

TOWN OF EAST KINGSTON, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING MINUTES
September 23, 1999

FILE

AGENDA

7:30 Motion for Rehearing – Chuck Woodlands Realty Trust – Charles Marden, Trustee (999-07)

Members attending: Chairman John V. Daly, Vice Chairman David A. Ciardelli, Norman J. Freeman, Alternate Members Peter A. Riley, Richard A. Cook, Nathaniel B. Rowell, J. Roby Day, Jr., and Selectman Donald C. Andolina.

Absent: Edward A. Cardone, David C. Boudreau, and Alternate Charles F. Marden.

Others attending: Becky Hanna – Seacoast News Correspondent.

Motion for Rehearing – Chuck Woodlands Realty Trust – Charles Marden, Trustee: Chairman Daly opened the meeting at 7:37 p.m. for the consideration of a rehearing filed by Chuck Woodlands Realty Trust in relation to the Board's August 12, 1999 decision to reverse the Planning Board's decision to approve a site plan review for Chuck Woodlands Realty Trust. Giving a brief synopsis of this case and its history, he stated that the Planning Board conducted a site plan review for Chuck Woodland's Realty Trust and after extensive discussion, approved the operation of a trucking business. Subsequently, Laurie Carbone and abutters appealed the Planning Board's decision to the ZBA. The ZBA heard the appeal and initially upheld the Planning Board's decision to approve the site plan review. Succeeding this decision, Laurie Carbone et al petitioned for a rehearing alleging member conflicts of interest. The rehearing was granted. The ZBA reheard the case in August and it reversed its initial decision to approve the site plan review on the grounds set forth in the August 12th minutes. Now, Charles Marden, Trustee has appealed for a rehearing of the August decision.

Chairman Daly went on to say that, in his view, most of the issues set forth in the motion for rehearing are not persuasive, except for the "scope of the review" which was performed by the ZBA (see para. E of Motion for Rehearing). He stated that if the Board grants a further rehearing and the decision to deny the site plan review is upheld, then Charles Marden, Trustee has the right to appeal this decision to superior court. If a rehearing is granted, the Board has 30 days in which to hold it.

He elaborated that if the August decision is reversed, then the newly aggrieved party would have the right to appeal to the ZBA. He said that those previously disqualified from voting in this case will still refrain from voting on this rehearing request, they may, however, participate in this discussion.

In understanding the "scope of review", he stated that appeals made on the basis of the site plan review not being conducted properly, are not within the Board's jurisdiction. The ZBA does not have authority beyond the interpretation of the zoning ordinance. A third party reading the minutes could come to the reasonable conclusion that the Board's August 12th decision was based on the Planning Board not conducting a proper site plan review. This would mean the ZBA made a mistake. This doesn't mean that the decision must be reversed – if there are sufficient reasons beyond the procedural one to uphold the decision to deny the site plan review, then a rehearing does not have to be granted.

Mr. Ciardelli stated that part of the confusion is that this is so complex. At the August hearing and after lengthy discussion, he stumbled with the language of the motion. He is not sure whether the motion is deceptive – there were other issues besides the site plan review process that were a factor in his voting to deny the site plan review; this was only one of a number of factors for him.

Mr. Rowell stated that if, in the overview of the request for rehearing, a rehearing was granted to Laurie Carbone, then it seems fair to grant one for the other side. At the public hearing – whatever this body votes for the decision will be the basis for one party to go to superior court. He asked if Charlie Marden could petition the court with the decision as it stands now.

Chairman Daly responded that if a rehearing is granted, the action at the rehearing will determine who goes to superior court. If a rehearing is not granted, then Charlie Marden can also go to court.

At the inquiry of Mr. Andolina, Chairman Daly stated that, in his opinion, the ZBA did, in fact, improperly rule at the August hearing. The Board did not have jurisdiction over the procedures of the site plan review.

Mr. Ciardelli stated that in his opinion this case would ultimately end up in superior court - further discussion adds to the case and that is good, but not if it confuses matters more. He said that it would be fair to think that the parties involved are feeling jerked around.

When asked if there was any basis to deny a rehearing, Chairman Daly replied that it was his judgment that the Board would have to determine that there are sufficient grounds in the August 12th minutes, independent of the proper site plan review procedure, to reverse the Planning Board's original decision and deny the site plan review.

Mr. Andolina stated that the site plan review procedure weighed heavy for him at the hearing.

Mr. Day stated that the original Planning Board decision and appeal to the ZBA focused on three articles. That is what the ZBA focused on at the original rehearing. The site plan review procedure was not considered then. It seems in the interim of the Planning Board's decision and tonight's meeting, those questions changed. The three zoning articles should have been used to determine whether or not the trucking business was legitimate or not.

Chairman Daly stated that new testimony was presented after the initial ZBA hearing and that during the process of rehearing, those arguments changed, which is not uncommon.

Mr. Day stated that it might be best to rehear the case and better define the perimeters of what the argument is about. He stated that he would like to see the Planning Board handle this.

Chairman Daly said that after the last hearing, he thought Charlie Marden should have gone back to the Planning Board with a new site plan review, but he chose not to do that.

Mr. Day asked if a rehearing were held, who would sit on the board as they are running out of people.

Chairman Daly listed the following voting members: Chuck Boudreau, Dave Ciardelli, Norm Freeman, Nat Rowell, Don Andolina (Deshaies argument regarding him is not convincing), and Ed Cardone.

Mr. Ciardelli explained that because of the complexity of this case, and part of the reason they are here tonight, was because at the last meeting while he was chairing, he was less than adequate on the legal aspect. Even if Chairman Daly did not vote at the rehearing, he would like to see him chair the meeting. He stated that he would like to propose this up front now.

Chairman Daly stated that that could be decided later although they could expect that Atty. Deshaies would raise it, since he brought it up at the August hearing.

Mr. Rowell stated that if a rehearing were granted all the same elements would apply. He asked what would be lost if it (rehearing) was granted.

Mr. Riley responded that if a rehearing were granted and the vote goes the same way, the basis of the use not being a permitted use in that zone could be articulated. If the decision is the other way, then it is another argument for Laurie Carbone et al to take before superior court. There is enough ambiguity to argue the ZBA overstepped its bounds.

Chairman Daly stated that if this case goes to superior court as is, without a rehearing, it would be likely the court would determine the ZBA didn't know what it was doing. If a rehearing is granted, the Board should stay away from the site plan review regulations. Given that it is the ZBA's August decision that would be appealed to superior court, a rehearing should be granted.

At Mr. Cook's inquiry, Chairman Daly stated that the Board's jurisdiction is to review any decision made by any board or administrative official on the interpretation of the zoning ordinance.

Mr. Ciardelli expounded by saying the three articles listing noise, dust, fumes, and diminishing property values should have been under consideration only.

Mr. Riley stated that the trucking business does not conform to the permitted uses of the district. He stated that he had a problem with Charlie's testimony in comparison to what he told the Planning Board and what he told the ZBA. He felt two different versions were presented.

Mr. Day replied that there is no clear picture of what is or is not permitted. The deputy fire chief indicated that the Fire Safety Code defines light industrial as using large trucks.

Mr. Cook stated that the original site plan review called the business a trucking terminal. It is not a trucking terminal – a trucking terminal has tractor trailer trucks going in and out of a site distributing goods throughout the area. This is a trucking company providing a service that is temporarily contracted under the hours involved.

Mr. Riley stated that Mr. Marden changed his testimony from a trucking terminal to a warehouse.

Chairman Daly redirected the discussion back to the issue of whether or not to grant a rehearing. As Mr. Riley stated, he is also compelled to grant a rehearing because if it goes to court now, it can be assumed the argument would be about the scope of review and the Board's lack of jurisdiction in it. Superior court would send it back to the ZBA to correct it. He stated that the rest of the argument is not persuasive. Superior court would not send the case back to the Planning Board as it would be a ZBA decision that would be appealed. If an error was made at the August hearing, which he thinks was, then a rehearing should be granted.

He continued to say that testimony about the site plan review does not taint the hearing as a whole, the Board just can't base their decision on it. It would be best not to permit that type of testimony.

Members voting on this rehearing request are Mr. Rowell, Mr. Andolina, Mr. Freeman, and Mr. Ciardelli.

MOTION: Mr. Rowell motioned to grant the petition for rehearing based on the scope of the August 12, 1999 decision not having been within the Board's jurisdiction. Mr. Andolina seconded.

DISCUSSION: None

The motion carried 4-0.

The Board then scheduled the rehearing to be held on Tuesday, October 19, 1999 at 7:30 p.m. at the Town Hall.

At Mr. Riley's inquiry, Mr. Andolina stated that the school bus driver's letter regarding the trucking company was currently being addressed by the Board of Selectmen.

OTHER BUSINESS

Rules and Procedure: Chairman Daly noted that this is the third and final reading of the Board's Rules and Procedures. If board members are agreeable to the amendments made at the previous meetings, then they (rules) may be adopted tonight. These rules should be reviewed on an annual basis. He then asked if members had any comments or recommendations for additional amendments. With no further discussion,

MOTION: Mr. Freeman motioned to adopt the Rules and Procedures as presented. Mr. Rowell seconded. With no further discussion, the motion carried 8-0. (All members present participated in the adoption of these rules.)

Minutes: The Board reviewed the minutes dated August 12, 1999 and without any objections approved them for the record.

With no further business the meeting adjourned at 8:17 p.m.

Catherine Belcher

Minutes completed and on file September 24, 1999.