



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Tuesday, January 5, 2016
Sydney Crook Conference Room, Town Office
6:30 PM

MEMBERS PRESENT: Douglas W. Lyon (Chair), W. Michael Todd, Vahan Sarkisian, Ann Bedard, Cheryl Devoe, Paul Vance, (Alternate), Frank Anzalone (Alternate), Jerry Coogan (Alternate), Kathrine Fischer (Alternate).

STAFF PRESENT: Lucy St. John, Planning and Zoning Administrator

OTHERS PRESENT: Nicole Faille, Esq. & Lynn Preston, Esq. (Attorneys for Robert Stahlman)

Call to Order: Chair Lyon called the meeting to order at 6:30 pm.

Roll Call: Chair Lyon called the roll: Chair Douglas Lyon, Michael Todd, Vahan Sarkisian, Ann Bedard, Cheryl Devoe, Paul Vance and Katharine Fischer.

Approval of Minutes

IT WAS MOVED (Vahan Sarkisian) AND SECONDED (W. Michael Todd) to approve the minutes of September 3, 2015 with an amendment to page 2, the discussion on establishing a meeting schedule, by inserting the word “and” in the first sentence. The sentence to read as Chair Lyon summarized and commented that this..... THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (W. Michael Todd) AND SECONDED (Vahan Sarkisian) to approve the minutes of September 14, 2015, as circulated. Ann Bedard abstained from voting as she was not in attendance at the Sept 14th meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Vahan Sarkisian) AND SECONDED (Cheryl Devoe) to approve the minutes of November 10, 2015 with an amendment to page 5, regarding the voting on each of the criteria. The second bullet, included the words “... not in the public interest”, the correct wording to read, “ Will not be contrary to the spirit of the ordinance- voting that this was met included Sarkisian, and voting that is not in the spirit of the ordinance- Bedard, Devoe, Vance and Lyon. THE MOTION WAS APPROVED UNANIMOUSLY.

Frank Anzalone (arrived 6:35 pm) and Jerry Coogan (arrived 6:37 pm).

Motion for Rehearing and Reconsideration of the ZBA November 10th decision denying the Robert Stahlman’s application for a variance.

Chair Lyon explained the discussion on Stahlman’s [hereafter Petitioner’s] application is to decide if a rehearing should be granted. He noted this meeting is a public meeting but it is not a public hearing. The difference is no new testimony will be taken tonight. The purpose is not to discuss the variance criteria and whether or not they have been met. The purpose is to discuss the legal brief prepared by the Petitioner’s attorneys that was submitted to the Board [hereafter ZBA] on Dec 9, 2015, and to make a decision on two things:

- ✓ Has there been any error of law?
- ✓ Is there any new evidence that has been presented in the rehearing request that was not previously available?

Chair Lyon explained because of the complexity of this application, he sought input from New London Town Counsel, Barton Mayer. Prior to the meeting, members of the ZBA had been provided the legal opinion of Town Attorney Mayer. He reminded the ZBA the decision is the ZBA's to make, not that of Town Counsel. Chair Lyon reiterated it is the ZBA responsibility to decide if a rehearing should or should not be granted, and what needs to be considered is the brief prepared by the Petitioner's attorneys. He reminded the ZBA they are not taking new testimony. Their purpose is to discuss the arguments made in the petition for a rehearing and not to discuss the variance criteria or the merits of the case.

Chair Lyon proceeded to discuss the points outlined in the petitioner's brief. He introduced the discussion by stating the fundamental issue here is the question of zoning boundaries.

The first contention of Petitioner is the ZBA misunderstood the nature of the variance requested. The discussion referenced in the brief was the court case Simplex vs. Town of Newington, which emphasizes the reasonable use of property. The petitioner argues the ZBA didn't understand the relief requested. Chair Lyon noted the ZBA did understand precisely what the petitioner was requesting. The disagreement was on whether the existence of a commercial parking lot in a residential zone is a reasonable use. The majority of the ZBA felt that it was not a reasonable use and it, in fact, changed the essential character of the residential area.

The second contention by Petitioner is the ZBA basically misunderstood its role in discussing this variance request. The ZBA correctly observed the request for this variance is fundamentally a rezoning of the property in question. The application requested a fundamental change in the zoning boundaries and it clearly made the ZBA uncomfortable. The discussion of other issues was simply a way of putting the request in some kind of context, but certainly did not mean the ZBA misunderstood their role. The issue remains the request was tantamount to a request to change the zoning boundary.

The third contention raised by the petitioner was the ZBA improperly made comparisons to other properties, and this was irrelevant to the case, and an unlawful expansion of the permissible scope of the inquiry. The observations made by the ZBA relative to other properties were entirely appropriate, and indeed necessary. The requirement the ZBA consider the special conditions of the property compels it to review other properties. The allusion to "spot zoning" was a characteristic of the application and seems apt. The ZBA certainly recognized; spot zoning is not a variance issue, it's a zoning issue. The ZBA had the right to reflect upon that issue and there is no evidence those reflections interfered with its ability to apply the five standards in a reasonable way. Indeed, in Bacon vs. Enfield, the court said that in considering a variance request, the ZBA should "consider how the neighborhood would be affected, if all similarly situated properties were granted the same variance." The fact the ZBA discussed other properties in the area and their relevance to the case was not only proper, but reasonable and necessary for the discussions.

The argument was made by Petitioner the ZBA misunderstood the five standards and the relationship between them, specifically the hardship criteria. They argued if the ZBA found positively about certain criteria, the ZBA could not then find there was no hardship. The hardship criteria is one of five and stands on its own. These criteria are related but not inextricably linked. It's important the ZBA discuss each one individually, and make a decision on each one.

Chair Lyon commented another contention of the Petitioner is the majority of the ZBA voted in a way the minutes do not reflect. Chair Lyon then reviewed each of the criteria and the voting as reflected in the Nov 10, 2015 draft minutes.

- ✓ Four of five voting members voted that there would be no diminution of surrounding properties if granted.

- ✓ Four out of five voting members voted that the granting of the variance would be contrary to the public interest.
- ✓ Four out of five voted that there was no unnecessary hardship
- ✓ Four out of five said that substantial justice would be done.
- ✓ Four out of five voted that it would be contrary to the spirit of the ordinance.

Chair stated again, that the fundamental issue is the boundary of the zoning district. If we accepted the argument that the Petitioner was making, it would lead to the conclusion that all properties situated on a boundary line would not be in conformity with the surrounding uses and thus the more restrictive ordinance reduces the value of those properties. Thus the boundary lines become meaningless and could be constantly changed by variance requests.

Decisions by the courts say; a self-created hardship, in and of itself, doesn't mean you have to deny the variance. Chair Lyon cited the case, Hill vs Town of Chester, noting the court held that; when a hardship is largely self-created, the applicant bears a heavier burden of demonstrating the variance is justified.

The ZBA noted Petitioner didn't like the fact that his property was not zoned for what he would like to use it for, so he wanted relief of the zoning ordinance provisions. The ZBA noted that he created the hardship. The ZBA noted that he didn't demonstrate how specific conditions of his property were different from other surrounding properties

The ZBA discussed and concluded in a residential zone, parking is not allowed, is not an accessory use.

The ZBA discussed the Petitioner's comment asking for surrounding property values was an improper request to make. Chair Lyon said that in the case of Daniels vs Londonderry, the court held the burden to demonstrate no diminution in property values lies with the applicant, not the ZBA.

The ZBA discussed Petitioners assertion the ZBA exhibited hostility, bias, and prejudice, and acted in bad faith. Chair Lyon commented that had the ZBA been hostile or prejudged the case, they would have denied Petitioner relief on his first appearance, when he came unprepared for his case, and failed to address any of the variance criteria, after Chair Lyon explained at the beginning of the hearing he must do so. The ZBA accommodated him by continuing the hearing, and urging him to seek legal counsel.

Chair asked if there were any other comments or concerns from the ZBA.

Gerry Coogan thanked Chair Lyon for his analysis this evening. He commented that the ZBA was not hostile. He asked who was representing Petitioner at this meeting, as Attorney Brad Cook prepared the brief and was not in attendance at the meeting, and shouldn't he be in attendance.

Chair Lyon noted that this is not a public hearing, and that it is not necessary for Petitioner or his legal counsel to be present. Chair Lyon noted that two attorneys are in attendance, Attorney Nicole Faille, Esq. and Lynn Preston, Esq.

Vahan Sarkisian noted a number of people in the community have talked to him about this variance application. He asked Chair Lyon why was the opinion of Town Counsel sought, shouldn't this be a decision of the ZBA, and who decides if Town Counsel should be contacted. Chair Lyon said that town committee chairs are encouraged to consult town counsel in complicated matters and re-iterated that it is the ZBA's responsibility to apply established law in reviewing the variance criteria and deciding whether or not to grant a rehearing.

Frank Anzalone commented that we should ask the question, as a ZBA, did we make a mistake, or is there any new evidence, in deciding if a rehearing should be granted. He also thanked Chair Lyon for his overview of the brief and discussion.

Michael Todd commented it is up to the Petitioner to submit new evidence, not the ZBA. The ZBA has a legal responsibility to apply the criteria to the best of their ability. The ZBA is obliged to look only at the brief.

IT WAS MOVED (Chair Lyon) AND SECONDED (Cheryl Devoe) to deny the petitioner's request for a rehearing. Voting in favor: Chair Douglas Lyon, Michael Todd, Ann Bedard and Cheryl Devoe, voting opposed, Vahan Sarkisian. **THE MOTION WAS APPROVED;** the request for rehearing was denied.

Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (W. Michael Todd) to adjourn the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

Meeting adjourned at 7:18 pm.

Motion to reconvene

IT WAS MOVED (Chair Lyon) AND SECONDED (Michael Todd) to reconvene the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

The ZBA continued to discuss the importance of looking at the commercial zoning district. ZBA member stated this is a topic the Planning Board really needs to address, including the current commercial zone and future commercial zoning boundaries based on anticipated growth, transportation issues and other related planning concerns. Michael Todd commented that the Institutional zone has not been expanded over the years, and other zoning district boundaries need to be discussed by the Planning Board. Ms. St. John referred to the 2011 Master Plan recommendation, which she had included on the Jan 14, 2014 Planning Board agenda attachment list, including specific recommendations related to the commercial district.

The ZBA also discussed the proposed zoning amendments for the Jan 14, 2016 Public Hearing. Members asked if the ZBA wanted to provide any comments to the Planning Board on the proposed amendments. It was noted, that considering this rehearing request, the ZBA may not want to offer any comments at this time on the petition amendment presented by Petitioner. It was stated that any ZBA member can offer testimony as a private citizen at the Planning Board public hearing on the proposed amendments, however they should clearly state it is their comments, not that of the ZBA.

Ms. Bedard said she was happy that Chair Lyon had solicited input from Town Counsel on this rehearing request.

Vahan Sarkisian suggested the current zoning map of the Town, clearly show the location of Interstate 89, as it not obvious on the map with the current color scheme used on the map.

Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (W. Michael Todd) to adjourn the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

Meeting adjourned at 7:38 pm.

Respectfully submitted,

Dianne Richtmyer, Recording Secretary
Town of New London