

Town of Lyme
LYME ZONING BOARD OF ADJUSTMENT
Minutes – October 19, 2017

Board Members: Present - Frank Bowles, Walter Swift, Michael Woodard, Alan Greateorex, Bill Malcolm

Absent: None

Alternate Members Absent: Dan Brand

Staff: David Robbins, Zoning Administrator; Tara McGovern, recorder

Public: Bret Ryan, Barry Schuster, Aaron Rich, Mark Puffer, Karen Menge, Barney Brannen, Beth Taylor, Russell Barnes...

Chairman Frank Bowles called the meeting to order at 7:30 pm. The last sentence of the minutes of the meeting of Sept. 21 were amended to read "Walter said that *it would be nice if* the two sides would each be given five minutes at the beginning of the next hearing to assert their positions before the board goes into deliberations." The minutes were then approved on a motion by Michael Woodard and seconded by Walter Swift.

Application #2017-ZB-30, Karen Menge (Tax Map 401 Lot 53.1)

Karen Menge has appealed back to the Lyme Zoning Board a decision of the Lyme Planning Board on July 27, 2017 that the site plan review of May 11, 2017 for Holt's Ledge LLC for the property at 65 Dartmouth College Hwy (Tax map 401 Lot 53.1) was consistent with sections 4.46, 8.27, 8.12, and 8.13 of the Lyme Zoning Ordinance. Chairman Bowles noted that he specifically asked that any documents pertaining to this decision be received in a timely manner and in specified format. Information from Atty. Puffer was received three days prior to this meeting and not in the requested format.

Atty. Puffer acknowledged that he had not complied with the Board's request. He then spoke to the role of the Zoning Board and the Planning Board and how their decisions may or may not have been influenced if this information had been made available. Chairman Bowles noted that he felt the Zoning Board has been asked to review the decision of the Planning Board. And expressed his concern that the board had not been given adequate time to review the volume of material which had been delivered.

The board went into deliberation at 7:37pm. Mr. Swift noted that he didn't think that this decision would be made tonight and he would be comfortable with postponing the discussion to allow for the Zoning Board to review the material received. The question of whether or not the material should be reviewed, or would this be equal to retrying the case, was raised. Deliberations ended at 7:44pm

The board went out of deliberation to give the applicant, the property owner and their counsel an opportunity to respond to its concerns about scope of review. Atty. Puffer commented that the scope of review can include additional materials.

The board entered into deliberation again at 7:49pm moved by Chairman Bowles. Chairman Bowles motioned that materials submitted for the Board's consideration must be submitted in hard-copy and must be received by the Friday prior to Zoning Board meetings to ensure that the materials can be reviewed and to share the information with all interested parties. These materials should be made available to the public at the Town Office the Friday prior to the Zoning Board meeting. This motion is subject to approval by Town Counsel.

Walter Swift questioned whether they are setting a precedent for all submissions to the Zoning board, when some instances may require more time or less time to review the materials submitted. Michael Woodard thought that the motion was reasonable, and Chairman Bowles commented that historically this has been the practice. The board commented that email is not the best form of submission of materials, as it is not secure and subject to human error through deletions or unintentional omission. . The motion was seconded and passed. Deliberation ended at 7:50pm.

The Board entered into deliberation at 7:51 pm

Frank questioned whether or not they could consider new information that was not presented to the Planning Board when they were deliberating this case. Frank thought that the Planning Board should review their decision again with this new information so that the Zoning Board would not be in a position of re-trying the case.

Bill Malcolm wondered whether or not giving the Zoning Board the time to review the information in the lengthy documents submitted on Monday by Atty. Puffer would make a difference in this case. The board discussed that their role is to review the decision of the Planning Board on the four sections of the Zoning Ordinance remanded back to them to affirm or deny their decision. .

Bill Malcolm suggested that the case should be sent back to the Planning Board because new information has been received. He offered that because there is site plan information in question, it should be reviewed and decided by the Planning Board. The Zoning Board continued to discuss their role in this case and its history. They reviewed whether or not the acceptance of new data in this case is appropriate. Mr. Swift quoted from RSA 676:5:IV and noted that this section allows the board to make additional investigative studies and to accept other materials pertinent to the appeal. It was determined that the Zoning Board can consider new information as it applies to the decision made by the Planning Board.

Water Swift felt that it would be unfair to all parties to make any decisions tonight before the entire Board had an opportunity to appropriately review the material submitted on Monday by Atty. Puffer.

Michael Woodard would like an opinion from Town Counsel on the history of when the land became conforming and non-conforming to assist the Zoning Board's decision as it relates to the intensity of use of the property in this case. Chairman Bowles agreed.

Chairman Bowles read an email from Stephen C. Buckley, Esq of the NH Municipal Association, which reads:

Ordinarily, in order to determine whether a new non-conforming use may be maintained the ZBA would examine the facts at the time the zoning ordinance created the non-conforming use. *Town of Salem v Wickson*, 146 N.H. 328 (2001). Town Counsel says the year the Lyme Zoning Ordinance was first adopted would be the proper time to determine the intensity of use of the subject property that would then be compared to the proposed use. Since that was the opinion of your Town Counsel you should heed that guidance.

You must elicit evidence that describes the intensity of the use of the subject property at the time just before Lyme adopted its first zoning ordinance. You should evaluate such things as traffic, building size, parking areas, signage, noise and all other possible off site effects of the subject property on the neighborhood. This quantum of past activity must then be compared to the proposed new use and its expected level of similar activity.

As you evaluate the intensity of the old use with the intensity of the new proposed use, please keep in mind the provisions of RSA 674:19

That statute gives protection to a non-conforming use such that a non-conforming use may be changed to a different use **unless** the new use is considered to be "any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration."

Taking into account the statutory limitations of RSA 674:19, I would further advise that when the ZBA compares the past intensity of use with the proposed intensity use, a modest increase in intensity of use will not violate section 8.12 of your zoning ordinance. The increased intensity of use must be such that, in the words of RSA 674:19, the use is substantially more intense than the past intensity of use.

After considering this information, the Board then determined that the opinion from Town Counsel, in reference to Mr. Woodards question, was no longer needed.

The Board again discussed the intensity of use of this property in 1989 and how it will be used as proposed. Walter noted that there is no definition for "commercial use" in the Zoning Ordinance. There is a term for "Business" and it is defined in the Zoning Ordinance.

Walter shared his review of Atty. Puffer's materials. He was of the opinion that the property was a "business use" and a "cottage industry" at the time zoning was enacted. He noted that sometime in the future the Zoning Board should expand upon some of these definitions. He felt that the property was a non-conforming permitted use.

Chairman Bowles suggested a continuation of this hearing to allow for the Zoning Board to review the materials submitted by Atty. Puffer and any additional materials submitted, and to schedule another meeting soon to come to a decision.

The Board exited deliberations at 8:30pm

Chairman Bowles asked for the proposed binders to be provided at the earliest convenience or no later than the Friday prior to the next meeting. The Board will continue to deliberate this appeal at that hearing.

Karen Menge mentioned that the Planning Board declined information she provided about the time and use of the gas pumps at the property in question. Chairman Bowles indicated that the board would be happy to receive additional information from Ms. Menge.

Atty. Puffer questioned the membership of the Zoning Board as it relates to this decision. The previous hearing only had a 3 member Board and Atty, Puffer noted that the additional two members were allowed to hear the case as long as they had reviewed the minutes and submitted materials.

The board voted to continue the Menge hearing to November 16, 2017 at 7:30pm on a motion by Michael Woodard seconded by Walter Swift.

The Chair noted that they need to elect a Vice-Chairman of the committee. Michael Woodard nominated Walter Swift. Walter Swift nominated Bill Malcolm. Bill Malcolm accepted. Motion seconded and passed (MSP).

Atty. Puffer requested a copy of the email read by Chairman Bowles from the NH Municipal Association counsel. He also presented the binders requested to the Zoning Board. Atty. Schuster agreed to provide the previous packet provided to the Planning Board to the members of the Zoning board at the request of the Board.

Meeting adjourned 8:41 pm

Respectfully submitted,

Tara McGovern, Recorder