



COMMUNITY DEVELOPMENT

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Draft Zoning Board of Adjustment Minutes April 16, 2013

Board Members:

Heath Partington Chairman – Present
Jim Tierney, Vice-Chairman – Present
Mark Samsel, Member – Present
Jay Yennaco, Member – Present

Mike Scholz, Member – Present
Mike Mazalewski, Alternate – Present
Tony Pellegrini, Alternate - Present

Staff:

Nancy Prendergast, ZBA/Code Enforcement Administrator
Cathy Pinette, ZBA Minute Taker

Call to Order/Attendance

The Chair called the meeting to order, introduced the Board, and explained the meeting process.

A Moment of Silence was observed for the bombing at the Boston Marathon.

Mr. Samsel read Lot 17-H-10, 17-H-20 & 17-H-25, Case # 13-2013 into the record.

Lot 17-H-10, 17-H-20 & 17-H-25, Case # 13-2013

Applicant – Patrick Nysten

Owner – The Karen L. Heller 1997 Trust (Lot 17-H-10 & Lot 17-H-20) & Alex Ray Windham LLC (Lot 17-H-25)

Location – 60 Range Road, 64 Range Road, 70 Range Road

Zone – Gateway Commercial District, Cobbett's Pond and Canobie Lake Watershed Protection Overlay District

An Application to Appeal an Administrative Decision has been filed against a decision made on March 4, 2013 by Ms. Nancy Prendergast, ZBA/Code Enforcement Administrator. The applicant believes that Ms. Prendergast has erred by not upholding and enforcing the Town of Windham's Zoning Ordinance due to the omission of variances that the applicant believes are required in connection with the proposed Nault's expansion.

The Chair advised the Board that they need to discuss if the applicant has a standing as the applicant is not an abutter or whether a legal appeal was filed in a timely fashion.

- Mr. Pat Nysten, 4 Edgewood Rd., addressed the board. He addressed why he believes he has a standing. He stated the New Hampshire Supreme Court ruled on a determination on whether or not a non-abutter can appeal. He cited *Golf Course Investor's of NH, LLC v. Jaffrey*. *Four factors are considered when determining whether a non-abutter has sufficient interest to confer standing: (1) the proximity of the appealing party's property to the property for which approval is sought, (2) the*

type of change being proposed, (3) the immediacy of the injury claimed and (4) the appealing party's participation in the administrative hearings. The Chair admitted this case as Exhibit A. Mr. Nysten stated his residence is at 4 Edgewood Rd. which is approximately 330 feet from the corner of the proposed project. His key concern is the magnitude of the expansion. This is an expansion of 20,000 sq. ft. The addition and the outdoor display area will be visible from his property. The new driveway is moving 320 feet closer to his property and he has noise concerns. There will be degradation of his property value. The front of the building will be on the new 111A and the rear of the building will be on Range Road. There have been no elevations presented. This use is not allowed in the District. The proposed expansion of a nonconforming use is not allowed here.

Questions/comments from the Board

- The Board asked Mr. Nysten if there is currently a business there in operation what would affect him with the proposed changes. Mr. Nysten stated it is the magnitude of the project. The proposed project would be in direct view of this property and he has outdoor storage concerns. The Board stated those issues are Planning Board issues. Mr. Nysten stated this was not allowed use in this District.
- Mr. John Bisson, of Cronin, Bisson and Zelinski, addressed the Board he stated he represents Ms. Karen L Heller. He stated he disagrees with Mr. Nysten and he relies on the same case. The RSA is very clear on this. He stated if Mr. Nysten believes he would be aggrieved with tangible harm that it could impact his value, he is quite a fair distance away from the property and is not even a close abutter.
- Mr. Nysten stated he has a direct view of the property and someone with a direct view could be impacted. He stated the intent was someone who was a mile away. His position is that the ordinance has not been enforced.
- The Board asked Mr. Nysten to please explain the immediacy of the injury claimed. Mr. Nysten stated cause-and-effect. This will generate noise by moving the driveways affecting his property values. The Board stated this plan still has to go before the Planning Board and the Zoning Board does not know what the final configuration is yet. Mr. Nysten again stated this is clearly not an allowed use.
- The Board stated Mr. Nysten's grievance has to do with normal activity in the Gateway District. The Board read the purpose of the Gateway District. Mr. Nysten read the list of permitted uses in the Gateway District.
- Mr. Nysten stated the Planning Board usually follows the Community Development Department's decisions and he is appealing staff's decision.
- The Board discussed whether Mr. Nysten had standing in this case. The Board stated they have not discussed about how much retail is proposed with this application and they discussed wetlands, location, and they didn't discuss the size of the expansion because it wasn't before them. Although some members of the Board stated the changes are more significant than were discussed. There would still be a parking lot if there was a medical center or office building being proposed. Some members of the Board stated Mr. Nysten could meet the criteria because he is in close proximity. It was stated the referenced court case deals with the different criteria than the Zoning Board. It was

also noted that the application was incomplete and the letter of denial states "other zoning relief might be needed". The Board was split on whether the applicant had standing.

Mr. Samsel motioned for Case #13-2013 that the applicant, Patrick Nysten, does not have standing in the filing of this Appeal of Administrative Decision for the reasons (1) the type of change being proposed and (2) the lack of immediacy of the injury claimed, seconded by Mr. Tierney. Motion passed 3 – 2. Mr. Partington and Mr. Scholz voted in opposition.

Discussion before the vote

- It seems like a safety valve for a non-abutter. With uses in the Gateway District some uses are going to make noise.
- If this kind of change will affect the applicant and the type of change is significant enough with the applicant being in close proximity, the applicant would have standing.

Mr. Tierney motioned to deny the Appeal of Administrative Decision for the lack of standing and incomplete application, seconded by Mr. Yennaco.

Discussion before the vote

- Some members of the Board stated there was not enough information included in the application to make a decision and the timing was not correct. The Board discussed materials that should've been in the application.
- The Board had a confidential legal document from Attorney Campbell dated April 5, 2013 that the Board discussed in vague terms.

Mr. Samsel motioned to make Attorney Campbell's memo from April 5, 2013 a public document in order to read a paragraph, seconded by Mr. Yennaco. Motion passed 5 – 0.

- Mr. Samuel stated Attorney Campbell's letter states a decision is premature as no decision has been made and there is another step to go.

Mr. Tierney motioned to deny the Appeal of Administrative Decision for the lack of standing and incomplete application, seconded by Mr. Yennaco. Motion passed 3 – 2. Mr. Partington and Mr. Scholz voted in opposition

Mr. Samsel motioned to adjourn, seconded by Mr. Scholz. Motion passed 5 – 0.

Meeting adjourned at 8:35 PM

These minutes are in draft form and respectfully submitted for your approval by Cathy Pinette, ZBA Minute Taker