

**TOWN OF CHESTERFIELD, NH
ZONING BOARD OF ADJUSTMENT**

**MINUTES
May 27, 2014**

Present: Chairman Burt Riendeau, Andy Cay, Harriet Davenport, John Perkowski, Alternates Lucky Evans and Kristin McKeon. Voting at this meeting will be Riendeau, Cay, Davenport, Perkowski and Evans.

Absent: Renee Fales

The Zoning Board of Adjustment met at the Chesterfield Town Office on May 27, 2014. Riendeau opened the meeting at 7:33 p.m. and explained the process of the meeting.

1. Planning Board General Discussion with James Corliss & Brad Chesley

Riendeau stated that a vote was made of the Planning Board to ask Corliss and Chesley to represent the Planning Board at the ZBA meeting. Corliss asked that the ZBA consider more detail be included in notice of decisions when describing the five criteria and considering them separately for the more complex decisions to ensure all parts of the test are met and all parts of the test are shown to be more satisfied and met with each motion and voted on for a more defensible decision, in the event that the decision is contested. By doing so, it will create a clearer decision for the Planning Board or any other committee to use.

Corliss asked that, as the variance changes the law, to consider limiting what is granted by the change in the law and in the notice of decision, particularly where it is going to go to another board, in that the change of the law may allow more than intended or presented to the ZBA as part of the original request for a change for other boards to understand what the ZBA had intended. Riendeau explained that the procedure for the ZBA for making the decisions depends on the application and the severity. After deliberation and going through the five points, that is the time to discuss it and if there is opposition to a particular portion of the five points, the board can discuss it. Corliss responded that the risk is less defensible in the record by taking one topic and making a decision before going to the next topic. He added that the hardship is a multi part piece and more complex. Cay stated that the ZBA does not make the laws or change the laws but provide relief from the Zoning Ordinance.

Chesley stated that the ZBA can set parameters to the change. Riendeau replied that the ZBA gives relief to the ordinance for reasons presented to the board for that property, and that property only. Jon McKeon, Chairman of the Board of Selectmen, stated that this would fall into the Rules of Procedure.

2. Nine A LLC – Request for a Rehearing

Riendeau stated that there are questions on the procedure. He added that there was already a rehearing so the Selectboard challenged the ZBA in court and submitted a rehearing and paperwork to Superior Court at the same time. The ZBA is required to respond to the subpoena

within 30 days of when the application was submitted to the ZBA. Riendeau stated that he contacted town counsel to get information on the procedure. Counsel suggested having a special meeting to address the rehearing and to make a decision to have the rehearing in Superior Court. Another consideration was whether there was any new evidence to constitute a rehearing. Perkowski asked if the ZBA would be funded by the town for legal counsel. Cay replied that the town would have the responsibility for fees of legal counsel. Cay stated that the petitioner will file their arguments before the court, it will go through a process of discovery of finding of evidence and it will go to court, with the petitioners making their arguments before the court and the ZBA counsel will make the opposing arguments. Davenport stated that the Selectmen are not allowing funding to save the town money and the applicant's attorney may want to pick up the expense for the ZBA.

Cay moved that in the interest of clarity and expediency, the board will take up the matter of a request for a rehearing and will find that a rehearing of a prior rehearing is not necessary and the applicant is free to go to Superior Court to seek relief. Riendeau seconded the motion.

Discussion: Cay stated that the court will have the entire record. Riendeau added that a case can only be reheard if there is a significant amount of evidence being proposed that was not considered during the original hearing or if it is felt that the record isn't totally complete. He added that a rehearing can't take place if the exact same evidence is presented from the original application. Davenport felt that the application is different from the application requested originally. Perkowski asked how the Selectboard responded in the rehearing as to the cluster housing in the Spofford Lake District. Evans stated that the Selectboard didn't feel that the cluster housing ordinance was being observed. Cay stated that the ZBA has the power to grant relief of the cluster housing restriction. Riendeau stated that the original motion was a little weak and the ZBA wanted to give the benefit in a rehearing to everyone concerned, as the ZBA felt there was substantial evidence for a rehearing. He added that people came to the meeting to speak in favor of the application and some who attended to were against it. Perkowski asked who would pay for legal counsel. Riendeau stated that that discussion will follow the vote on the motion.

The vote was called: (Yes-4, No-1) The motion passed by majority vote.

Discussion: A question of who would support the ZBA in court. McKeon stated that she felt that it is in the applicant's interest to defend the ZBA's decision, to have the Superior Court rule in their favor and to take on the responsibility and it should be the person's interest who would gain the variance. When Perkowski asked where the defense would come from, Cay read the following from New Hampshire Practice, Vol. 15 Land Use, Planning and Zoning, Third Edition by Peter J. Loughlin:

Section 21.09 "The authority of the zoning board of adjustment is exclusive and cannot be usurped by other boards such as the board of selectmen. While the legislative body of the municipality of the ordinance or even abolish zoning, as long as a zoning ordinance is in effect, relief from the terms of that ordinance can only be obtained from the zoning board of adjustment²² and the powers of the board cannot be delegated to any other entity. Although the ZBA, under appropriate circumstances can retain professional services in conjunction with a particular application for advice on matters not related to a specific application, the

ZBA can expend money only to the extent that the funds have been appropriated and exist in the budget approved by the legislative body. Thus, although a ZBA may be unhappy with legal representation provided by the counsel, appointed by the Selectmen, unless the board has money in its own budget to hire its own lawyer, it is going to have to use the attorney appointed by the selectmen. The only exception would be a case in which the ZBA and the governing body are on opposite sides of an appeal of the board's decision, in which case fairness would compel the governing body to provide for alternate representation to the ZBA."

Cay stated that Attorney Tower isn't going to represent the ZBA in this case because of a conflict between the two boards, so the ZBA will need separate counsel. Cay added that the attorney may want to collaborate with the applicant's attorney, therefore, putting more weight on the applicant.

Attorney Saturley stated that he represents Nine A LLC; they are his client and he cannot offer the ZBA any counsel or advice, but has offered information. Nine A LLC will be moving to intervene in the court case and will participate in the court case and he will be representing only Nine A LLC and cannot invasion Nine A LLC paying for counsel for the ZBA. Riendeau stated that the ZBA is independent of the other boards and have legal obligations to defend the decision that the ZBA made. The ZBA will have to hire its own counsel.

Saturley stated that the ZBA response is 30 days from the date of being served and has offered to contact with Attorney Tower and Attorney Little on May 28 to be sure that the ZBA has all the time it needs to interview and come up with its own counsel so that no one will make an argument that you have defaulted by not appearing in a proper time.

When Cay asked Saturley on the process, Saturley verified that the Selectboard has to have their complaint served upon the ZBA and the Selectboard has to file with the Court. The ZBA needs to respond within 30 days from that point with the serving and record to the Court to move forward, then the 30 days gets pulled forward. Town Clerk Barbara Girs stated that the Town was served on May 19th.

Jon McKeon asked if Selectman Jim Larkin had spoken with the ZBA in that the Selectboard has asked that all boards convey attorney discussions to follow up in writing so that all members know what has been discussed. Riendeau replied that it was in meeting minutes and the Town Administrator Rick Carrier sent the request. Riendeau spoke with town counsel regarding the request and the attorney will not put the discussions in writing. McKeon stated that if the document is not discussed at the meeting, it is not considered a public document.

Resident Tom Woodman expressed his concerns for the ZBA not being able to have their own counsel to be represented in court. Riendeau stated that the ZBA will have their own counsel that may work in conjunction with the attorney for Nine A LLC. Town counsel offered names of three attorneys that may possibly be able to represent the ZBA, one being Gary Kinyon.

Cay moved to authorize Riendeau to seek out independent counsel for this matter related to Chesterfield Board of Selectmen vs. Chesterfield Zoning Board of Adjustment, with Riendeau being able to have discussions with attorneys and identify attorneys and work with that attorney to gather necessary information and most likely have a meeting between that attorney and this

board. Riendeau will coordinate the steps to get the ZBA to that point. Perkowski seconded the motion.

Riendeau will get back to the ZBA with the attorney information on June 10. The ZBA was served the summons on May 21, 2014, which it is date stamped by the ZBA secretary. The vote was taken. The motion passed unanimously.

3. ZBA Rules of Procedure

Riendeau stated that a document needed to be created, separate from the Zoning Ordinance. He added that there was an RSA generated in 2010 stating that the board has to adopt Rules of Procedures, specifically on how alternates participate. By creating the Rules of Procedure, changes can be made without going through the whole voting process to get it changed in the Zoning Ordinance. Riendeau stated that these are guidelines to enable to ZBA to follow procedures of the meetings, with obligations involved with the ordinances.

Changes to the draft Rules of procedures are:

III. Members and Alternates Section E

To add “to close the public portion of the meeting and moves”

XII. Decisions Section A

To delete the following, “With agreement of the applicant,”

Perkowski moved to adopt the Rules of Procedure with the amendments as discussed. Davenport seconded the motion, which carried unanimously.

4. Review Meeting Minutes

- **April 8, 2014** – The minutes will be reviewed at the June 10, 2014 meeting.

5. Other

Riendeau stated that the Chairman and Vice Chairman should be selected at tonight’s meeting.

Perkowski moved that Riendeau remain Chairman of the Chesterfield Zoning Board of Adjustment. The motion was seconded by Davenport, which carried unanimously.

Perkowski moved that Cay remain Vice Chairman of the Chesterfield Zoning Board of Adjustment. The motion was seconded by Davenport.

The vote was called: (4) Yes (1) Abstained

Adjourn: The meeting adjourned at 10:17 p.m.

Respectfully submitted,
Patricia Grace
Secretary

Approved

Burt Riendeau
Chairman, Zoning Board of Adjustment

Date _____