

## ZBA Minutes 05/20/13

### NEWMARKET ZONING BOARD OF ADJUSTMENT MAY 20, 2013 MINUTES

Present: Wayne Rosa (Vice Chairman), Bob Daigle, Richard Shelton (Alternate), Elaine Winn

Absent: Bill Barr, Chris Hawkins (Chairman) both excused

Called to Order: 7:00 p.m.

Adjourned: Approximately at 8:00 p.m.

#### Agenda Item #1 – Pledge of Allegiance

Vice Chairman Rosa appointed Richard Shelton to fill in for Bill Barr.

#### Agenda Item #2 – Review & Approval of Minutes: 04/08/13 & 04/15/13

04/08/13

##### Action

Motion: Bob Daigle made a motion to accept the minutes of 04/08/13

Second: Elaine Winn

Vote: All in favor

04/15/13

##### Action

Motion: Bob Daigle made a motion to accept the minutes of 04/15/13

Second: Elaine Winn

Vote: All in favor

#### Agenda Item #3 – Regular Business

Bill Pothier – Motion for Rehearing, pursuant to NH RSA 677:2, regarding the denial, on April 8, 2013, of a Special Exception pursuant to Section 1.05(B)(1) to allow the horizontal expansion of a structure that violates setback requirements, finding that Section 1.05(B)(1)(c) “the owner demonstrates that no other expansion, which reasonably fulfills the intended purpose, can be achieved in conformance with this Ordinance” had not been met.

Vice Chairman Rosa stated it is recommended that the meeting to consider a motion for rehearing not be a public hearing and that no public testimony be taken. It is a public meeting and anyone has the right to attend, but all the Board is acting on is the motion in front of them which has been submitted and it should not involve comments by the applicant, petitioner or abutters. If the Board believes there is sufficient ground to reconsider their original decision, the motion should be granted, if not the motion should be denied. He stated, since people were in the audience, he would like the Board to vote whether to allow public comment.

#### Action

Motion: Bob Daigle made a motion that they allow public comment.

Second: Richard Shelton

Vote: All in favor

Vice Chairman Rosa read the motion for rehearing submitted by Attorney Scott Hogan, representing the applicant.

Vice Chairman Rosa opened the meeting up for public comment.

Bernard Gordon, 6 Bay Road, congratulated the Board on a thorough job at the previous hearing, but he did not agree with part of what they did. He wanted to draw attention to something in the motion, that being the last sentence from Attorney Hogan. Attorney Hogan had written, “It should be noted that, at the Board’s April 8th hearing, no Board member could articulate any benefit that would result from denying this request for Special Exception.” He stated for the Board to uphold the rules would be the benefit from denying this requests. He stated the notion that a Board should have to articulate a benefit in denying the Special Exception flies in the face of fundamental reality and the point of all of this. The Board is doing the proper thing. He stated the benefit is the game. Upholding the rules is something that we all expect. For an attorney to charge that Board members could not articulate any benefit from what they did is beyond a reasonable expectation. He stated it is possibly true that the building that is now up is prettier than what was there previously. That isn’t the point. You could make it the Taj Mahal. The issue is not whether it is prettier or whether the owner spent more money. The issue is whether the rules were followed. If the owner did not follow the requirements, and if he had a concern to come forward to say he could not do it the way he originally intended, he (should have) had to amend his permit. He did not do that. To grant the Special Exception after the fact for this building is to make a mockery of the whole purpose of having rules and regulations in Newmarket.

Richard Shelton stated he could figure this out two ways. At the meeting where this was denied, the Board did their due diligence. As there is no new information that was not previously available, the Board has a right to deny the application. The waterway under the building has nothing to do with the permitting. The Board is talking about the expansion not the work underneath. He stated the other way of looking at this is here we are with a piece of property that the owner spent a lot of money on. There were three Code Enforcement Officers handling this during a period of staff turnover. None of them testified at the meeting about what was allowed. He stated the DES permit issued was to replace “in-kind” two existing barn buildings. It is different from what DES stated it should be. The applicant should have been before the Board when he realized these buildings needed to be built outside of the original footprint. He felt the Board should grant a rehearing. The applicant and builder should have been before the ZBA requesting necessary variances. He felt the ZBA should have heard from the builder, who made these changes.

Elaine Winn stated the applicant had said he was not around when the changes were made and the builder just went ahead and made them. She had no problem with rehearing it.

Bob Daigle stated he was in a similar situation at his job that a Code Enforcement Officer is in his. Just because he does not stop something that is not going right, it does not absolve the contractor of their responsibility to do the work in accordance with the approved plans and specifications. At some point, this contractor made a decision to deviate from the plans, holding the permit in hand that said "on the same footprint". The contractor and property owner has the responsibility to build in compliance with the plans and specs. He stated, at his own job, if he finds something has been done afterward that does not meet the plans and specs, the contractor is still held responsible to make it right.

Vice Chairman Rosa stated, if the owner had come before the Board last year and presented his situation to us before it was built, he might have had a good case. The only thing he sees the applicant basing his motion for rehearing on is that the Board go out to the site and look at it. Nothing else is presented. He stated he thought all of the ZBA members had been by the property and they know the situation.

Richard Shelton stated the minute the owner changed the footprint, he should have come to this Board. Diane Hardy stated that was not what the Board was here to discuss tonight. The Board is here for a very specific reason, to review the letter from the attorney and to question whether there is compelling evidence provided in that letter that would warrant a new hearing. There are a couple of things that are mentioned in the ZBA Handbook put out by the NH Office of Energy and Planning. One of them is "Has there been a change in circumstances since the first hearing that would warrant reconsideration by this Board of the application". Another item is "Is there additional information that is now available that was not available at the time of the first hearing". The Board needs to focus not on what happened in the building process, but whether or not a variance and special exception is warranted given the testimony at the first hearing and the decision that the Board made. She asked if they felt confident in their decision and if they felt any errors were made by the Board that this rehearing would give the Board an opportunity to correct. She stated Richard Shelton said there could have been testimony from the Building Official. She asked if that was something that would change anything, if they had a rehearing. Richard Shelton stated no. No one requested it at the time. He did not see anything in the attorney's letter that warrants a rehearing. He stated there was nothing new there. The Board has to base their decision on what is contained his motion.

Vice Chairman Rosa stated the only thing he could see they could consider voting on was the site walk. He did not feel a site walk will change anything.

Bob Daigle stated he walked the site on his own. Vice Chairman Rosa stated he did that on his own, too. He did not feel he would learn anything from another site walk and he did not think the attorney could present anything that has not been presented already. The attorney had done a fine slide show and presentation. He did not see any new evidence here.

Bob Daigle stated the owner has built a fine building over there, if he had only followed the plan or procedures in place. He explained the gist of his vote at the April 8 meeting was that the ordinance is the ordinance and he voted that way to preserve the ordinance that is in place and the fact that the permits that were issued said "in kind" "on the same footprint". Prior to the start of construction, if the owner had come in and presented a different plan, it might have been appropriate, but he voted to preserve the ordinance. The owner came in after the fact and said "By the way, I changed the plans."

Richard Shelton stated this was the builder's problem more than anyone else's.

#### Action

Motion: Bob Daigle made a motion that the Board deny the request for rehearing of information was provided in the petition for rehearing

Second: Elaine Winn

Vote: All in favor

Diane Hardy explained to the public that this can now be appealed by the applicant to Superior Court within a 30-day timeframe. This moves the matter from the Town's realm to the Court's realm.

Bernard Gordon stated Attorney Hogan stated the Board would have to find if there is new information or find the Board had made some sort of procedural error. Diane Hardy stated she did not think anyone felt an error was made that would warrant a new hearing. So, it moves to the next level.

#### Discussion & First Reading of Amendments to Zoning Board of Adjustment Rules of Procedure

Diane Hardy went over the proposed Rules of Procedure. The NH Office of Energy and Planning (OEP) put out an updated ZBA Handbook that contained recommended changes to the Rules of Procedure. A copy of the Newmarket Rules of Procedure was updated and sent to the ZBA with the proposed amendments highlighted. There have been changes in the role of Alternate Board members. She had two suggestions. There was a typo on page 3, paragraph 2B. "The Chairman will designate one of the Alternate members to 'sit'..." The other thing she thought had some wording that was a little bit awkward was on page 8, under "Amendment". The Rules of Procedure can be changed, but it cannot be at the same meeting at which they were introduced. So, there would be two meetings. Right now the Board has to have three meetings. That language could be re-worked to be a little clearer. The way it is stated in the Handbook, is confusing. Otherwise, it looks good.

Diane Hardy stated it should say, "These Rules of Procedure shall be adopted or amended by a majority vote at a regular meeting of the Board provided that such new rules or amendments as proposed have been discussed at a prior meeting of the Board at which the vote is proposed to be taken" or similar wording. This is on page 8. That gets the point across that there has to be two meetings.

There was some confusion on page numbering. Everyone got the same email version, but everyone's printer at home prints differently and some members had items on different page numbers than others causing difficulty for some members in locating the sections being talked about.

Diane Hardy will go through and make her recommendations and bring them to the next meeting. Bob Daigle liked the amendments.

#### Action

Motion: Bob Daigle made a motion to postpone any action on the revised Rules

Second: Elaine Winn

Vote: All in favor

#### New/Old Business

Diane Hardy asked if anyone went to the Office of Energy and Planning's seminar for Zoning Board members. No one had attended.

#### Agenda Item #4 – Adjourn

##### Action

Motion: Bob Daigle made a motion to adjourn at approximately  
8:00 p.m.

Second: Elaine Winn

Vote: All in favor