

ZBA Minutes 08/06/12

NEWMARKET ZONING BOARD OF ADJUSTMENT AUGUST 6, 2012 MINUTES

Present: Chris Hawkins (Chairman), Bill Barr, Gerry O'Connell, Bob Daigle

Absent: Wayne Rosa (Vice Chairman)

Called to order: 7:06 p.m.

Adjourned: 7:41 p.m.

Agenda Item #1 – Pledge of Allegiance

Agenda Item #2 – Review & approval of minutes: 07/09/12

The members had not had a chance to review the minutes and they were deferred to the next meeting.

Agenda Item #3 - Regular Business

Walter W. Cheney - Appeal from Administrative Decision. The applicant requests an Appeal from Administrative Decision to allow for the issuance of a building permit, the application for which was denied due to the lot being determined as "unbuildable open space". The lot is located off Cushing Road, Tax Map R2, Lot 36-13, Zone R1. This application was originally heard on May 18, 2009 and a motion was made and unanimously passed to "postpone any discussion on this issue until the lawsuits have been properly adjudicated and the Board has legal answers in front of them by which the Board can then render a decision". The applicant has requested a continuance of this meeting be held stating the "resolution came on March 3, 2011, where the court ruled in the favor that Lot 13 was owned by Walter W. Cheney and that Lot 13 is an independent lot of record..."

Chairman Hawkins explained the history of the application. He stated there were two issues on the table in 2009. One was whether the consideration of the denial of the building permit would be deferred, which is what happened. The other is the issue of whether the Zoning Board had jurisdiction over this appeal under the applicable ordinances.

He explained they would proceed by asking the applicant to address the question of jurisdiction specifically. If the Board gets past that issue, there will be presentation on the merits of the matter.

Chairman Hawkins stated he noted there were certified mail receipts for all of the people listed on Mr. Cheney's abutters list. Chairman Hawkins noted that the board had carefully reviewed the original application materials, as well as the supplemental materials submitted by the applicant and the Town's attorney.

He asked Walter Cheney to step forward and address the issue of the Zoning Board's jurisdiction first. He asked Mr. Cheney to advise them which part of the Zoning Ordinance was at issue tonight. From the materials he received about this application, including those from the Town's attorney and what Mr. Cheney had presented to the Board tonight about the subdivision regulations, he was wondering what provision in the Zoning Ordinance was at play in this application.

Walter Cheney stated he had no reason to believe the Zoning Board could not hear this case. Whenever there is a building issue, you go to the Zoning Board if you have an issue with the building permit. He stated he had no personal issue and had not done any personal research or effort in determining jurisdiction. He thought that was a Town issue, not an issue he raised.

Chairman Hawkins asked if it was fair to say there was no provision in the Zoning Ordinance that is at play in his application. Chairman Hawkins did not see anything and was wondering if there was any provision of the Zoning Ordinance, as opposed to the subdivision regulations, at issue. Mr. Cheney said, "No".

Chairman Hawkins stated this was an important question, as the Zoning Board can only hear what they are authorized to hear. The Zoning Board has very limited statutory authority. He stated he would like to hear from the Town's attorney and then from anyone else who would like to contribute something to this topic.

Attorney Justin Richardson, from Upton & Hatfield, the Town's attorney, stated he was here to present this matter on behalf of the Town's Planning Department. He understood the legal issue that is before this Board. When you look at RSA 674:33, it talks about whenever an administrative official makes a determination relative to the Zoning Ordinance, this Board can hear an appeal. He cautioned the Board not to put all of its eggs in one basket and simply rule that it does not have authority. He felt that was a legal question and should be decided by a court of law. The reason is, if Mr. Cheney is not entitled to bring his appeal from the denial of his building permit, he did not think there was any direct local avenue that he would have to appear before a Town board other than to re-plead his case to the same official who denied his permit. Attorney Richardson stated he researched the issue and there were a couple of things that came to mind. One is, when you look at the nature of subdivision regulation, with attention to RSA 674:35, it says, "A municipality may, by ordinance or resolution authorize the Planning Board to require preliminary review of subdivisions and to approve or disapprove in its discretion plats..." and it goes on to talk about subdivision plans. He stated the key words are "by ordinance". What the Town is doing when it votes to authorize a Planning Board to regulate subdivisions is giving it a form of zoning power. You are doing that by ordinance. It does not say "Zoning Ordinance". This act is different than what the Planning Board would do, which would not be the municipality, but would be the Board adopting regulations. That is under a different provision in the statutes. This is the actual Town saying, "Planning Board, we're going to authorize you by ordinance, in other words, we'll enact an ordinance to say that the Planning Board now has the power to adopt regulations and to regulate subdivisions." Then the Planning Board comes up with regulations that give the building officials the authority to approve or deny applications.

Attorney Richardson stated another provision is a bit of an "odd duck" in that it does not appear to directly address the issue, but, if you turn to RSA 676:5, it says "Appeals to the Board of Adjustment" and subparagraph III says, "If, in the exercise of subdivision or site plan review, the Planning Board makes a decision or determination which is based on the terms of the Zoning Ordinance or any construction interpretation or application of the ordinance, which would be appealable to the Board of Adjustment, if it had been made by an administrative officer." What is unusual about that is, if you were to read the 674:33 provision to say it has to be a zoning ordinance determination, that is the only thing that can be appealed to this Board, this provision would not make any sense, because there would be no administrative decision under the subdivision or site plan regulations that could be appealed. There would be no appeal from the Planning Board or administrative official. He thought what had to be recognized was these statutes go back to a simpler day when everything was put into the same pot, whether it was zoning, subdivision review, site plan review or whether it was denial of a permit clearly based on a specific provision of the Zoning Ordinance. The statutes were written to allow that review to occur locally. He stated he thought there were cases that supported that. He gave the citations, *McNamara v. Hersh* 157 NH 72 (2008), the court specifically says, "Ordinarily, challenges to decisions regarding building permits must first be made to the Zoning Board of Adjustment". Like this one, it is an appeal of a building permit. The other provision is discussed in *Ouellette v. Kingston* 157 NH 604 (2008), which is a complicated and confusing case. It talks about a Zoning Board's authority to hear appeals that relate to a historic district ordinance and regulations. That is something that is not, strictly speaking, a Zoning Ordinance; it is a regulation adopted by an HDC about the use of historic properties. The Supreme Court upheld a Zoning Board's decision to hear a case and the Zoning Board reversed the decision by the HDC under its own regulations. This is a complicated issue and he would caution this Board not to put all of its eggs in one basket, given those complexities. It would be better if this case was heard and decided by the Zoning Board, in the first instance, and, if you were inclined to believe you may or may not have the authority, he would rule in the alternative, to say that "We heard these arguments, we have given our ruling on the merits, we note there is a legal question before the board that should ultimately be decided by the courts in the event that either party appealed." If a court were to find there was jurisdiction, it would not have to get sent all the way back a year from now. If the court found there was no jurisdiction, we would still have the benefits of the ruling. There is a legal issue out there and the better ruling is that ZBAs are meant to hear local matters; this is clearly a local matter, clearly a case involving a building permit, which the Supreme Court has said this Board has the authority to hear.

Chairman Hawkins asked if any member of the public was here to address the issue of jurisdiction. No members of the public responded.

Chairman Hawkins then recognized Diane Hardy, Town Planner. Ms. Hardy stated, with all due respect to the Town's legal counsel, she understands there is a difference of opinion between Attorney Richardson and Attorney Laura Spector, the former legal counsel for the Town regarding this matter. She wanted to point out, in Attorney Spector's letter of May 18, 2009, Attorney Spector felt the Board lacks jurisdiction. The reason for that is this application concerns a subdivision that was approved by the Newmarket Planning Board on November 12, 1985 and it was clear from the record of that Planning Board at the time what the intent was and there is another avenue that Mr. Cheney can pursue. That is to make modifications to his approved site plan, send it back to the Planning Board and ask them to reconsider given changes in circumstances, market, and information that is now available and ask for the Planning Board to consider a revision to the plan. Perhaps that revision would include carving out a lot for a single-family home on Lot 13. Diane Hardy stated she would like to reiterate what Attorney Spector stated, "The determination of whether Lot 13 is unbuildable is not based on an interpretation of the Zoning Ordinance and, since the Zoning Board does not have authority to interpret subdivision regulations, there is no jurisdiction to hear the appeal of the denial. For that reason the Zoning Board should dismiss the appeal."

Chairman Hawkins stated he would like to give Mr. Cheney an opportunity to respond to the presentations by the Town's attorney and Ms. Hardy.

Walter Cheney stated he has been dealing with the Town a long time and no one has ever heard his side of the story. Everyone has given their side, but him. This happened 27 years ago and everyone thinks they know what went on, but he is the only guy in this room who was there. He stated he would like to be heard somewhere along the line. He stated if he has to go to court, he will go to court. Someone is going to hear his story. It would be nice if his story could be heard. When you put the facts on the table, it has a whole different flavor than what everyone has heard to date. He asked to be heard. He did not know the legalities of it, but certainly the Town Attorney feels he should be heard and he would like to be heard.

Chairman Hawkins stated the Board has reviewed all of the materials Mr. Cheney submitted back in 2009 and they have looked briefly at the materials Mr. Cheney submitted at the meeting. To the extent that reading this stack of papers in the file is "being heard", he hoped Mr. Cheney does not feel he is being shortchanged in that respect. The Board has read all of the materials he submitted. The question of jurisdiction is really serious. The Zoning Board has very limited authority. The authority is set down by the statutes. Typically, the Board hears appeals from decisions of administrative officers, like the Code Enforcement Officer, that relate to an interpretation of the Zoning Ordinance. For example, if a building permit is denied because the building would violate a setback or something of that nature under the Zoning Ordinance. They hear requests for special exceptions. The way he reads the statute, RSA 676:5, subparagraph (1), it says that "Appeals to the ZBA concerning any matter within the Board's powers, as set forth in RSA 674:33". When you turn to that statute, under subparagraph (1)(a) it talks about "Hearing and deciding appeals from decisions of an administrative official in the enforcement of any zoning ordinance", so the way he reads it, he did not believe the Board had any power to hear this appeal, because there is no provision in the Zoning Ordinance that is implicated. The remedy may be in Superior Court. He did not know where the remedy lies; the Board's decision on what their powers are under the statute is not binding on the court. The court is going to make its own interpretation and decision. This issue appears to be heading back to court one way or another.

Chairman Hawkins stated he was confused. Based on the decisions of the court in the underlying case, he thought the court made a finding, based on Mr. Cheney's testimony, that the intention was for this lot to remain as undeveloped. Mr. Cheney responded that that is not what the court decided. Chairman Hawkins stated that the court will decide on that. The way he reads the statutes, the Board does not have the power to hear this appeal. He proposed to entertain a motion to dismiss the appeal for a lack of jurisdiction.

Action

Motion: Bob Daigle made a motion that we dismiss this appeal based on lack of jurisdiction

Second: Gerry O'Connell

Attorney Richardson asked to speak. Chairman Hawkins apologized and stated he should have closed the public hearing, but to go ahead.

Attorney Richardson stated he wouldn't re-argue any of the legal positions. He stated it was ultimately an issue the court will decide. What he did want to do was give one additional document to the Board that should shed some light on the record in response to what Mr. Cheney presented. This has to do with what the intent of the Planning Board was. He noticed, in reviewing and preparing, for the date of the final approval November 12, 1985, there are minutes for that meeting. He thought it would be helpful to submit those to the Board to be added to the record and, if this gets appealed, it would be part of the record. He also gave a copy to Mr. Cheney. He handed copies to the Board. He stated he wanted to draw the Board's attention to the third page of this document. You can see the actual motion to approve the Moody Point plan by the Planning Board. They refer to three letters from Attorney Malcolm McNeill that were imposed as conditions with all of the other requirements previously discussed. He wanted that to be part of the record. Chairman Hawkins asked Attorney Richardson to provide a copy of the document to Mr. Cheney, and Attorney Richardson did so. Chairman Hawkins noted that the document appeared to have no bearing on the issue of jurisdiction, but accepted it and placed a copy in the Town's file.

Mr. Cheney stated he was there and we have all seen these approvals. When they talk about "all other requirements previously discussed" in the motion to approve by the Planning Board in 1985, logical people would think that would mean anything that was discussed and voted upon. If you have ever attended a Planning Board meeting that is everything discussed. In this case, we have gone through two entirely different plans. All of the studies were done on one plan and then there was another plan done. People get up and talk and talk about Lot 13. Lot 13, when it was approved and studies were done, looked entirely different. He stated if the Board would give him fifteen minutes, he could show that anything that anybody has ever said is false. They don't understand what they are talking about. It is very frustrating. Attorney Richardson is the only gentleman in the entire town that has communicated with him and talked to him. He stated that was a disgrace. He has asked people to meet with him and look at the fact and walk through the ordinance step by step. If you take the information provided to you today home and take everything you have heard to date and look at it and compare it with the facts, when people talk about Lot 13, Lot 13 isn't Lot 10. They want to call Lot 10, Lot 13.

There were no further comments and Chairman Hawkins closed the public hearing and went back to the motion on the table.

Vote: Bob Daigle – Aye

Gerry O'Connell – Aye

Bill Barr – abstain

Chairman Hawkins asked the reason for his abstention. Bill Barr stated he had a question and then he would like to move forward with his vote.

Bill Barr asked, as the Town attorney brought up, is there harm in the Board's determination that they do not have jurisdiction rather than hearing the case and making a decision, noting that the jurisdiction was in question? He asked for help coming to an understanding on that. This is a new concept that he had not considered before.

Chairman Hawkins stated what he was concerned about was that they end up wasting a lot of time and a lot of energy hearing something that he was convinced, based on the way he reads the statute, they just don't have the authority to do. A judge may disagree. Whatever the Board has to say about it ends up being pointless or meaningless and it ends up being a waste of time. This issue has been out there before and for whatever reason it wasn't addressed. He felt this issue was heading to court one way or the other. He stated to let it be heard by someone who has the authority to give relief or make a determination that is going to be binding on everyone, rather than the Zoning Board spinning their wheels doing something that has, in his view, a very strong likelihood of being a waste of time.

Gerry O'Connell stated he was all for hearing anyone and giving people the opportunity to have their say and that is the right thing that should be done, but, in looking at this, he did not believe the Board has jurisdiction and, therefore, what is the point of doing the full hearing on it.

Bob Daigle stated, if there was some section of the Zoning Ordinance that they could point to and say this is where we

clearly have jurisdiction they could hear it.

Chairman Hawkins stated, in a different context, you hear the term “judicial activism”, which is people thinking that judges made decisions they have no real authority to make and that’s the species of what the concern is here. The Board’s jurisdiction and powers are very limited by what the words of the statute say.

Gerry O’Connell stated he did not see within the Zoning Ordinance where the Zoning Board has authority. He has come to the conclusion the Board does not have jurisdiction, albeit the Town Attorney says we should still hear it.

Bill Barr stated he does agree. He just wanted to entertain the conversation prior to voting, since it was a new concept to him. He thanked the Board for delaying this and asked that they continue on with the vote.

Chairman Hawkins asked all those in favor signify by saying “aye”.

Vote: Bob Daigle – Aye

Bill Barr – Aye

Gerry O’Connell – Aye

Chris Hawkins – Aye

None opposed

Motion carries

Agenda Item #5 – Other Business

Chairman Hawkins asked if there was any other business to come before the ZBA this evening.

Walter Cheney stated it was a disgrace that this Board could not have made that decision. They have wasted all of Justin’s time and all of his time. He stated the Board should have had the common courtesy for the Town to make this decision in advance before he and the Town Attorney spent all of this time on this. This was not fair.

Chairman Hawkins stated, respectfully, the ZBA is a quasi-judicial board. The Board cannot write letters, or engage in private discussions with applicants. The Board can only perform its business in public, in public hearings, and at public meetings. They had no choice, but to go through this process, to pay attention to everything that was submitted, and make a determination. The Board does not have the authority to call him up and have discussions about things, it is not within their power and he felt Mr. Cheney knew that.

Mr. Cheney stated, if that was true, he apologized. He asked if somebody within the Town would have the authority to do that. Chairman Hawkins did not believe so. The application is before the Zoning Board and no one in town administration, no one in the Planning Office, no one has the power to act on it, but the ZBA. It is given to the Board by law. He appreciated the fact that time was expended. He did not feel time has been wasted, however, because Mr. Cheney is going to take his material and Attorney Richardson is going to take his material and it is going to end up before a judge in the Superior Court, just with a different caption on it. He appreciates what Mr. Cheney is saying, it is just not within his power to write him a letter. The Board is required to act in public where everyone can see. He appreciates Mr. Cheney’s frustration. Bob Daigle stated that the Board members are not allowed to discuss applications privately among themselves. Chairman Hawkins pointed out that Mr. Cheney is frustrated, because no one will talk to him, but maybe there is no one who can talk about it privately. He did not know the answer to that, but he did know the Zoning Board

cannot do so.

Chairman Hawkins asked if there was any other business to come before the ZBA this evening.

Attorney Richardson stated he would continue to talk to Mr. Cheney about a way to get this resolved as inexpensively and efficiently as possible. Chairman Hawkins responded that he generally favors negotiated agreements whenever possible, but if agreement is not possible, that is what courts are for.

Russ Simon, Cushing Road, asked, in speaking about authority, he did not know whether the ZBA had authority or any other area in town had authority for providing the community with the drainage plans and the water and sewer plans that have never been surfaced by the developer of Moody Point or anybody else in Newmarket. Does the ZBA have the responsibility to surface those plans? For nine years they have asked the Town and everyone else for copies of plans, so they can manage the property and the developer, the lawyers, the Town, and DES, do not have those plans. He did not know if the ZBA had the authority to get those plans surfaced. Chairman Hawkins stated the ZBA has no secret stash of documents. You can make a request through the Town and either they have them or they don't. Russ Simon stated they have made requests, but he was asking because it was a jurisdictional issue.

Action

Motion: Bob Daigle made a motion to adjourn at 7:41 p.m.

Second: Bill Barr

Vote: All in favor