

ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Tuesday, July 28, 2009

Present: Frank Polito, Chairman, Sandy Carter

Alternates: Glenn Saba

Mr. Polito called the meeting to order at 7:00 P.M.

Mr. Polito announced that the meeting was a Public Meeting but not a Public Hearing and would be limited to approval of minutes and consideration of a request for rehearing.

The Board noted one other piece of business that the Board needed to review/sign off;

State of New Hampshire, Department of Health & Human Services, Health Facilities Administration Certification of Zoning conformance.

After discussion on the subject property, Mr. Carter made a motion to affirm that the 58 Island Pond business, referred to as Elliot Draw Station in Atkinson, is currently in compliance with Zoning. Motion was seconded by Mr. Saba and unanimously approved for signature.

1) Review and approval of June 10th minutes.

The Board reviewed the Minutes and the following corrections were made:

Page 3, first paragraph 5th line from bottom – change word ‘is’ to ‘are’.

Page 5, seventh line from bottom – remove coma after word problem and replace with period.

Page 9, tenth line from bottom – add word ‘living’ between word ‘accessory & unit’.

Page 11, 18th line from bottom – correct spelling of ‘analgous to analogous’.

Mr. Carter made a motion to approve the minutes of June 10, 2009 as amended , seconded by Mr. Saba, and unanimously approved.

Rehearing Request – Attorney James Troisi for Richard and Patricia Hanes, 6 Indian Ridge Road, Map 5, Lot 54.

Motion for Rehearing (Variance)

Motion for Rehearing (Administrative Appeal)

Mr. Polito reported that given a problem with the Town’s audio recording machine, there was not adequate time to review the original draft minutes before they went out. As a result, there was a subsequent revision of the minutes to reflect the Board’s discussion during the review of the 5 variance criteria during the Hanes hearing. Mr. Polito stated that he sent a letter to Attorney Troisi and the applicant informing them about the revised minutes and provided them a copy. He informed them that they had an opportunity to provide an addendum to their request for rehearing; but

limited it to addressing only the revisions to the minutes. He noted that nothing had been received from the applicant so the Board agreed that the original request for rehearing would be the basis for review. Mr. Polito reported that he also offered Attorney Troisi and the applicant the opportunity to obtain a copy of the meeting DVD, at no charge, should they wish to review it. He apologized for any inconvenience that this situation may have been caused.

Board members reviewed the Rehearing Request submission. Mr. Polito stated that there were two separate requests. The Board first considered the request for rehearing of the Appeal of Administrative Decision.

According to the original application and minutes, the applicant contends that the change on their property's tax card constituted a zoning decision by a Building Official. The applicant was appealing the Building Official's decision to make that change. Mr. Carter said that the facts before the Board, born out in the minutes of the hearing, are that the assessor, not a Building Official, changed/corrected what was on the assessing card to read 'unpermitted in-law'. At the hearing on this appeal, it was the Board's position that under the RSA governing the authority and power of the ZBA to hear appeals, that authority is restricted to decisions by Town officials or the legislative body and only on decisions involving zoning. It was the Board's view at the hearing that the decision being appealed was not one of zoning; instead, it was a change in the physical description of a property as reflected only on the property's tax card. The Board said this was an issue between the applicant and the Selectmen who, by RSA, are the Town's Property Assessors.

Mr. Polito said that in consideration of whether to grant a rehearing, the Board should determine whether the original decision was unreasonable or unlawful, whether the request for rehearing lays out new information not reasonably available at the hearing, or whether the official record is clear or not. Mr. Carter stated that he felt the Board adequately reviewed the application, listened to the pleadings and testimony of the applicant, and properly determined that it was the assessor, not the building inspector that updated the subject property's tax card.

Mr. Polito added that assessment cards are not used as a measure of zoning compliance. Mr. Polito expanded to explain that he was told that during the last town revaluation, the assessors identified anything that had changed on a property from the previous assessment and notes were then added to the property card.

Mr. Carter made a motion to deny Attorney Troisi's request for rehearing of an Administrative Appeal based on the fact that the Board did not make an error in law, acted reasonably, and the official record adequately reflects the Board's decision. Mr. Saba seconded the motion. Motion passed unanimously.

Rehearing Request – Attorney James Troisi for Richard and Patricia Hanes, 6 Indian Ridge Road, Map 5, Lot 54.

Motion for Rehearing (Variance)

Mr. Polito noted for the record that he wanted to apologize to the Board for having given the applicant, and Attorney Troisi, such a long time, as represented in the minutes, to convince the Board as to whether a second living unit existed at the time of the granting of the Occupancy Permit. He said that this was not germane to the appeal because even if it had existed at the time the Occupancy Permit was issued, zoning at that time did not allow for such use; regardless of its square footage. He added that it was not established by the applicant that the building inspector had full knowledge of the second living unit when he issued the Occupancy Permit. Even if the Board had been convinced that was the case, the Board could not grant a variance simply because of an error on the part of the building inspector. In fact the applicant previously sought relief under an Equitable Waiver and did not pass the necessary criteria.

Mr. Carter agreed and said the issue is whether the Board acted reasonable and lawfully. He felt that the Board dealt with the case as if it were a new case, blind to the fact that the second living unit already existed and the Board reviewed it adequately in light of the zoning laws. He said that the Board found that the second living unit would not meet all of the criteria necessary to support a variance; even considering today's zoning that allows a second living unit with conditions under special exception. Mr. Carter felt the official record was complete, and the Board did not make an error of law nor was the Board's decision unreasonable. He went on to say that the applicant did not present any new information that was not available for consideration at the time of the hearing.

After having reviewed all of the 24 reasons set forth in the request for rehearing, Mr. Carter made a motion to deny the request for a rehearing of the application for Variance for Richard Haines and Patricia Haines by Attorney James Troisi based on the fact that there was no representation of new evidence not available at the time of the original hearing nor does the Board believe that they made any error in law and further the Board believes that their original decision was reasonable based on the evidence. Mr. Saba seconded the motion. Motion unanimously approved.

Mr. Carter made a motion to adjourn the meeting; Mr. Saba seconded the motion which was approved.

Transcribed from tape.

Respectfully submitted,

Shirley A. Galvin

Board reviewed minutes of July 28, 2009

Board reviewed minutes of July 28, 2009 and made the following changes:

Page 1, Remove 'Approval of Minutes 7/28/09'.

Page 3, third line add 'a' between word 'whether' and 'second'

End of Line 4, after word 'it' add 'had'.

End of Line 6, delete 'to the Board' and add 'by the applicant'.

Third paragraph , third to last sentence remove 'that was presented' after word 'hearing'.

Corrections were noted but approval could not be made without Mr. Glenn Saba. Minutes will be revisited at the next meeting of October 14.

Approval of Minutes – October 14, 2009

Mr. Carter made a motion to approve the minutes as amended, seconded by Mr. Saba and approved.

APPROVED - 10/14/09