

**ZONING BOARD OF ADJUSTMENT
MEMORIAL BUILDING**

**DECEMBER 1, 2009
7:00 P.M.**

The following are to be considered draft minutes only until approved by the Board at their next meeting.

Present: Cynthia Hayes, Chairperson, Bill Sullivan, Kathy Richardson, Barbara Dunlap, Gene Hayes and John Chiarella (Selectman representative). Not present: Kevin Waite.

Others Present: Sara Ellis, John Trachy, Ken Jacques, B. Manning and Attorney Susan Hankin Birke.

Cynthia appointed Gene as the alternate in place of Kevin. Cynthia called role.

Minutes: November 3, 2009 - Correction on page 3, 2nd last paragraph has too many apostrophes; page 4, next to last a paragraph to change “filed” to “file”. Bill moved to approve the minutes as corrected, 2nd by Gene, all in favor.

Literature & Correspondence: Newsletter from the friends of Mt. Sunapee is available to the group.

Brunell, Mark – Special Exception

Cynthia read the conditions listed on the Notice of Decision. Condition 1 reads “A descriptive covenant explaining the nature of the wetland buffer on the property will be filed with the Registry of Deeds.” Copies of the covenant/caveat submitted by Gregory Michael of Wiggin & Norrie, P.A. on Mr. Brunelle’s behalf was distributed for review. Kathy noted that under property it reads “Grantham Road”, this is commonly known as Main Street. The book and page is referenced, it is not important. Otherwise, the caveat is acceptable. We’ll let Mr. Brunelle know it is acceptable. He can sign off and file with the Registry.

Kevin Waite arrived. Gene stepped down to his seat as an alternate.

Cynthia called a recess until 7:30.

7:30 Cynthia called the meeting back to order

Appeal of Administrative Decision

Applicant: John Tracy relative to building permit issued to Victor Rifkin, Map 9, Lot 403-367 (RSM Camp Sunapee)

Cynthia opened the public hearing and read the notice. John Trachy for an Administrative Appeal to the terms of Article(s) VIII and IX paragraphs B and C of the Zoning Ordinance. Applicant alleges that an error has been made in the November 9 2009 decision by the Board of Selectmen approving building permits for the addition of six (6) additional structures on property located at 266 Deer Hill Road, in the Rural Residential Zone.

Cynthia recued herself and turned the meeting over to Bill Sullivan.

Mr. Sullivan stated Mr. Trachy is appealing the application for a building permit dated 9/29/09 there is an additional permit dated 1/10/09. Mr. Sullivan asked if anyone knew if they were different. Mr. Chiarella reviewed the two permits. It is believed the permit in January 2009 was issued for 3 existing cabins. The second permit issued September 2009 is for 3 additional cabins. The appeal is for 6 cabins.

Mr. Trachy pointed out the applicant for the building permit is not the property owner. Mr. Sullivan observed that the permit is for 3, the appeal is for 6. The question before the board is the appeal of the administrative decision.

Mr. Trachy pointed out 2 typos on the appeal, Article IX s/b Article X noted twice in the appeal. Attorney Hankin Birke clarified that if the appeal was incorrect the notice is also incorrect as it states Article IIIV and Article IX.

Mr. Trachy continued, no one is arguing that the property is nonconforming use. This past year we have seen 3 structures added without permits and 3 more proposed. Article VIII on Page 16 of the Zoning Ordinance, Non-Conforming Uses "This Zoning Ordinance shall not apply to existing structures or to the existing use of any buildings.....[read entirety]." General principle in state law and purpose of the zoning ordinance is to make it gradually less non-conforming so that eventually it becomes the same as the zone it is in. If you look at RSA 674:19, as attached, "...does apply to alteration that is substantially different." The problem is there has never been a baseline, never been a Special Exception applied for and reviewed by the Zoning Board (ZBA). There is no method of knowing whether the addition of these buildings constitutes an expansion that makes this more non-conforming, there is no way short of a ZBA review would determine that. If you look at RSA 676:13I, "The building inspector shall not issue any building or occupancy permit for any proposed construction, remodeling, or maintenance which will not comply with any or all zoning ordinances, building codes, or planning board regulations which are in effect. There is no way to tell, there is no baseline. The only way would be to have it go to ZBA examine the operations and determine whether or not this is an expansion, in improper expansion of non-conforming use. Under Article X sections B and C of Zoning Ordinance on page 17, Section B Permits shall be required... issued only if the purposed use conforms to the zoning regulations..." Article C. ... No permit shall be issued for the erection of any structure and the use of land unless the proposal complies with the provisions of this Ordinance and is consistent with the Town Plan.

Mr. Trachy added, if you look at the Selectmen's minutes of November 9th, the Selectmen are depending on what the Planning Board did, they have not done an independent investigation according to the minutes. I don't see where the actions of the Planning Board for Site Plan Review constitute a baseline that would help in making a determination as to whether this expansion is more non-conforming use and subject to a special exception. I ask the board to evaluate this and void the decision of the select board.

Bill, questions? So it is your contention that any pre-existing, non-conforming use, if there is any expansion, requires coming before the ZBA for the lack of a baseline. Mr. Trachy, if there is nothing to measure it against, yes. Bill, the point you made was the question of bringing nonconforming use into conformity, always seemed to me to be something of a pipe dream – strictly interpreted it would deter any expansion. Mr. Trachy, a natural expansion would not impact the density of the area, the operation, the traffic. A situation where you have gone from 60 to 150 campers, the Town now has a stop sign; seems to me this is an expansion of use.

Bill, questions?

Two people here to respond are the Board of Selectman representative and the attorney for the property owner.

John Chiarella the determination was made by some investigation, we made some calls, and we did look at what the Planning Board did. We called and emailed the Local Government Center. The previous letter that Cynthia received was inaccurate because of how the situation was relayed to them. One thing to define here is, what is an expansion? If you go in to the regulations, they have a property established as a camp, which has gone through natural growth, they are proposing new buildings to shift the use of some of the older buildings that they just cannot house people in anymore. The camp has grown over the years. The reason of the stop sign should not be assumed to be from additional traffic, but in fact to stop people from pulling in to an area where there is ongoing traffic. As far as a physical change to the lay out, as far as the LGC opinion rendered to us, are they changing the overall size, is it expanding into woodlot, are they cutting trees, generating new fields, expanding the physical layout past the borders it is in – the answer is no. The main change is shifting within their use of the buildings. It is true that the first 3 showed up, because of their understanding, once told they needed a permit, they applied. After looking at the existing business, the Select Board felt they needed to see the Planning Board. There was a question brought up to the Planning Board 5-6 weeks into the process with an email from Local Government Center saying they should get a Special Exemption. The Planning Board determined they should go on with their process, due process was gone through, their determination was thought to be proper under town regulations and the decision was reasonable. Essentially, if expanded use to a different area, or a different clientele, or something that is not part of their operation, the Select board would have sent them to ZBA for a determination. They went to Planning for review, completed the process, the Select Board and Planning determined they did not need to go before ZBA.

Kevin – the Select Board's contention was that it was natural growth and expansion over the course of the 50 years. John C., yes, as a matter of safety of updating the facility, managing and basically the whole idea that without stricter definitions of what expansion is or how we apply it, you are not bound by a Zoning Board to look at these things but if you look at the prevue there are a lot of overlaps. Since they had gone through the Planning procedure and through that process we found they had a vetting for the same stipulations that the Zoning Board would make – Planning seemed like the right

procedure. Bill asked, what is the scope of the expansion of this camp since zoning was brought in? Will all these little things become a big thing? John restated, how do you define it, what is natural expansion? John C, germane here are the three that were put up and the three proposed, if it became a pattern, the idea is change of use, expansion outside their borders it would need to go to ZBA. There does not appear to be a substantial change.

Gene asked about the sewer capacity. John C. that is not a germane question, the way the state determines use of septic, there are no utilities or plumbing in these cabins. Gene asked does this mean more people. John C, what you have to look at is if you have an established business, an established clientele, if you expand, unless there is a failure, the State requirements are met. Gene, where is your baseline, if the population has doubled aren't you taxing the systems? Can you allow this continued growth without a baseline, over-expansion. John C: When we do not have a specific to address, we have to go by state law, we cannot impinge on their expansion. Ken: People in the sheds are on the facilities now; using the existing facilities versus the proposed house. In looking at expansion, if it is one, the number of campers for a 4 week period versus prior number of campers for an 8 week period is not an expansion of the use of the property – shorter period of time. When they purchased the farm house it was dilapidated. Bill noted the house is not an issue.

Attorney Susan Hinken Burke: I come to this question differently, it is true that when the Rifkin's were referred to the Planning Board relative to what they were proposing for buildings etc, they began the process of site plan review consistent with town regulations. Into the process, after engineering took place, plans were drawn, revised, etc, based on the site plan review process, the question was raised, is this an expansion proposed beyond what the Zoning Ordinance allows and should it be referred to the ZBA for a special exception. That issue was addressed by the Planning Board in the context of the site plan review. They determined after discussion and the minutes address it and you heard some of the dialogue here tonight as to what the Planning Board considered as to whether this was reasonable and normal expansion which the Zoning Ordinance makes reference to. They determined a not an expansion, just a reasonable grown and improvement of the existing business. They did not feel it needed to go to a Special Exception. There was some talk of a joint meeting, which did not happen. The site plan was approved. When the building permits were brought to the Select Board, in my estimation, once site plan approved site plan by the Planning Board, I don't the Select Board had a choice but to sign those building permits. In fact, what was being proposed was approved by Planning Board. The way the NH laws are organized, an appeal from a decision of the Planning Board, is addressed by 677:15. This says that an appeal from a site plan review goes to the Superior Court. The appeal is of the granting of the building permits, those permits were based on an approved site plan, the Select Board cannot go against the Planning Board, the Planning Board decision needs to be appealed. They looked at the issue, this town sent this individual to the Planning Board not to the ZBA, whether or not there needed to be some other process, was within their prevue, given the circumstances, they did not think so. To undo that decision, I feel requires Superior Court. Cynthia, the letter was brought before the Planning Board, they did discuss it and

decided that it did need to go before the ZBA. The Rifkin's decided to proceed with the Planning Board.

Ken: There was going to be a joint meeting, it was determined that the planning process should go ahead after consulting with the Local Government Center. Also, the Planning Board did render a decision assuming they had jurisdiction and they acted properly.

Bill reminded the issue of whether this requires a special exception is closed - the appeal is of the granting of the building permit. Kathy shared that under RSA 676.5 her interpretation is that the appeal would come to the ZBA. John C. stated he felt this was only in cases where the other process was not completed. Because of the way the regulations are written and lack of definition, who determines where they go? Essentially it is up to the individual, ultimately the responsibility is theirs. Once the town signs on, determines jurisdiction, the procedure goes through and something comes up and new material info was disclosed, the process would halt, and it would go to ZBA. In this case, because of the determination, no lack of disclosure, it meets the criteria of what the Planning Board has purvue over, it meets their criteria. Maybe it is a flaw. If we set that as a precedence going forward, the ZBA will hear everything. Gene stated our zoning is rural residential, beyond that is a special exception. John C, what is normal and usual growth?

Bill expressed that the Planning Board made a mistake not referring it to the Planning Board. What we are discussing here is whether or not the ZBA can rule on this appeal or whether or not it goes to Superior Court. Second, whether or not this is an expansion that requires a special exception.

Attorney Hankin Birke, having worked in various towns you appreciate the differences in ordinances, the item that caught my attention Section IIIV, dealing with non-conforming uses, the third paragraph says "any and all non-conforming property may be altered and expanded as business and conditions warrant, providing however that any such expansion will not make any existing non-conforming structure a more non-conforming structure within the terms of the ordinance and that all other standards of this ordinance are met." The heading of the section is nonconforming uses. The Planning Board was looking at the uses of the property, is the use expanding in some way. The buildings are not expanding, the use of the property is not expanding beyond business conditions. Kevin suggested if buildings are going up, are any coming down. Susan responded that previously where the campers and counselors slept differed that what is expected today, the use unchanged. B. Manning: The business can expand, the issue is the conformity, the impact - putting up a building should require only a building permit. This expansion is part of what they are entitled to. The master plan encourages business, business can expand.

Bill asked if anyone would like to talk in favor of this appeal.

Cynthia said she is uncomfortable with assumptions with use of some of these buildings. When they tell you they are not expanding, over time the camp has added 3 cabins, they have changed a recreation hall into a kitchen, a farm house into classrooms, 3 more cabins plus a house, at one point does this not become a natural expansion? How do you know what is going on, unless you send them to ZBA and get a baseline. The Planning Board did say they should come to ZBA.

Bill asked if anyone else wished to talk. Ken the Planning Board was told by counsel they could not make the determination if the applicant should go before the ZBA. The Planning Board addressed a site plan review, if the client needed to go to ZBA it should have come from Select Board. Kathy, this camp has been in existence how long? Cynthia responded that the sign says 1939. Kathy, it is grandfathered, nonconforming use.

Bill read from the ZBA manual, “question of expansion and changes in a non-conforming use may reach the ZBA by one of several routes. An owner may assume he is “grandfathered” for a particular use and just begins expanding the use. A concerned abutter may disagree and complain to the zoning administrator who in turn must decide if the expansion is allowed or not. The owner or abutter can then appeal that administrative decision to the ZBA who would have to decide if the expanded use were grandfathered or not. Alternatively, the owner might apply for a building permit and the administrative office would make the initial decision regarding the grandfathered status and either issue or deny the permit. That decision would be appealable as before.

Attorney Hankin Birke, the issue you bantered about, when is it appropriate and at what point in the process is someone referred elsewhere? The advice that may have kept the Planning Board moving forward was where it was in the process. A town can change its protocol, if the 1st stage is people go to select board for permit and they are sent to Planning Board or the ZBA, maybe there has to be something done in the use of process in the town so that there is a protocol to follow. Part of the issue here is we now have a decision by a Planning Board, which is how I get to the point in the statute, if the decision was somehow unreasonable or contrary to facts, that is an appeal of the Planning Board decision.

John C stated, addressing the idea of changing the uses of buildings, one domicile, doesn't follow that a building can't change in use. Kevin stated if the house is changing use, how does it effect the neighbors or the area, does it increase noise, does it increase traffic, things the neighbors may be concerned with? Attorney Hinken Birke responded that those are the issues that the Planning Board addresses in a site review and did by imposing the obligation to plant certain trees in locations. The concern that you are voicing is in fact the duty of the Planning Board in approving site plans.

John T. asked them to refer to the handout RSA 674:19 annotations section 3, paragraph 7, established policy of zoning law is to carefully limit enlargement and extension of non-conforming uses, and ultimately to reduce them to conformity as completely and rapidly as possible.” John T also read 674:16, 5: paragraph 1 “Nonconforming uses may be

expanded, where expansion is a natural activity, closely related to manner in which piece of property was use at time of enactment of ordinance creating nonconforming use, but enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate.” At what point does it become substantial? Susan responded that the statute reads that a zoning ordinance pursuant to 674:19, shall not apply to existing structures or the existing use of any building – it shall apply to any alteration of a building for use for a purpose or in a manner that is substantially different from the use of which it was used before the alteration.

John C. stated that Mr. Trachys assertion that the Select Board should have done more, our zoning and planning is all self reporting. We can get as much info as provided, how much investigation or assessment can be done, the process currently is self reporting.

Bill closed public portion. First, let’s address whether we have the authority to rule on this or whether this must go to Superior Court. Barbara clarified that what is being appealed is a building permit. Kathy directed the board to RSA 676.5 relative to appeals to Zoning Board of Adjustment, [she read the RSA].

Bill, once again the appeal is not addressed to the Planning Board decision but to the building permit. Though argument could be correct that we have no authority to review, an appellant does to have the right to appeal the decision by the Select Board on a building permit. Therein lies a great opportunity for conflict, we have the right to deal and ought to deal with this. Any motion for or against? Kevin made a motion to proceed and make a decision on the merits of the appeal. Gene 2nd. Vote 4 in favor, 1 against.

Bill asked the board to consider the merits of the appeal. Kevin questioned, does it constitute a substantial change in use. This appears to be providing housing for adequate privacy, not building housing for campers. Gene stated his question is how much existed when they took over the property. Is there evidence that expansion was going on and plans for future expansion? Bill reminded the board they can rule on the appeal for that particular building permit, for the 3 new cabins. Kathy referred to the 3rd paragraph of the appeal - trying to hash out substantially different use. She stated she doesn’t see how 674:19 supports the argument stated on the appeal. Kevin pointed out the appeal is for 6 buildings, the building permit is for 3. Kathy stated the Planning Board looks at traffic, lighting, etc. the Planning Board has completed a site review. Bill there is a great deal of overlap of the two boards’ considerations. Barbara asked, are we deciding if they need a Special Exception? Bill responded that if in fact they decided that the issuance of a building permit was incorrect, they would in fact have to back and make an application for a special exception. Kathy, referring to Article X, section B questioned how does the proposed use of zoning regulations, how doe sit not comply? The business is in existence prior to. Gene, one point is the baseline aspect, where did they start, are they growing, there is no baseline moving forward. Kevin noted a business is naturally going to expand over time. The question, is there a change in use? Bill reminded the board they are very much limited to the application 3 cabins. Bill read from the Board of Adjustments Handbook, paraphrased here...nonconforming status of property does not constitute a hardship; to expand or change a nonconforming use a landowner must either argue that

the expansion is natural expansion which doesn't change the nature of the use, doesn't make the property proportionally less adequate and doesn't have a substantially different impact on the neighborhood or apply for a variance. It seems to me that this property fits the first of those. In addition, in reviewing whether a particular activity is protecting within the existing nonconforming use, the following factors of test must be considered 1) To what extent does the challenged activity reflect the nature and purpose of the existing nonconforming use; 2) Does the challenged activity have a substantially different impact on the neighborhood? Bill stated ruling specifically on this appeal, I don't believe this goes beyond natural expansion. The greater issue of how we deal with gradual growth over a long period of time that differs from its original use is not something to be dealt with here tonight.

Gene made a motion to deny the appeal based on the facts. The reasons for supporting the denial are no substantial change and natural expansion. Kevin 2nd the motion. The buildings under consideration are well within the definition of natural expansion, do not substantially change the use, and does not deviate from the previous nonconforming use. Board voted all in favor. Appeal denied.

Bill made a motion to adjourn, Barbara 2nd. Meeting adjourned at 9:10 pm.

Respectfully submitted,

Deborah McGlew, Recording Secretary