

MINUTES
ZONING BOARD OF ADJUSTMENT
TOWN OF PETERBOROUGH
Monday, November 5, 2012 – 7:00 pm
1 Grove Street, Peterborough, New Hampshire

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

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

Chair Stewart called the meeting to order at 7:00 p.m. He introduced himself and the Board members and appointed Alternates Lambert and Briggs to sit for a full Board. Chair Stewart looked at the audience and said “I’ll begin by giving you a brief background for this meeting and why we are here tonight.” He proceeded to recall the events of the October 1st ZBA meeting (an Appeal from an Administrative Decision where applicant Richard Fernald alleges an error has been made in the decision, determination, or requirement by the Code Enforcement Officer in relation to Article II, Section 245-6B (2) of the zoning ordinance and hence appealed the decision) and how the members listened to the testimony and closed the Public Hearing for deliberation. He noted that once the hearing was closed and deliberations had begun “we realized we still had several questions that needed to be answered to continue deliberation and come to a decision.” He went on to note he requested a special meeting on October 3, 2012 for October 5, 2012 where he made a motion to re-open the public hearing. That vote was in the affirmative and a meeting for October 29, 2012 was scheduled. “That meeting was cancelled because of Hurricane Sandy and rescheduled for tonight” he said. Chair Stewart then read the Public Notice and reviewed the Rules of Procedure which included 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 gave Mr. Fernald the opportunity to speak. Mr. Fernald thanked him and noted “I don’t know if I have to go through all the facts, you were all here before.” He briefly reviewed his testimony of the events that led up to the meeting tonight. He noted “my concern is I feel the Code Officer’s decision in this case is erroneous and does not comply with the Peterborough Zoning Ordinance. It is the Code Officer’s duty to enforce the ordinances.” He added “I would like to remind you that in order to get zoning into a community or amend zoning ordinances you have to use the Planning Board.” Mr. Fernald briefly described the public process and town vote necessary to amend a zoning amendment. Mr. Fernald told the members “the definition of setback is what the whole issue is here.” He noted his research revealed the original zoning regulations were enacted in Peterborough in March of 1970. He referred to 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 *unoccupied*. “That was the first definition” he said. He noted that 12 years prior to that however, the town abided by subdivision regulations. He noted that while

he did not find an original definition of setback in the subdivision regulations, “the same definition of setback presently in effect in the zoning ordinance is the same.”

Mr. Fernald noted he had supplied the members with Planning Board Minutes from meetings in January and February of 2012 so they had some history of the zoning amendments for Town Meeting in May. He also showed them an enlarged photograph of the structure in question noting “it is 6 X 6 vertical timbers, a very nice and well-built structure.” Mr. Fernald reiterated his actions after he got home one night and his wife told about the structure. “She told me she thought they were building a garage” he said. He reiterated his attempt to contact this neighbor and his visit to the Code Office for answers. He noted the structure was 15 feet long, 8½ high and 6½ feet wide, “one inch from my property line.”

Mr. Fernald went on to describe how he ran into his neighbor a few days later and was told by him that the Code Officer had told him to move the structure off the property line. His neighbor also noted he intended to put boards on the top and the Code Officer told him to cover it with a tarp. “My argument is not with my neighbor, it is with the Code Officer” he said. Mr. Fernald added “I did not understand then and I do not understand now how anyone can say that does not violate the front setback of 30 feet.”

Chair Stewart asked a few questions about determining what must meet setback and what is exempt. He asked Mr. Fernald “you believe the structure is development and must meet the setback?” Mr. Fernald replied “yes, absolutely.” Chair Stewart asked “do you consider a dumpster development?” Mr. Fernald replied “that would depend on what you define *permanent* as” adding “I don’t know of any dumpster that sits for a year or two years and then is gone.” Chair Stewart asked “what about pipe and canvas tarp? Is that development?” Mr. Fernald replied “not necessarily” adding “you have to consider the development, where and when it was done, zoning came to this town in 1970, so this town is full of nonconforming uses.”

Mr. Leishman arrived at 7:12 p.m.

Mr. Fernald gave a brief review of how he attended several planning board meetings in January and February of this year. He noted he had prepared copies of the Minutes for member review. He told the members “during those meeting the Planning Board was asked to change the definition of setback by deleting it.” Chair Stewart reminded Mr. Fernald that the Board must decide the appeal on what the definition of setback is *today*. Mr. Fernald replied “they tried three times and were turned down.” “Duly noted” replied Chair Stewart.

Mr. Fernald noted his property was “in the Family District, the most restrictive district.” He noted the front setback was 30 feet and that space must remain open and unoccupied. He noted the Code Officer referred to the terms “open and unoccupied” as confusing and open to all sorts of definitions. “Frankly” said Mr. Fernald, “I like to keep things simple and uncomplicated as possible and *open and unoccupied* is pretty simple for anyone to understand” adding “how can you have a structure like that and call the space open and unoccupied?”

A brief discussion about the functions of setbacks, buffers and the interpretation of development followed. At one point Mr. Fernald reminded the Board his home was located in the Family

District with Chair Stewart replying “the setback in the Family District is no different than any other district.” Mr. Fernald replied “it is spelled out in the ordinance in simple, plain language” adding “if an air conditioner is in a window, it is part of the building. If there is a central air conditioning unit you find it off to the side or in the back but not in the front.” Chair Stewart briefly reviewed Mr. Fernald’s written affidavit with Mr. Fernald noting “I want to emphasize they had three meetings, *three* meetings where they attempted to change the definition of setback, I gave you the evidence, you can read it yourself.” Mr. Fernald went on to note “if you adopt Dario’s definition of what is not a building, thus what can be in a setback, you are opening up all sorts of trouble for this town.”

Mr. Fernald then noted the definition of a building (any independent structure having a *roof* with structural supports) “another definition they slipped in there” he said. He went to describe Cheney Avenue, Lookout Hill Road, Orchard Hill Road and Kaufman Drive as a neighborhood “with every house having a nice big open setback, what the zoning ordinances were trying to give the town of Peterborough.” Chair Stewart asked “are they all conforming lots?” Mr. Fernald replied “some are and some are not.”

Chair Stewart asked Mr. Carrara if he had anything to say. Mr. Carrara replied “I would not change anything in the letter I wrote, I stand behind it 100%.” He went to note “the definition of roof was before three public hearings and confirmation from both our Town Council and the Office of Community Development that is was fine and did not need change. It went through the process and was adopted by Town vote.”

Chair Stewart asked how situations were handled before the definition of roof was established. Mr. Carrara replied “this is really the first this has come up, that is why I created the definition, to try to clarify things.” He added “when we have definitions and procedures, we apply them so you don’t have a separate result or answer in each case” adding “in this case there was no definition, so I went back to the office came up with one and applied it to the situation.”

Mr. Carrara also noted “before the definition of roof was passed the definition of setback and the interpretation of development was used, if the structure had no roof, it was not in violation.”

A member asked “so setbacks were meant for buildings and not things like LP gas tanks and such?” “That is my understanding” replied Mr. Carrara. Ms. Briggs noted that Mr. Carrara had been on the job just two or so years and asked “but do you believe your actions to be true to Tommy’s? (Weeks, retired Code Officer). Mr. Carrara replied “Tom was around 25 years as inspector before me and we worked together for over 18 months; he was not the type to stay quiet.” Ms. Briggs interjected “so you can say he passed on his collective wisdom.” “Yes” replied Mr. Carrara.

Chair Stewart had two images of canvas and pipe structures on sale at the Job Lots Store this week projected on to the screen. He noted “they are calling one a garage and the other a shed.” He asked “are these allowed in the setback? They do not have a roof per se so they are not defined as a building.” Ms. Briggs noted “it has a lot to do with your interpretation” with Mr. Carrara interjecting “these types of things are not buildings unless they are used for habitat, for instance if you put heat or light in them.” The members reviewed the definitions of *roof* and

structure and *building* as well as the interpretation of *permanence*. It was noted that “sheds with solid roofs tend to be much more permanent even though they can be moved.” Mr. Carrara noted “to be fair and consistent is very difficult sometimes but that is always my goal. Typically these structures are not regulated.”

Ms. Briggs noted “and you made an administrative decision not to enforce setbacks for those types of structures” with Mr. Carrara replying “yes, that is fair to say” adding “you have to draw the line somewhere, I only have so many hours in the days and I have other important things to get to.”

Ms. Monahan asked for clarification on the decision Mr. Carrara wrote. She also asked why he had required Ms. Brooks and Mr. Tietsch to move the structure off Mr. Fernald’s property line. She noted the decision said the structure was exempt because it had a membrane covering and was not defined as a building, and therefore not subject to front, side or rear setbacks.”

Mr. Carrara replied “I need to be clear here” adding “I believe the intent here was to build a shed, not a building and that must be five feet off the property line. “Side setback?” asked Chair Stewart with Mr. Carrara replying “yes.”

A very brief dispute over whether or not the setback is deemed from the property line (Mr. Carrara’s understanding) or the Right-of-Way (Ms. Monahan’s understanding) followed.

Chair Stewart then asked Mr. Carrara “but if it has a membrane roof the whole discussion of front or side setback is null and void?” Ms. Monahan asked “is it consistent practice to meet the side setback but not the front setback?” Another brief discussion about membrane roofs, the definition of structure, similar structure and development followed.

Mr. Carrara then presented slides showing about 20 campers, wood sheds, covered boats, dumpsters and fuel tanks pointing out property lines and frontage spaces.

There were no further questions from the Board. Chair Stewart opened the hearing up to the audience.

Mona Adisa Brooks introduced herself and said “I am not a lawyer, but Mike and I built a woodshed, it was never meant to be anything else. “I am an artist, and very much appreciate Mr. Fernald’s preservation of beauty in our neighborhood, that is very important to both of us.” She went on to say “Dario did nothing but his job” adding “and we had no other place to put the shed. She described a 100-foot Douglas Fir tree to the immediate south of the structure that did not show in the photographs taken by Mr. Fernald. “We are not cutting it down” she said.

Ms. Brooks recalled “one month ago I was sitting here and was stunned to see a photo of the shed with “stuff” in it (not wood). She looked at the Board and said “I was on my way to the Sunapee Fair. That “stuff” was to be loaded into my car. My work is valuable to me and my fans; those were work boxes of porcupine fragile sculptures.”

Chair Stewart replied “the content of the shed is irrelevant; if the Board agrees with Mr. Fernald you will need to *move* it and anything in it. If the Board agrees with Mr. Carrara you can *keep* anything in it.”

Ms. Brooks again looked to the Board and said “this is embarrassing, having our neighbor take a photo from the street. I was packing my car for the fair when this was taken. To have the image projected on the screen was unkind from a human point of view.” She added “I felt stunned, like someone taking a picture of you walking to your mailbox in your pajamas. It is wrong from an ethical and human point of view.”

Ms. Brooks told the members they should read “1984” adding “I am an American and proud of it. We care about our environment and built something really beautiful.” She went on to note “if we move it, they *will* see it.” Ms. Brooks then briefly reviewed the constraints of her yard and the lack of a better location for the woodshed.

Ms. Brooks said “please respect what I am talking about, I am sorry about the elevated voice but I have passion about this and I deserve some respect. We acted in good faith to our dear neighbor and Dario (Carrara, Code Officer).”

Jan Dolan introduced herself as a friend of Ms. Brooks. She told the members “I am a native of Peterborough, I remember Cheney Avenue without so many houses on it” adding “I feel there is something not right about this.” Ms. Briggs asked “do you live in Peterborough?” Ms. Dolan replied “I live on Union Street.” Ms. Dolan went on to note “I drive up Cheney Ave. and all I see is a big garage, (Mr. Fernald’s garage) but I don’t see her (Ms. Brooks) woodshed.” She looked at the Board and asked “why is he upset? Neighbors and people need to get along.”

Michael Teitsch told the members he would like to make it clear that when he spoke to the Code Officer “I asked him if it was OK to put a tarp on it instead of a roof and he clarified how a tarp was OK but not a roof. Putting the tarp on the woodshed was my idea” he said. He went on to say he preferred to put a roof on the shed to keep the wood dry and make the woodshed more attractive, but a tarp was the only option. He also pointed out that what was not shown in the photograph presented by Mr. Fernald was the existence of a 60-foot pine tree just to the south of the shed. He noted “there is no other practical place to put it.”

Felix Tarango introduced himself as a resident of Kaufman Drive. “I pass by on a daily basis” he said and noted he actually stopped to take a look from the street. “It is a good piece of work” he said, adding “but to Dick’s credit, he is right it is a structure in the 30-foot setback.”

Mr. Tarango went on to note “I have no stake in this game, if you let it stay, that would be fine but make it look nice, put some shingles on it.” He noted the value of his home was important and suggested the shed be decorated in the best manner if it were to stay.

Ms. Brooks raised her hand and said she had one final comment. Chair Stewart asked “it is quick?” Ms. Brooks replied she did not know the gentleman who had just spoken but that she whole heartedly agreed with him.

Chair Stewart looked around and asked “how does the Board feel about this? Do we need more examples? Do we need a site visit?” Ms. Briggs replied “I think we have plenty of information to make a decision.” Mr. Leishman noted he had done a drive by to satisfy his curiosity. Ms. Monahan interjected “I did too.” Mr. Sobe added “so did I, I went past it the first time, but I stopped and got out to look” adding “that blue tarp looks like hell.” Mr. Teitsch interjected “it is brown.”

Chair Stewart was adamant that the Board felt confident in closing the public hearing before and proceeding to deliberation. “I do *not* want to close and re-open” he said. Mr. Leishman, Ms. Briggs and Ms. Monahan all replied at once that they felt ready to make a decision.

Mr. Sobe asked if siding could be applied to the shed. “It would still not be a building right?” he asked. Mr. Carrara replied “as long as it does not have a roof, that is how I see it.”

Mr. Fernald briefly reiterated the purpose of the Peterborough zoning ordinances and noted the front setbacks throughout his neighborhood were respected. He cautioned “you allow one violation; you will allow them all” adding “all sorts of things could happen if you don’t carry out the ordinance. I do not understand why *open and unoccupied* is so difficult to understand.”

Chair Stewart noted “without any other questions I make a motion to close this hearing for deliberation.” The motion was seconded with all in favor.

Deliberation

Chair Stewart read a statement regarding the deliberation process. He noted additional testimony would not be taken but the Board reserved the right to request additional information if necessary.

Ms. Briggs mentioned the opinion from Town Counsel with Chair Stewart asking if all the members had received and reviewed that document. Mr. Leishman replied in the affirmative adding “but Mr. Chairman I do believe this Board has the wherewithal and smarts to make a decision even without it.” Chair Stewart replied “what is your decision?” Mr. Leishman noted “we need to go back to Dario’s decision and review his interpretation of open and unoccupied as being vague and ambiguous.” Mr. Leishman added “that is not my interpretation in terms of the setback.”

A brief discussion that included the definitions of open and unoccupied, development, similar structures and enforcement in a consistent manner followed.

Chair Stewart noted “this Board can agree with Dario if we feel there is ambiguity. We would uphold his Administrative Decision; have him continue to enforce zoning in a consistent manner and let the Planning Board deal with it.”

Ms. Briggs interjected “actually, on the advice of counsel we have three choices” adding “if the members believe the ordinance is clear and had been applied correctly then we should vote to uphold Dario’s decision. If the members believe the ordinance is clear and has been incorrectly

applied, we should overturn Dario's decision and lastly if we the members believe Dario's interpretation was based in part from the Doctrine of Administrative Gloss to the ordinance then it is up to the voters to change the ordinance. Ms. Briggs also noted that their decision depended on whether or not the structure is a similar structure. "If we believe it is, it needs to be removed from the setback, if we don't believe it is a similar structure then it is exempt and may stay in place."

Ms. Monahan noted "and be applied in a consistent manner, and that does not seem to be the case with the slides Dario presented."

The members also briefly discussed whether or not Mr. Carrara had acted with the consistency of the retired Code Officer over the past two years.

Mr. Leishman suggested they focus on the appeal and once again noted the substantiality of the structure. "This is not going to blow away in a wind storm." Chair Stewart asked if wood piled on pallets with a tarp over it would be different with Mr. Leishman replying "absolutely. We have heard testimony from both sides that is a well built structure" adding "take a look around the neighborhood, it is out of place. We need to use some common sense, you heard from the folks that built it they would like to put a roof on it." Ms. Briggs noted "you have shared your gut reaction that it does not belong" and asked "but how do we get to that opinion given (town) counsel's choices?"

Much of the discussion that followed involved §245-5 D Setback Exemptions. "Single story residential storage sheds, playhouses, and similar structures up to 120 square feet in area that are exempt from building permit requirements must still comply with front setbacks, but one such structure may be located as close as five (5) feet from the side or rear property lines." The members again spent a significant amount of time discussing the interpretation of development, ambiguous and similar structure. Ms. Monahan stated "I am not trying to attack his (Mr. Carrara's) interpretation but this is a similar structure according to 245-5 D." Ms. Briggs in turn asked "what if it was pipe and canvas? Under the Doctrine of Administrative Gloss pipe and canvas is not a similar structure so how do you distinguish?" Ms. Monahan replied "wood is much more permanent, pipe and canvas is not as substantial, it is based on its permanence."

Chair Stewart looked at the photograph of the frame of the wooden structure and said "come on guys, this could be lifted up. You really think this is permanent?" Mr. Leishman replied "this would take something to get that apart, I am impressed by how solid it looks." When Chair Stewart asked "so you think it is similar to a shed?" Mr. Sobe replied, "yes, and we should enforce the front setback." Chair Stewart simply asked "how do we put that in the decision?" Ms. Briggs looked at the Chairman and said "there are three votes, it's their show. What do you think?" Chair Stewart replied "it doesn't matter what I think, it is three to two." Chair Stewart did note and question the setback only applying to dwellings. "I know I asked about it in the first meeting and Sharon has brought it up as well (the setback applying to dwellings question)" he said. Ms. Monahan replied "maybe what is exempt from setbacks is a better way to approach it." Ms. Briggs asked "so we say to Dario Administrative Gloss covers pipe and canvas structures but as soon as it becomes more substantial Administrative Gloss no longer applies? Is that where we are going?"

Mr. Leishman noted “there will be other instances down the road. The Planning Board needs to address this pipe and canvas in the setback issue to make it easier for Dario and the rest of us.” Chair Stewart interjected “three agree with Mr. Fernald, you get your way.” He added “in the future people will have to think about how to protect their woodpile, you are setting us up for disaster.” He looked at Ms. Monahan and said “you are the Vice Chair; I am sick that you want to go ahead and assist in this.”

Ms. Monahan reiterated her interpretation (especially of similar structure) and replied “it needs to be moved out of the setback.”

Ms. Briggs asked “what about metal frame and canvas?” A brief discussion followed. Mr. Leishman noted “not to dodge a perfectly good bullet, you need to look at the structure and the zone it is in.” Chair Stewart interjected “the zone is irrelevant” with Mr. Leishman replying “the zone is important.”

Mr. Leishman added “it is a well constructed and substantial woodshed and because of zoning they need to move it out of the front setback, then they could put a roof on it if they wanted to. Chair Stewart questioned the interpretation of substantial as being a “hunch or a feeling.” Mr. Leishman noted “if it were 30 feet back we would not be sitting here.”

Further discussion about the definitions and interpretations of permanent, fixed, substantial and similar structures followed.

Ms. Briggs looked to Chair Stewart and said “they have a point though” adding “it can stay with a tarp on it but that is not what the landowner wanted. It doesn’t look good in the neighborhood, it does not look nice. If it were moved it could have a roof and shingles.”

A brief discussion about “permanently fixed and substantial followed. It was this discussion and these definitions that had Mr. Leishman, Ms. Monahan and Mr. Sobe in agreement that the woodshed was indeed a “similar structure” and as such, needed to comply with the front setback and must be removed or modified.

Chair Stewart noted the implications of the ruling going forward for the Code Officer. Ms. Briggs agreed noting “he will have to assess the height and the type of wood and make a decision.” Mr. Leishman interjected “Let’s not put Dario on the spot, let’s let the Planning Board worry about that and focus on what is going on tonight.”

Resigned, Chair Stewart said “well, we have three so let’s go ahead and write this up.” Ms. Briggs suggested the decision, however written, coincide as closely as possible with the advice of Town Counsel.

Chair Stewart replied “I just don’t get it” with Mr. Leishman replying “if he had not been stopped that structure would have a roof on it. We heard in testimony from both sides the intent was for a substantial, long standing woodshed with a roof.”

Chair Stewart looked at Mr. Leishman and asked “do you burn wood?” Mr. Leishman replied “yes I do.” Chair Stewart asked him how he kept his wood dry with Ms. Leishman relying “it is inside, in the garage, under a roof.”

Ms. Monahan noted an instance when a chicken coup (with a roof) was ordered moved out of the front setback of a residence by the previous Code Officer.

Chair Stewart in essence threw up his arms and stated “I don’t know how we can reconcile a decision with Town Counsel’s advice. Ms. Briggs reviewed what she believed to be the three choices in the decision. She noted “if you believe that the ordinance is clear on its terms and has been incorrectly applied, then you can vote to overturn the interpretation.” “I am willing to say that” replied Mr. Leishman. “Then I think you better put those words in the decision” said Ms. Briggs, adding “first that you find the definition of similar structure is not ambiguous.”

Mr. Leishman noted “it is clear to me that storage sheds, playhouses, and similar structures belong in the back yard.” Chair Stewart replied “dog houses?” “Yes” replied Mr. Leishman adding “the space now occupied by the woodshed should have remained open and unoccupied. That is how I read the setback. That, to me is not ambiguous.”

Ms. Briggs spoke briefly about “a world of trouble” when you mix *administrative gloss* and *open and unoccupied*. She also discussed the term *similar structure* and whether or not that term was ambiguous. The members also briefly discussed how their decision may affect future cases with several of the members advocating case by case review, testimony and deliberation.

With the Decision drafted the vote to overturn the Administrative Decision of August 29, 2012 by Code Officer Dario Carrara was approved with Ms. Monahan, Mr. Leishman and Mr. Sobe in favor. Chairman Stewart and Ms. Briggs were against. Chair Stewart concluded the meeting with “Mr. Fernald’s motion to appeal has been granted.”

The meeting adjourned at 9:25 p.m.

Respectfully submitted,

Laura Norton
Administrative Assistant

ZONING BOARD OF ADJUSTMENT
NOTICE OF DECISION

Case Number: 1185

November 5, 2012

You are hereby notified that the appeal from an administrative decision, where the applicant, Richard R. Fernald alleges that an error has been made in the decision, determination, or requirement by the Code Enforcement Officer on August 29, 2012 in relation to Article II Section 245-6B (2) of the Zoning Ordinance is hereby **GRANTED**. This decision pertains to what Mr. Fernald deems a structure on the west side of his neighbor's property located at 77 Cheney Avenue, Parcel Number U002-043-000, in the Family District.

In reaching this decision the Board finds that:

This membrane covered wood structure used for storage of wood is a "similar structure" pursuant to 245-5 D because of its construction which is fixed and substantial. Therefore, this structure must meet the front, side and rear setbacks as defined in 245-5 D.

Signed,

Chair

Note: An application for rehearing on any question of the above determination may be taken within 30 days of said determination by any party to the action or person directly affected thereby according to the provisions of New Hampshire Revised Statutes Annotated, Chapter 677. Decisions for Variances and Special Exceptions shall become null and void in two years if substantial compliance with said decision or substantial completion of the improvements allowed by said decision has not been undertaken after the date of approval. If this decision becomes null and void, the owner must reapply to the Board of Adjustment for a Variance or Special Exception as provided for in §245-42 of the Peterborough Zoning Ordinance.