory structures (buildings located on the same lot as the main building but used for the sole purpose of storage of activities incidental to the household and not used as a dwelling). Ms. Briggs brought up the pipe and canvas structures and asked “how are they not different?” Mr. Leishman noted the pipe and canvas structures are a more flimsy structure adding “you have a substantial structure in the setback here, a substantial piece of construction. That is my opinion.”

Another brief discussion about other items (i.e. pools) and the need for building permits followed. The also discussed “permanence” in relationship to “development” with Ms. Briggs noting “so how you draw the line is by how permanent it looks.” Mr. Carrara replied “I guess that is a good way of saying it” adding “zoning regulations do not enumerate what can and

cannot be in a setback. I rely on the definitions” he said. Ms. Briggs replied “let’s make it clear that we are not here to criticize your decision.” Mr. Carrara replied “no problem and went on to elaborate a bit on the history of enforcement in the past – especially the pipe and canvas and membrane structures.

Chair Stewart looked around and said “there are three things we can do here.” Go with Mr. Fernald and focus on the permanent structure in the setback; explore the “grey fuzzy” (is it development and does it occupy space) we talked about; or go with Mr. Carrara’s original administrative decision and agree the setback is not violated.

Chair Stewart noted that if they did not go with the third option the members would need to concentrate on *open* and *unoccupied* and *development* “and we’ll have to agree on what that means.” He suggested the members would have to base their decision on what the zoning is, noting they may not agree 100% “but we have no choice” he said, but to look at zoning and look at our definitions and extrapolate that to development and whether or not it applies in an open and unoccupied space.

A very brief discussion about storage, permanent construction, movability and even hardship followed. Chair Stewart noted his biggest fear was setting a precedence in the reinterpretation of the Code Enforcement Officer’s decision.

Chair Stewart asked “how do you see this going down? Ms. Briggs replying “if we rule we will want town council’s approval on anything we write.” A member asked “so it is about permanence?” with Ms. Briggs replying “yes.” Mr. Leishman interjected “I have a fourth option Mr. Chairman,” and suggested a site visit. “It would allow the members to see the actual structure while the questions that arose went back to town council. Over-turning this Decision is not a comfortable thing” he said, adding “he (Mr. Carrara) does a good job.” Mr. Leishman also noted “this has been going on since September of 2011; it is not a life and death situation. I think the best decision is to talk to council and look at the site.” Chair Stewart replied “that (a site visit) is irrelevant.” Mr. Leishman replied “not to me, in my own mind I think it would help. I would like to see it.” “Then we’ll vote on it” replied Chair Stewart. When the opportunity to make a site visit to #77 Cheney Avenue was posed, Mr. Leishman, Ms. Monahan and Mr. Sobe all thought it was a good idea, “that is a majority” said Chair Stewart.

Chair Stewart then redirected the conversation by noting “let’s go over a few facts.” He reviewed the consensus that all agreed that a structure existed. “A substantial structure in nature” added Chair Stewart. A brief discussion about other pipe and canvas structures around town (“there are several” reported Mr. Carrara) followed. Mr. Carrara also reiterated that the regulation on those types of items was consistent with enforcement efforts in the past. Ms. Briggs asked Mr. Carrara for “examples of what you are allowing and what you are not.” Ms. Briggs also noted “the majority of us want to see the site so we will have to continue this deliberation.” She asked again about a photo array of structures that are allowed within the setbacks in town and spoke briefly about the “grey area” and “why in our gut we are feeling this is different.” She went on to note “this feels like it might look like development.” Chair Stewart replied “I am not sure I agree with that, it goes back to the key word of development.” Ms. Briggs noted the permanence of the structure noting it was built with big 6 X 6 posts. “Looks like it is there for the ages” she said.

She went to note “with a permanence of use it is no longer a woodpile that comes and goes it is a structure that is big and tall.” Chair Stewart replied “it is 97 square feet” adding “yeah, it is tall, but it is similar to a garden shed.”

Ms. Monahan noted “so we agree it is a structure, so it is back to the setback” Ms. Briggs asked “if we go that way are we going to want to see the 100-200 pipe and canvas items be removed?” “That is a key question” replied Chair Stewart. Mr. Leishman interjected it would most likely be a situation where current pipe and canvas structures would be grandfathered.

In closing Mr. Carrara brought up the use of the assessing database as a helpful tool in assisting the code officer. “Buildings are a part of the tax maps and can be helpful in enforcement situations” he said. Chair Stewart found that interesting and asked “and does the abutter see a decrease in his property value as a result?” Mr. Leishman replied “I am sure the abutter would, the assessors, I am not so sure.”

Mr. Sobe noted he had a difficult time seeing the structure from the road. Chair Stewart asked Mr. Teitsch and Ms. Brooks if the Board members had permission to go on to their property on Sunday at 4:00 p.m. to view the structure. Both agreed. At this time Ms. Brooks interjected that she did not mean to say an asphalt roof was what they really wanted, and that there had been a terrible misunderstanding about the items stored in the structure at the time the photographs were taken. She asked to speak with Chair Stewart replying he was sorry but “no” the public hearing had been closed.

The members agreed to a site visit to 77 Cheney Avenue on Sunday, October 7, 2012 at 4:00 p.m.

A motion was made/seconded (Stewart/Briggs) to continue the deliberative session to October 10, 2012 at 7:00 p.m. Mr. Stewart reminded the members of the importance of all of them attending this important meeting.

The meeting adjourned at 9:40 p.m.

Respectfully submitted,

Laura Norton
Administrative Assistant

Approved January 7, 2013