

Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254

Regular Meeting

December 7, 2016

Minutes

Present: Members: Bob Stephens, Robert St. Peter, Russ Nolin
 Alternates: Nick DeMeo, Richard Jenny, Jerry Hopkins
Excused: Members: Bob Zewski, Ken Bickford
 Alternate: Paul Onthank
Staff Present: Administrative Assistant, Bonnie Whitney

I. Call to Order

Chairman Stephens called the meeting to order at 7:00 PM and led the Pledge of Allegiance. He then introduced the members of the board to the public.

II. Pledge of Allegiance

III. Approval of Minutes

Motion: Mr. Nolin moved to approve the Zoning Board of Adjustment Minutes of November 16th, 2016, as written, seconded by Mr. St. Peter, carried unanimously.

IV. Hearings

Chairman Stephens stated that he would be recusing himself from the Board for the Mark and John Stephens application this evening. Mr. Stephens appointed Rob St. Peter as acting chair for the hearing.

Mr. St. Peter appointed Nick DeMeo, Rich Jenny and Jerry Hopkins to sit on the board with full voting privileges in place of excused member Bob Zewski, Ken Bickford and Bob Stephens.

1. Mark and John Stephens (135-16) (62/70 Moultonboro Neck Road)
 Variance from Articles VI.A.4, VI.C, VI.D and to the degree applicable, Article VI.E.1.b

Mr. St. Peter stated that this was an application submitted by Mark and John Stephens.

Attorney Christopher of Boldt of Donahue, Tucker & Ciandella, who represents the applicants, along with Mark and John Stephens, and Carl Johnson were in attendance. Attorney Boldt asked that the Board consider the part of their application that makes the argument that they technically don't need a variance for what is being proposed. Attorney Boldt gave a general description of the property, what is being proposed, and why he believes they fall within the parameters of the Agricultural statue. Attorney Boldt noted that they were provided with the Staff Memo and Town Counsels letter that was referenced there in, so he is aware of the concerns and can address them. If not, he may be narrow down the scope of what the variance would be necessary for.

Attorney Boldt described the Avery property, approximately 52 +/- acres located on Moultonboro Neck Road. There is a significant wetland and unnamed pond that takes up a fair portion of the property. The proposal is to redevelop the old Avery Trucking and Gravel Pit office/garage building, and the existing dwelling on the property. The addition of stock piles and green houses for Stephens Landscaping retail site located on Route 25. Retail would not be occurring at this site. Attorney Boldt described the existing conditions of the property, new growth, existing interior roadway to the old gravel pit, existing paving of the site and various discarded items to be cleaned up. They will honor the setback from the wetlands, no new development in there. The existing tree coverage along the wetland will remain. The development of the storage bins for Gravel, Rock, Soil, Loam, Compost will be to the rear, approximately 2 acres of the 52-acre site. Attorney Boldt acknowledged the need go before the Planning Board for site plan approval.

Attorney Boldt indicated that he had provided in the application packet a copy of the Agricultural definition statute, RSA 21:34-a. He stated it was broad, and defines things in somewhat loose fashion of what constitutes agricultural in the state. He highlighted several areas from the statute, noting the word "farm" means any land, buildings, or structure on or in which agriculture and farming activities are carried out or conducted and shall include the residence or residences of owners, occupants, or employees located on such land. Includes the production and storage of nursery stock, green houses, the words agriculture and farming include all operations of farm, including, storage of things like fertilizer, lime, wood ash, sawdust, manure, and other lawful soil amendments. Green house crops, growing, nursery stocks, sod, trees, compost and other things. The practice on the farm incident to, or in conjunction with, but not necessarily restricted to: the transportation to the farm of supplies and materials, workers and the production and storage of compost and the materials necessary to produce compost, whether such materials originate, in whole or part, from operations of the farm

Attorney Boldt noted in his narrative the products anticipated to be stored outside on the Property namely: Crushed Stone (3/4" Crushed Stone; 1.5" Crushed Stone; 3-6" Crushed Stone; 1-2" River Stone), Sand, Beach Sand, Loam, Compost, Mulch, Gravel, Palatized Stone (Cobble Stone; Blue Stone; Field Stone), Sod and other Plants. He feels that the materials listed are much the same as what are similar to those currently stored at the Route 25 Facilities. These are the same type of products that will be stored. It is clear in his opinion, and that Attorney Serge agrees, the green houses are not an issue, the house is not an issue, the operation of the offices and the maintenance of vehicles that will come back into the garage are not the issue. The issue is which of the materials in the back do, or do not, qualify as agriculture, to allowed as a matter of right in the agricultural / residential zone. He went on to say that he thought they could agree that sod, and soil materials are not an issue. It's really the rocks or stone that are an issue of such that it's so different that it's not within the category. As this is an inclusive statute, he reads it as such, that this might be a natural augmentation of this specific list that is there. If, however the Board disagrees, his hope was that they would limit the necessity for the Variance for those items that they don't agree naturally fall within the scope of the agricultural definition. Attorney Boldt answered any questions on this issue now, before getting into the criteria if they do need a variance.

Mr. St. Peter asked for Board member questions. Mr. Hopkins asked if they did not feel they needed the variance, then why are they here? Attorney Boldt stated that in conversations with Don Cahoon and Interim Town Planner, Jerry Coogan, they thought that it did not quite fit within the definition of agriculture. In the interests of time, they chose to come to the Board with a variance application that says they don't feel they need the variance as the case in Bartlett v. Manchester, and to ask the Board to make the initial jurisdictional question determination, do we need a variance for this use or not, in this zone, at this property. Mr. Hopkins stated that this was not the initial determination. That was determined by them. That would be an Administrative Decision. Wouldn't there be an appeal to that? Attorney Boldt stated you can have it that way. Positively correct. But the Bartlett v. Manchester case is the threshold question whether the applicant's proposed use of the property requires a variance.

There is a jurisdictional question “inherent in any variance application is the jurisdictional question of whether a variance is even needed for the proposed use”.

Mr. DeMeo questioned if the site was identified as a gravel pit, why do they need the variance. Attorney Boldt stated that the gravel pit predated zoning and has been closed for over twenty-plus years.

Mr. Jenny pointed out that the application is for relief from Article IV, and questioned if it should be Article VI. Attorney Boldt stated that it appears this is a typo all throughout the application, and should be Article VI. The Board should note that this is throughout the entire application. This is a Scrivener’s error on part of the lawyer.

Mr. St. Peter questioned if this was used in the past for sand and gravel, is there any precedent that allows you to keep using it? Attorney Boldt stated the length of time for abandonment has passed.

Mr. DeMeo and Mr. Nolin questioned who would be housed in the dwelling unit. Questioning if it was to be workers from the farm, or employees of Stephens Landscaping. If there were employees of the landscaping company, then why wouldn’t they need a special exception for mixed use? Attorney Boldt responded the site is in an agricultural zone, and that part is clearly agricultural, which can have mixed use. There was a lengthy discussion regarding who would reside in the house. Attorney Boldt commented that residential is not allowed in the commercial, but is allowed in the ag/residential zone, therefore they can have the residence in both parts.

Mr. Hopkins commented that the first question that was asked was whether or not the Board needs to hear this, and they are getting into the variance now, as opposed to does it need to be heard or not. Considering that, he went onto to make the motion.

Motion: Mr. Hopkins moved to accept the amended application for Variance and hear it as opposed to disagreeing with Code Enforcement and the Interim Planner, seconded by Mr. Nolin.

Discussion on Motion. Mr. Jenny commented that in their submission they state that there is a two-bedroom home, and on the Site Plan they mention 18 employees. Attorney Boldt stated not all of them are staying there. Mr. Jenny asked what’s the intended number of people to be there. Mr. Stephens replied approximately four. Attorney Boldt stated that kind of detail would come in with site plan review.

Mr. St. Peter stated the question before the Board is whether or not this requires a variance or does the proposed use fall under the Agricultural. Town Counsels opinion is that they do need to, as a couple of the materials that they’re going to have on the property don’t fall within the definition of agricultural. The question is do they agree with what Town Counsel has said, they don’t fit and therefore they need to go through the process of getting a variance, or do they agree with the applicant that those products actually do fall under agriculture.

Mr. Nolin noted that there was a motion on the floor, which he seconded.

Attorney Boldt asked for clarification, if the motion was targeting a list of the products that they need the variance for, or they need a variance to do anything on the site? Mr. Hopkins replied that they have before the Board an application for a variance for Articles VI.A.4, VI.C, VI.D and VI.E.1.b. That is what he moved to hear, noting the amendment was the reference from Article IV to Article VI.

Mr. St. Peter stated the motion is to deny the request that they do not need the variance and to require the applicant to apply for the variance. He then called for a vote on the motion. Motion carried, unanimously.

Attorney Boldt then proceeded with his presentation for the request for variance as applied. He noted all the information he had provide regarding the description and history of the site remains the same. Attorney Boldt then reviewed each of the five criteria for the grating of a variance as provided in his narrative submitted with his application and reason for why they believe they meet each criterion. Attorney Boldt answered any questions from the Board.

The Acting Chair asked if there were any questions from the board. Mr. Nolin had a few questions regarding the maintenance building. He noted his concern with how much of the landscaping business vehicles would be worked on in that area. Attorney Boldt stated that it could well be for the maintenance of their trucks. It is an old garage building and is a natural fit. Mr. Nolin expressed his concerns with the way people use the definition of agriculture is light using a 4" sash brush and calling it pin stripping. Attorney Boldt stated that there will not be any third-party vehicles, it would only be Stephens vehicles. There was a lengthy discussion regarding the vehicles to be maintained and the area in which they will maintained, outside of the existing garage. It was agreed that there will be no maintenance of anything out front of the building. All maintenance will take place inside or behind the plain of the proposed dry storage area. This will be depicted on the plat for site plan approval.

Mr. Hopkins questioned if there were any provisions for contaminates from vehicles. Carl Johnson, surveyor of record, stated one of the things that comes through the planning process is the ground water protection ordinance. It has very specific things to deal with how you're going to protect the ground water system which may include infiltration trenches and other structures that will prevent any type of dripping to enter the ground water. This will be addressed extensively in the Planning Board process.

Ms. Whitney noted that Attorney Boldt had previously stated that mixed use was allowed by right in the Residential/Agricultural zone, and disagreed with his statement. The Moultonborough Table of Permitted Uses on page 18 of the zoning ordinance clearly states that a special exception is required for mixed use in all zones, except Commercial Zone C where it is permitted. The Board had granted a special exception in June of 2014 for a mixed use for the Sturgeon property located at 22 Moultonboro Neck Road. Attorney Boldt stated that he had specifically asked the Code Enforcement Officer what they needed to ask for. This is an application to use the property under the agricultural definition, and under the agricultural definition you can have the residence. Mr. Nolin stated that was why he questioned it, as it wasn't the agricultural people, it would be the landscaping people. There was a lengthy discussion regarding who would reside in the house. Attorney Boldt states Mixed Use as defined in the zoning ordinance is "Any development, or even a single building, that blends a combination of residential, commercial, or institutional uses, where those functions are physically and functionally integrated; containing or zoned for commercial and residential facilities or development." Attorney Boldt was not certain of the definition, or the CEO's interpretation of it. He did not think that they need a special exception to have a residential use in the Residential/Agricultural zone, and he was not aware that they had required somebody else to do so. Mr. Hopkins suggested the Board deal with the application before them and if the CEO has an issue with it, then he will send them back. Mr. St. Peter noted that the application explains that there is an existing residence on the property and it's going to be used. The legal opinion from Counsel comes down to the narrow, few products that are going to be on the property that aren't spelt out in the definition of agriculture. It was felt that the criteria for a variance are the harder standards to meet, and if met, they would be meeting a higher standard than for a special exception.

Mr. Hopkins asked for further information regarding the request for relief from Article VI.E.1.b. Attorney Boldt stated his reason for including that is that he wasn't sure if it was applicable, the 50' buffer. They will be removing scrub trees for the green houses. They are not intending to do anything along the waterfront. There will not be 50' along the north west and the front will not have 50'.

The Acting Chair opened the hearing for public input. Abutter, Adam Cahoon questioned if the only reason the applicant is before the board for a variance is for the “rocks” to be stored there? It is because the definition of agriculture does not include gravel, sand and stone, and the applicant is proposing those materials. There were no further questions now. The Chair then closed the public input portion of the hearing.

The Acting Chair asked if there were any questions from the board. It was noted that there were none. The board went into deliberative session to discuss each of the criteria for the granting of a variance at 8:06 PM and came out of deliberative session at 8:11 PM.

There was no further input from the Board or public. The voting members were Rob, Russ, Rich, Nick and Jerry.

Motion: Mr. Hopkins moved to grant the request for a variance from Articles VI.A.4, VI.C, VI.D and to the degree applicable, Article VI.E.1.b for Mark and John Stephens, Tax Map 135, Lot 16, with the following conditions: 1) Site Plan approval from the Planning Board; 2) Any necessary NH DES approvals.; 3) All best management practices shall be employed, and to close the public hearing and to direct staff to draft a formal Notice of Decision for Board discussion only, based on the Finding of Facts during tonight’s hearing, which will be reviewed for accuracy only and signed by the Acting Chair at the next scheduled meeting. Seconded by Mr. DeMeo, motion passed, five (5) in favor (St. Peter, Nolin, Jenny, DeMeo, Hopkins) and none (0) opposed.

Mr. St. Peter noted the right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

V. Correspondence

VI. Unfinished Business

Chairman Stephens returned to the Board now with full voting privileges, with Mr. Hopkins stepping down for the remainder of the meeting.

1. Review and possible authorization for the Chair to sign the formal Notice of Decision for the November 16th, 2016 granting of a variance for Walter C. Jr., and Sarah J. Larson, for a parcel located on 204 Wentworth Shores Road (Tax Map 131 Lot 30).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on November 16th. There were no changes made to the draft.

Motion: Mr. St. Peter moved to approve the formal Notice of Decision as written for Walter C. Jr., and Sarah J. Larson, Tax Map 131, Lot 30 and to authorize the Chairman to sign and staff to mail said notice to the applicant or applicant’s agent, seconded by Mr. Stephens, motion passed, five (5) in favor (Stephens, Nolin, St. Peter, DeMeo, Jenny), and none (0) opposed.

2. Review and possible authorization for the Chair to sign the formal Notice of Decision for the November 16th, 2016 granting of a Special Exception for OM Moultonboro Realty Trust, for a parcel located on 268 Whittier Highway (Tax Map 142 Lot 1).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on November 16th. There were no changes made to the draft.

Motion: Mr. St. Peter moved to approve the formal Notice of Decision as written for OM Moultonboro Realty Trust, Tax Map 142, Lot 1 and to authorize the Chairman to sign and staff to mail said notice to the applicant or applicant's agent, seconded by Mr. DeMeo, motion passed, five (5) in favor (Stephens, Nolin, St. Peter, DeMeo, Jenny), and none (0) opposed.

3. Review and possible authorization for the Chair to sign the formal Notice of Decision for the November 16th, 2016, 2016 granting of an amended variance for Leon & Cheryl Haydon, for a parcel located on Winaukee Road (Tax Map 252, Lot 23).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on November 16th, 2016. There were no changes made to the draft.

Motion: Mr. St. Peter moved to approve the formal Decision Letter as written for Leon & Cheryl Haydon, Tax Map 252, Lot 23 and to authorize the Chairman to sign and staff to mail said notice to the applicant or applicant's agent, seconded by Mr. Stephens, motion passed, four (4) in favor (Stephens, St. Peter, DeMeo, Jenny), none (0) opposed, and one (1) abstention (Nolin).

4. Chairman Stephens noted an email from the Conservation Commission Chair inviting the ZBA members to the January 12, 2017, Board of Selectmen Meeting to hear a review of the updated Natural Resources Inventory completed in December of 2016. The meeting begins at 7:00 pm and the presentation and time for questions for questions will run about 30 minutes.

VII. Adjournment

Motion: Mr. Stephens made the motion to adjourn at 8:24 PM, seconded by Mr. St. Peter, carried unanimously.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant