

ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall
Wednesday July 14, 2010

Present: Hank Riehl, Vice-Chairman; Sandy Carter; Sue Miner; Glen Saba; Sam Zannini (arrived 5 minutes late)

Mr. Riehl called the meeting to order at 7:30 p.m.
Correspondence

Incoming

- 1) Budget/Expenditures through 6/30/2010
- 2) Info from Lorman Education Services re: Wetland Regulation class
- 3) 6/15/2010 letter from code Enforcement to Michael Saviano re violations
- 4) June 2010 Town and City magazine

Outgoing:

- 1) June 10, 2010 Decision letters re: Home Business Renewal approvals to
 - a. Mary Gullo, 15 Hawthorne
 - b. Mr. John Goodwin, 23 Academy Avenue
 - c. Mr. John Sinclair, 42 Salem Road
 - d. Ms. Dorothy Menzie, 12 Sunset Drive
 - e. Mrs. Norma Smith, 52 East Road
- 2) June 17, 2010 Decision letter to Paquin and Haines re 6 Oak Ridge

Approval of Minutes of June 9, 2010

The following corrections/additions were made:

Page 2, third last line after "included, is not excluded", delete "not".

Page 3, thirteenth line after "variance: delete "approval" and add "hearing".

Page 4, second paragraph, change "he" to "Attorney Troisi"

Page 4, last paragraph second sentence change "fulfils" to "fulfills".

Page 5, seventh line after "situation", delete "was".

Page 5, eighth line after "could not" change "me" to "be".

Page 5, twelfth line change "waiver" to "waive"

Page 5, thirteenth line change "waiver" to "waive"

Page 5, seventh line from bottom of second paragraph, change "precedence" to "precedent"

Page 5, last line, after "variance" change "on" to "in"

Page 6, third paragraph, first sentence, change "had" to "has" and "intents" to "intent"

Page 6, third paragraph, seventh sentence after "one kitchen" add "on the permit and application"

Page 6, third paragraph, last sentence, change "tunede" to "tune"

Page 7, first sentence, change “inculpatd” to “incorporated”

Page 7, criteria 5, add “Ms.” before “Miner”

Page 7, under the second criteria change “reviewd” to “reviewed”

Page 7, condition h, after met, add “due to the prior variance being granted”

Mr. Carter made a motion to approve the minutes as amended. Ms. Miner seconded and they were unanimously approved.

PUBLIC HEARINGS: 7:30 P.M.

Trustees of the Kimball Library, Appeal from Administrative Decision of Building Code Official, denial of Sign Permit Application on property located at 5 Academy Avenue, Map 13, Lot 31 in the TC Zone, and Application for Special Exception from Zoning Article IV Section 470:8-e to allow 25 (+/-) square foot sign on property located at 5 Academy Avenue, Map 13, Lot 31 in the TC Zone.

Abutters list was read with the following present:

Trustees of Kimball Library – Allen Phair; Kate Galloway and Nina Gray

Mr. Phair said they were charged with designing a sign when the new library opened and it never got done. The sign will provide much needed information to residents about events, etc. Although there are other means of getting information out many people driving by may not be aware of or have forgotten about a particular event.

They are before the Board as the result of an application that was denied based on the size of the proposed sign. They have reapplied for both a Special Exception and an appeal from an administrative decision regarding the interpretation of Article 470:6d. This will be an internally lit sign and the contention of the Trustees is that the ordinance does not properly address the new LED sign technology. The sign is approximately 25+/- square feet. They have included a rendition of what the sign would look like, which is to scale. They content there are many signs in this district that exceed the allowable limit. Mr. Phair stated that the proposed sign would only be visible within the boundaries of the library property. This type of sign is very easy to read and would benefit the residents. They originally submitted the request under RSA 470:4. They felt that a legal opinion on how to proceed was in order but Attorney Kalman told them they should discuss it with the Board of Selectmen first. They did that and the Board of Selectman referred them to the ZBA. That is what brings them before the Board.

Mr. Riehl wondered if the Library was a governmental entity and therefore was not subject to zoning laws. He wanted the Board’s input. Mr. Carter did not believe the Building inspector made an error, because it does not meet the ordinance requirements. Ms. Miner agreed that the library is a governmental use of the land. She believed that they should not be before the ZBA, but the applicant may need a meeting before the Selectmen and they may have their own public hearing. Mr. Saba questioned the meaning of 470:4 and Mr. Carter stated that his interpretation was that the section 470:4 shall not apply. Mr. Riehl

concurred that 470:4 affirms the RSA that the ordinance does not apply to Town entities. Ms. Miner said the ordinance contains the word "conventional" lighting. Mr. Carter believed that 470:4 reinforces the State Law and even though it mentions the word conventional, it does not form a prohibition to internal lighting. Ms. Miner asked what is conventional. Does it mean conventional for today or when it was put in place. She thought they might ask Ms. Killam if she were involved in the enactment of this ordinance and what the thought process was. Ms. Killam was not involved in that process, but thought the ordinance stated that signs were supposed to be for directional and location purposes. The reason the Building Inspector denied the application was based on the internally lit portion of it. Ms. Miner said that according to the RSA the Library could very well be exempt. She asked if 470:4 meant to limit what is exempt and what isn't? Mr. Carter said in his view even though he thought this was exempt and should not be before this Board, he believed there were still some processes the Library would have to follow in order to comply. Mr. Zannini believed this was addressed under RSA 674:54 (incorporated by reference) and was to be under the purview of the governing body of the Town or the Planning Board. Mr. Riehl thought the Board was making this more complicated than it had to be. The question was does the Board believe the Library needs to be before the Board or are they a governmental entity? If they are a governmental entity this is not the venue.

Mr. Riehl opened the hearing to public comment. Ms. Hall was not in favor of this application. She said this was a rural community and if one wants to see lights on signs one could go to Route 28 in Salem or Route 125 in Plaistow. She believed this was contrary to the whole spirit of what the Town was about. The Townspeople decided they did not want this type of signage in the Town of Atkinson and the ordinances were overwhelmingly approved by the voters. She did not believe the Library was a governmental agency and a part of the Town of Atkinson, but rather their own separate Board. There is no hardship. Mr. Riehl pointed out that the applicants are not here for a variance and this is not germane. He explained they are trying to figure out what is the best way to proceed and who they should be before for this request. They are looking for answers at this point. The Board is considering whether they need to be before the ZBA at all. If the Board decided they need to be before the Board they will address those types of concerns at that time. Ms. Hall stated they are not a part of the Town government. Mr. Riehl said they were funded by the Town. Ms. Hall tried to equate that with organizations that the Town makes annual donations to and pointed out that it does not make them Town entities. Mr. Riehl asked the members of the Board if they thought the Library was a government entity. The members all concurred it was.

Chief Consentino believed this would be a benefit to the public for both informational and safety reasons and said the Department was in favor of it. Ms. Miner believed the Board only needed to determine if they are bound by zoning and need to be before the Board, but cannot tell them they can go and install the sign. She believes there is a process that needs to be followed, but the ZBA is not the right avenue. Mr. Carter concurred that these were non-binding discussions tonight on how the Library request should proceed and the Board was not telling them they could just erect a sign. They are exploring whether the

Library is a governmental agency, and if so, whether the zoning ordinances apply and are subject to ZBA actions. If zoning were found not to apply, there still may be a supplemental process that the Library will have to submit to and will have to seek guidance as to what that is. Ms. Miner wanted the minutes to reflect that the Board looked at and discussed the article "When Does Zoning Apply to Governmental Use of Land" from New Hampshire Town and City Article Index, dated May 2002, hereby incorporated by reference.

Mr. Carter made a motion to overturn the decision of the Building Inspector to deny a building permit on the basis that the Library is a Governmental Entity and therefore exempt from the provisions of the ordinance. It is the Board's understanding that further process may be required in order to fully comply with the provisions of RSA 374:54. Ms. Miner seconded the motion and it was unanimously approved.

Mr. Riehl asked the applicant if they wished to withdraw their application for the Special Exception because it is now moot. The applicant agreed.

Mr. Zannini made a motion to accept the withdrawal without prejudice. Mr. Carter seconded the motion and it was unanimously approved.

REHEARING REQUEST: 8:30 P.M.

Under RSA 477:2 Request by Board of Selectmen for Rehearing of Paquin/Haines Variance and Special Exception to allow Accessory Family Living Unit of 946(+/-) square feet on property located at 6 Indian Ridge Road, Map 5 Lot 54.

Mr. Zannini stated he would not vote on this because he was not present at the last hearing.

Mr. Riehl explained that the Board took three votes at the last hearing. The first was whether or not the Board should accept the application. The Board heard from Attorney Troisi and there were four elements that collectively persuaded the Board that the application was materially different from the earlier one. The Board of Selectmen is challenging on a number of issues. Mr. Riehl wanted to go through their allegations and address each challenge. The Board of Selectmen contended there was no new information and that the ZBA approved the second application without first finding a material change of circumstances. Ms. Miner stated that the Board definitely had those conversations. Mr. Riehl reiterated the applicant applied under a different ordinance and the size had changed. A solid hour was spent discussing whether the application was new and different enough to hear it. This is well documented in the minutes and the Board made a motion that specifically accepted it for hearing. The Board also determined that it was not just a change in circumstances, but there were other precedents cited and laws discussed that gave the Board comfort to accept it. Mr. Riehl pointed out for the record that it was the Board of Selectmen that left the door open for the applicants to seek a variance for a condition of the special exception. This is

clearly reflected in the Board of Selectmen's June 2009 minutes, which were read into the record and incorporated by reference. Ms. Miner stated this swayed her and Mr. Riehl concurred they were influential. There was a consensus of the Board that this allegation had no merit and that they did find more than one material change of circumstances that allowed them to accept and hear the new application.

Mr. Riehl moved on to the approval for a variance and in summary explained that the Board, after much discussion, approved a variance allowing the 940+/- square feet to be the dimension for the accessory living unit in this specific instance. The Board of Selectmen contend the ZBA lacked the authority to do this. Mr. Carter believed the process was the approval of the variance given to relax one of the requirements necessary to meet the Special Exception. Mr. Carter is now having second thoughts, and is not comfortable with the decision he made at the last hearing. He does not believe it is consistent with the law. Mr. Riehl said they did grant a variance to relax a requirement of the Special Exception. Mr. Carter believes the Selectmen contend there is no precedent in the law to allow this. Mr. Riehl believed these applicants tried to go through the right processes. The spirit and intent of the accessory living unit ordinance is to permit that type of unit and in keeping with the character of the neighborhood. By any subjective view and all that took the site walk, this floor space complies. The ordinance is flawed. Mr. Riehl felt that if the ZBA has violated something by this approval then the Selectmen should pursue it in Court if they feel so strongly that justice was not served. These applicants have been jerked around for over a year and told specifically by the Board of Selectmen to come before the ZBA for a variance and then a special exception. He was very persuaded in his decision by this action. He is perplexed at why the applicant did as they were told by the Board of Selectmen: find a buyer, go to the ZBA, seek a variance and then a special exception and they are now being challenged by the BOS. Ms. Miner asked Mr. Riehl if he had sought advice from Attorney Kalman regarding this re-hearing issue prior to tonight's hearing and Mr. Riehl said he had not, and was at times frustrated when seeking advice from Attorney Kalman that answers are vague. He had sought advice from Attorney Kalman before the June 2010 Haines / Paquin hearing and did not feel he got much guidance on the issues now being challenged by the Selectmen. Ms. Miner reiterated that the Board tried to get legal advice in advance to be sure they were not going down the wrong path. Mr. Riehl said the only thing that Attorney Kalman had told him was to be careful of the very first question and that was whether or not to accept the application. Mr. Riehl felt very confident that the Board scrutinized that aspect of it before they accepted it for hearing. Mr. Carter said that although he feels for the applicant the powers invested in the Board under the RSA's are supposed to be within the confines of the law. Mr. Carter agreed with Mr. Riehl about the emotion of it but now feels he was unduly influenced and made an error in law supporting some of the actions; specifically modifying the provisions of a special exception by granting the variance. The purpose of the special exception is to more tightly constrain a Board to specific provisions but make it easier to grant. He contends there is no case law or precedence for what they did. Ms. Miner reiterated that the minutes of the Selectmen's meeting are what swayed her the

most. Mr. Carter said that still is not the law and was issued from an emotional standpoint.

Ms. Miner did not agree and said her decision was not based on emotions. The applicant was counseled by the BOS to come before the ZBA, which they did. Attorney Troisi had argued that under RSA 674:33 5A, the ZBA had the authority to give a variance on the size and then grant the exception. She believed the decision by the ZBA followed a logical process. Mr. Carter claimed the RSA's do not support it and that no Zoning Board in the State had ever put a variance on a provision of a special exception. Ms. Miner asked if he had ever seen an RSA or case law that said that you could not do so. Mr. Carter said no and they agreed to disagree. There is no case law where it has ever been tried. Mr. Riehl stated that the Board is quasi judicial and they have some flex. Mr. Saba believed what the Board granted was right for the applicant but was wrong under the law. He believed this decision would open Pandora's Box. He believed there was no way to misinterpret the RSA and ordinance. He stated that under the provisions of 460:2 the special exception only allows 750 square feet in an accessory living unit; period. He believed more harm would be done if this was not reheard. He now feels that the Board does not have the authority to grant a variance on this provision. Ms. Miner stated that a variance is a way to relax a particular requirement of an ordinance and asked if this was not an ordinance? Mr. Carter asked the Board to look at the Handbook of Local Officials for the NH Board of Adjustment, October 09, Page 10 (incorporated by reference). He read the paragraph and believes this spoke to Mr. Saba's claim and although not case law, it is written by lawyers. He cited the Shell Oil v. City of Manchester case. Ms. Miner thought that one of the discussions the Board had when it granted the variance was that this specifically did not alter the use and the variance was not granted for the use. It granted a variance to the area. Mr. Riehl agreed it was a waiver for relaxation of a particular requirement. A variance allows the Board to relax use or dimensional requirements. The Board voted on an application to relax a dimensional requirement in the ordinance. Mr. Saba asked if the Board should really go there. Mr. Riehl does not believe the Town's gain relative to what this applicant will lose makes any sense by reversing the action. Mr. Saba was concerned about future applicants coming forward and asking for this kind of relief and wanted to know how the Board would deal with it. Mr. Riehl said that each case is decided on its own merits. This was a tortured case with a pre-existing finished space in existence for 20 years and has been taxed as a guest suite by the Town for the same amount of time. There have been 18 months that the applicants have been coming in and trying to do the right thing to get a legal status. Mr. Carter believed there were other ways. If someone closed on this house during the 30 day appeal period then the Board could not be faulted. The Board agreed the applicant was given the caveat at the hearing that there was a 30 day appeal period. Ms. Miner had conflicted feelings regarding the differences between a use and area variance. She said the Board discussed the spirit and intent of the ordinance and it determined that giving that small amount of square footage (about 200 sq. ft) was not against the intent of the objective of the ordinance. Mr. Saba contended that with that reasoning then why couldn't any of the other provisions be given a variance. For example, why limit it to only one

accessory unit in a dwelling, why not give a variance and allow two units in a dwelling. Ms. Miner stated the applicant had to meet the conditions of a variance first and that included meeting the spirit and intent of the ordinance. The members were not questioning whether the criteria of the variance had been met, but rather the granting of a variance to be used on a special exception. Mr. Carter stated that under the RSA's unless something is specifically enabled it isn't legal. One can extrapolate and would most likely be the interpretation of a Court. Mr. Riehl contended again that the Board had the ability to grant variances that relax dimensional requirements. It does not say except for Special Exception Ordinances. Mr. Carter agreed that anything in the law is subject to interpretation and until the Court adjudicates it is not case law. The provisions of the RSA are very clear as to what a Special Exception is and does not say you can modify it. This is what has made him change his mind about the vote he cast at the last hearing. Mr. Carter said the question at hand is if the Board is going to accept a rehearing request.

Mr. Zannini stated that after reviewing the minutes and listening to the discussions he believed he could make a decision on this matter and be comfortable with it. He stated that tonight's questions involve legal process and ZBA authority, not the specific merits of the Variance & Special Exception discussed in the prior hearings. Mr. Riehl concurred tonight's issue was about legality and agreed to allow him to cast a vote.

Mr. Carter made a motion to accept the request for a re-hearing as discussed. Mr. Zannini seconded and it was approved, 4 in favor of and 1 (Mr. Riehl) opposed.

Motion to adjourn was made and seconded. Mr. Riehl adjourned the hearing at 10:15 P.M.

Respectfully Submitted

Minutes transcribed from tape

Rebecca Russo