

These minutes were approved at the July 20, 2010 meeting.

**Durham Zoning Board
Tuesday April 13, 2010
Durham Town Hall - Council Chambers
7:00P.M.
MINUTES**

MEMBERS PRESENT: Vice Chair Robbi Woodburn; Secretary Jerry Gottsacker; Ruth Davis; Sean Starkey; Edmund Harvey; Chris Mulligan

MEMBERS ABSENT: Carden Welsh

OTHERS PRESENT Victoria Parmele, Minutes taker

I. Approval of Agenda

Ms. Woodburn noted that Chair Gooze was no longer on the ZBA, having now become a member of the Town Council. She served as Chair for the meeting, and noted that Mr. Johnson was not present that evening. She appointed Mr. Starkey and Mr. Harvey as voting members for the approval of the Agenda.

Jerry Gottsacker MOVED to approve the Agenda. Sean Starkey SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by Pine Ledge Holdings Inc., Hooksett, New Hampshire, for an **APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION** from a letter written on February 5, 2010, by Zoning Administrator, Thomas Johnson, regarding a violation of parking on a property. The property involved is shown on Tax Map 2, Lot 6-0, is located at 20 Strafford Avenue, and is in the Professional Office Zoning District.

It was noted that there was a request from the applicant and two abutters that the application be postponed.

Chair Woodburn appointed Mr. Harvey and Mr. Mulligan as voting members for this Agenda item.

Chris Mulligan MOVED to approve the applicant's request that the application be postponed. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

III. Board Correspondence and/or Discussion

- A. **Request for Rehearing** on a March 9, 2010 denial of a petition submitted by Steven F. Kimball, Pine Ledge Holdings Inc., Hooksett, New Hampshire for an **APPEAL OF ADMINISTRATIVE DECISION** on a decision of the Planning Board to approve a Site Plan application for Xemed Holdings, LLC, at 16 Strafford Avenue. The property involved is shown on Tax Map 2, Lot 8-3 is located at 16 Strafford Avenue, and is in the Professional Office Zoning District.

Chair Woodburn appointed Mr. Starkey and Mr. Harvey as voting members for this Agenda item. It was noted that in reviewing a Request for Rehearing, the Board needed to look at what the applicant had provided, and determine whether any new information had been provided, or whether the Board had made a legal error in making its decision.

Chair Woodburn said the applicant said that he had come forward in a timely manner to ask for this Rehearing. She then reviewed the four issues he said supported a Rehearing. She said the first issue listed was that the Board had acted unreasonably by limiting their discussion of the issue at hand; that the applicant had substantial new information to present at that time; and by starting the meeting past 10 pm, the Board didn't give the matter the gravity it deserved and examine all the information he put forward.

She said the applicant's second issue was that the public hearing was never closed and formal deliberation on the issues was never conducted, so the Board had erred.

She said the third issue was that the decision to deny the Appeal was based on erroneous information, in that the Planning Board in 2006 never made a decision about the use, so was making a decision on the use in its 2010 decision. She said the ZBA's recent decision on the applicant's Appeal was based on the fact that it wasn't a timely application, but the applicant was now saying it was, because the issue of use was determined in 2010 and not in 2006.

She said the fourth issue was regarding a potential conflict of interest for the Chair concerning the Appeal.

Chair Woodburn asked the Board to consider the first issue.

3.1 The Board acted unreasonably by not continuing the Hearing to hear all the facts in the case.

Ms. Davis said she understood the argument stated under 3.1, but said as the Minutes from that meeting indicated, after the Board heard the letter from its Attorney and also heard from the Town Planner and the Planning Board Chair, they began to understand the issues better. She said that was when Mr. Gottsacker retracted his previous request to continue the hearing. She said the Board felt at that point that it had distilled the

information down to the important points, and therefore felt that it could vote.

Chair Woodburn agreed that a lot of information was presented, but said as the discussion went on, it then boiled down to two issues, one of which was the lack of a stamp on the plans by a wetland scientist, and the other which was the use issue, which the Board's attorney had provided guidance on. She said it became clear despite the piles of information that those were the two main objections.

Mr. Gottsacker said when the Board started on this Appeal application, it was clear that a lot of information had been provided at the meeting. But he said it then became clear that the Board's attorney was saying that the appeal was untimely, and as a result, there was no need to think about the information that had been provided.

3.2 The Board made procedural errors which resulted in harm to the appellant's case.

Ms. Davis said the ZBA Handbook provided some guidance, and said it spoke about a technical error that might be made by the ZBA to the applicant's detriment. She said it was true that the public hearing wasn't closed, but said she was having a hard time seeing that this had been a detriment.

Mr. Harvey said a question was what happened when the hearing was still left open. He said if nothing happened, he couldn't see what the detriment was.

Mr. Gottsacker said it was hard to see how properly closing the hearing would have completely swayed the outcome. He said he thought it would have had no effect.

Mr. Starkey noted that he hadn't voted on this matter, but was at the meeting. He said having not closed the hearing and having direct conversation with members alone without questions back and forth to the applicant could seem large. He said the Board never had a chance to deliberate on the issue at hand. He said he was concerned about what would happen if this went to court. He also said the Board didn't discuss the criteria. He said he didn't see anything else that indicated that the Board didn't do its job regarding the Appeal application, but said he did think there was a procedural issue.

Mr. Gottsacker said the courts didn't look at every single detail of what the ZBA did. He also noted that this was an Appeal, and said the basis for the Board's decision was the letter from the Attorney, which said this was an untimely appeal.

Mr. Starkey said he didn't think the Board should have even voted on the Appeal because he didn't think the applicant had the right to appeal the Planning Board decision.

There was discussion that with an Appeal, the variance criteria didn't apply.

Mr. Starkey said he thought this could be a big thing if it went to court, and Mr. Gottsacker said he disagreed.

Ms. Davis said she could see from reading the Minutes where the natural place would have been to close the meeting. She noted that it was late when the Appeal was heard. Chair Woodburn said if the Board erred, it was in starting the application late, which resulted in a tendency to cut this short, which sort of related to this second issue.

Ms. Davis said the decision to do the hearing late was because people had been waiting, and the Board wanted to be considerate of the people who had stayed later.

Chair Woodburn said because it was an Appeal, the thought at first was that the application would be fairly straightforward.

3.3 The Board's decision to deny the appeal was based on erroneous information.

Ms. Davis asked the Board to discuss what the appropriate time would have been to object to the use.

Chair Woodburn said the appropriate time would have been right from the beginning. She said in all of that time, Mr. Johnson's reasoning was that the use fit the Professional Office use. She said either in the first or second case, there should have been an appeal by Mr. Kimball saying this wasn't the use that people thought it was. She said that was the way she read it, and was also the way the Board's attorney had read it.

Ms. Davis asked what could have been appealed.

Mr. Gottsacker said the trump card was the letter from the ZBA's attorney. He said if the Board said this letter wasn't correct, it was saying it shouldn't follow its attorney, which was silly. He said the attorney said it was an untimely appeal, and said if she was wrong, it should not be ZBA that decide on this, and said it should be handled in court.

Mr. Starkey said that got back to why he didn't think the Board should have even voted on the Appeal, because it wasn't within the time frame.

Mr. Gottsacker said members of the public were entitled to come before the ZBA and make an appeal, and said the ZBA Handbook was clear on this. He said the Board could then decide whether an appeal was valid. He said the motion that had been made by the Board simply said it was denying the Appeal.

Ms. Davis noted another application involving an untimely appeal issue, and Mr. Gottsacker said ultimately the ZBA had denied the appeal because it was untimely. He said the applicants had then planned to go to the Town Council.

Chair Woodburn said it sounded like Board members were in agreement that there was no error on this.

3.4 A Board member had a conflict of interest with the Appeal

Mr. Harvey said the way the rules read statewide, they were written for much smaller

towns than Durham. He said there really had to be a direct, and perhaps financial conflict of interest.

Mr. Gottsacker said volunteering for the ZBA, etc. did not mean that citizens had to give up their right to have an opinion or speak up. He also noted that he had worked with Mr. Gooze on the ZBA for five years and that he was always fair.

Mr. Starkey said knowing Mr. Gooze, he thought that if there had been a conflict of interest, Mr. Gooze would have recused himself. He said he trusted his judgment fully.

Mr. Gottsacker agreed, and said if Board members had to recuse themselves because they had opinions, there would be no town boards or committees.

There was discussion that the only things the Board really needed to discuss right now were the 4 issues raised in the Request for Rehearing. There was then further discussion on issue 3.2, regarding a possible procedural error in not closing the public hearing.

Ms. Davis said she didn't agree that formal deliberation was never conducted. She said the Board distilled down the issues, and did formally deliberate.

Mr. Harvey said he thought the word "formal", as used by the appellant, referred to technically closing the public hearing, and not about the words going back and forth. He said it really boiled down to how the courts went on this. He said technically, there was no closing.

Mr. Gottsacker said they should let the courts decide whether this was a big deal or a little deal. He also noted that there had been a lengthy discussion, covering several pages in the Board's minutes. He also questioned whether, if the Board had forgotten to approve the Agenda, that would have invalidated all the decisions they made that evening.

Ms. Davis said there might be a problem if the Board forgot to call for people supporting the application, or something else like this that was procedural.

There was further discussion.

Mr. Gottsacker said they were a citizen volunteer board, and said the courts didn't expect the ZBA to be perfect. He said they did their best, as evidenced by the court cases, which they won.

Jerry Gottsacker MOVED to deny the APPEAL OF ADMINISTRATIVE DECISION on a decision of the Planning Board to approve a Site Plan application for Xemed Holdings, LLC, at 16 Strafford Avenue. The property involved is shown on Tax Map 2, Lot 8-3 is located at 16 Strafford Avenue, and is in the Professional Office Zoning District. Ruth Davis SECONDED the motion, and it PASSED unanimously 4-0-1, with Sean Starkey abstaining.

- B. **Request for Rehearing** on a March 9, 2010 denial on a petition submitted by Paul F. Mackin, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article II, Section 175-7 of the Zoning Ordinance to allow for four unrelated occupants within each side of a duplex. The property involved is shown on Tax Map 2, Lot 8-6(A&B), is located at 5A & 5 B Madbury Court, and is in the Professional Office Zoning District.

Chair Woodburn appointed Mr. Mulligan and Mr. Starkey as voting members for this Agenda item.

Mr. Gottsacker read out loud the letter received from the applicant, Paul Mackin, which said the photographs he had provided supported his position that a variance allowing four people to live in the subject home regardless of relation was appropriate where all but one of the surrounding properties were student rentals, with most of the properties housing more than 4 unrelated per unit.

Mr. Mackin's letter said the photographs illustrated that the area surrounding his property was not a residential neighborhood and instead was a dense zone of student rentals. He said many of the surrounding structures, including apartment buildings, sororities and fraternities each housed a large number of students.

Mr. Mackin's letter said it was consistent with the character of the neighborhood to allow four unrelated people to live in the subject home, and noted that it wasn't even in a residential zone, and instead was in the Professional Office district.

Mr. Gottsacker noted that the ZBA couldn't grant a variance right now, as the letter had requested, and said it would simply be deliberating on whether to accept or deny a Request for Rehearing.

Chair Woodburn stated that the Board should look at whether it had made a legal error in its previous decision, or whether there was any new information being provided now.

Mr. Starkey said the aerial photos didn't change what the property looked like or where it was, and said these were things the Board had discussed at the prior meeting. He said they understood what the property looked like, and noted there was also concern about people parking illegally, which was shown on the photograph. He said he didn't believe any new information was brought to light indicating that the Board should rehear the application.

Mr. Gottsacker pointed out that the first sentence of the appellant's letter said he had incorporated by reference all prior pleadings and oral arguments made. He said this information was not new, so was irrelevant.

Chair Woodburn said the new information was the photos, but said this was merely a

picture of everything the Board had discussed at the meeting.

Mr. Gottsacker said a lot of the Board members lived nearby, so already knew the property.

Chair Woodburn said the aerial photo was meant to show a pattern, but she said even though it showed red dots representing student housing, they could become yellow dots, which were single family homes that were not student housing if there was a change of ownership.

Mr. Starkey said the property was already a rental, and said just because the properties around were rentals, this didn't mean the applicant should be able to have more parking spots. He said he didn't think any information had been brought to light that warranted a new hearing.

Ms. Davis noted that there should also be red dots on the second photo that was provided, which showed some of the RA district.

Mr. Gottsacker confirmed that he lived in that area, and said there were single family homes being used for student housing there. He provided details on this.

Chair Woodburn asked Board members if they thought the Board had erred in its discussions.

Mr. Mulligan said everything needing to be said had already been said. He said an aerial photo was simply a depiction of what was on the ground, and said this was discussed in detail.

Ms. Davis noted that the original application was to allow four people to live in the applicant's home, and was not about the parking.

Sean Starkey MOVED to deny the Request for Rehearing on a March 9, 2010 denial on a petition submitted by Paul F. Mackin, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article II, Section 175-7 of the Zoning Ordinance to allow for four unrelated occupants within each side of a duplex. The property involved is shown on Tax Map 2, Lot 8-6(A&B), is located at 5A & 5 B Madbury Court, and is in the Professional Office Zoning District. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

IV. Approval of Minutes –

February 9, 2010

Page 16, 4th full paragraph, should read “..contrary to the spirit and intent of the Ordinance.”

Jerry Gottsacker MOVED to approve the February 9, 2010 Minutes as amended. Sean

Starkey SECONDED the motion, and it PASSED unanimously 4-0.

February 16, 2010

Page 8, top paragraph, should read “..address the variances requested one at a time, but that it would vote on them all at once.”

Sean Starkey MOVED to approve the February 16, 2010 Minutes. Chris Mulligan SECONDED the motion, and it PASSED unanimously 4-0.

March 9, 2010

Sean Starkey MOVED to postpone voting on the March 9, 2010 Minutes until the next meeting, in May. Ruth Davis SECONDED the motion, and it PASSED 5-0.

V. Other Business

Chair Woodburn said the recent Court ruling concerning the Seacoast Repertory Theatre had been in favor of the ZBA. She also noted that the appellant had then moved to reconsider this decision.

Mr. Mulligan provided details on this process, and said if denied, it could go to the Supreme Court. There was discussion.

Mr. Gottsacker told Board members that he'd come upon a passage in the ZBA handbook regarding the fact that a landowner could not bootstrap his way to a variance by claiming that the nonconforming status of a property somehow constituted a hardship.

Chair Woodburn said the NHOEP conference would be held on May 8th.

VI. Adjournment

Ruth Davis MOVED to adjourn the meeting. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

Adjournment at 7:51 pm

Victoria Parmele, Minutes taker

Sean Starkey, Secretary