



Zoning Board of Adjustment Meeting
Monday, December 7, 2015 7:00 PM
City Hall Council Chambers

MINUTES
Approved 1/4/2016

Call to Order by the Chair.

I. Attendance/Roll Call

Present & Participating: Richard Collins, Michael Hurd, David Nichols, Todd Russel, Carolyn Towle, Amy Richardson (joined the meeting during the legal consultation for ZO 2015-00014), James Petrin

Absent: Daniel Worcester

City Staff: Michael McCrory, Interim City Planner

II. Minutes of Previous Meeting - November 2, 2015

Motion: To accept the minutes of the November 2nd meeting as written.

Made by: Mr. Nichols **Second:** Mr. Collins

Vote: Unanimous in favor

III. Old Business

- A. (ZO 2015-00014) Michael & Elizabeth Lemieux, 519 Jarvis Hill Road** – seek to appeal an administrative decision requiring a Special Exception Permit for a gravel pit/quarry operation and an Earth Excavation Permit at **149 Alden Road**. Tax Map 182, Lot 3. Zoning district: RR. (Cont. from 11/2/2015)

Chairman Hurd read the public notice.

Mr. Hurd asked if there were any conflicts of interest or objections to any members of the Board sitting on this case. Rock Allard, 100 Springfarm Road, said he had come to learn that there is a working relationship between Mr. Petrin, member of the Board, and Mr. Lemieux. He shared with the Board pictures as evidence of his claim. The pictures show a logging operation with equipment displaying the Pine Hill company name and a sign advertising “Firewood for Sale” with Mr. Petrin’s telephone number on it posted on the same property.

Mr. Lemieux stated that the equipment and the firewood belong to him. He said it came off of his job sites – that it (the firewood) was located in a field below his house up to this summer, that the wood came from when he logged the airport; that there had been over 100 cord of firewood. He said he cut firewood in his father-in-law’s field and sold it. He said he had to move the wood out of the field (Mr. LaClair farms the field) and he moved the wood to property owned by Mr. Hughes. Mr. Lemieux said that Mr. Petrin

had asked him (Mr. Lemieux) if he (Mr. Petrin) could put up a sign (on the Hughe's property where Mr. Lemieux was processing his own firewood), because the site has accessibility and Mr. Petrin is selling a barn full of wood for The Hughes family. He denied any business relationship with Mr. Petrin.

Mr. Allard repeated that Mr. Petrin should excuse himself.

Mr. Nichols asked Mr. Lemieux if Mr. Lemieux considers Mr. Petrin to be his friend. Mr. Lemieux said he knows everyone on the Board, that he has lived in Claremont long enough to "know everybody" and be friends with a lot of people, but he has never exchanged money with any of the Board members.

Mr. Russel said that in his opinion if an abutter has a problem with any Board member hearing a case that the Board member should step down. Mrs. Towle said she agreed "100%", saying that the code of conduct was "pretty clear".

Mr. McCrory read the conflict of interest section of the Board's Rules of Procedure.

Mr. Hurd said he is related by marriage to Mr. Bergeron (who was in the audience) and said under the policy he would have to step down as well. He said that if he had to step down, there wouldn't be enough people to hear the case. He then asked for a recess for legal consultation.

Motion: To recess the hearing for the Board to have a legal consultation.

Made by: Mr. Hurd **Second:** Mr. Russel

Vote: Unanimous in favor

Ms. Richardson joined the meeting during the legal consultation.

After the recess, Mr. Lemieux said that he did not recall Tim Bergeron being an abutter. Mr. McCrory confirmed that Mr. Bergeron is not an abutter, and so Mr. Hurd did not have to disqualify himself on those grounds. He said, however, that if Mr. Bergeron wanted to speak as a member of the public, the Board could vote at that time on whether or not Mr. Hurd should participate or recuse himself.

Mr. Lemieux said that Mrs. Towle and Mr. Nichols live in the neighborhood (of the gravel operation). If his trucks exit onto Alden Road the trucks will travel close to their neighborhood. He asked if they have a problem with truck traffic on Sugar River Drive, would they be able to remain unbiased?

Mr. Hurd polled the Board about his (Mr. Hurd's) participation. Mr. Russel had no problem; Mr. Petrin was stepping down; Mrs. Towle said that Mr. Hurd had been present for all but one of the hearings on this case, and therefore he should continue to participate. Mr. Nichols and Mr. Collins concurred.

Mrs. Towle said she thought she could act fairly on the application in spite of her proximity to a possible truck route. Mr. Nichols felt the same way. City Solicitor Taylor

stated that living in the neighborhood of a project is not grounds for disqualification unless there is evidence of prejudgment.

Mr. Petrin voluntarily stepped down from the Board.

Mr. Hurd appointed Mrs. Towle to sit in for Mr. Petrin for the purpose of voting. Attorney Taylor clarified that all members – regular and alternate – are permitted to participate in the discussions and questioning (except those that are recused).

Public Hearing Opened

Mr. Hurd declared the public hearing open again. Mr. Hurd asked if there was new material to be presented. Mr. McCrory stated that no new information had been received from the appellant by the deadline of November 30th. He drew the Board's attention to the December 4th memo which summarizes the case to this point. He reviewed the memo with the Board.

Mr. McCrory said that a Cease and Desist Order had been issued to Mr. Lemieux on November 23rd for issues that are unrelated to this case.

Mr. McCrory reiterated the points upon which the Board must decide: (1) To determine if the use is a pre-existing nonconforming use (using criteria provided by the City Solicitor) and (2) the requirement to obtain an earth excavation permit (again with the assistance of criteria). Based on these findings and decisions, the Board then must then decide to overturn or uphold the Zoning Administrator's decision. Each criterion must be voted on separately and in each case the burden of proof is on the appellant to show that the Zoning Administrator's decision is in error.

Mr. Lemieux said he had brought pictures and an AutoCAD drawing showing that his property had been excavated before he bought it.

Motion: To accept the pictures presented by Mr. Lemieux.

Made by: Mrs. Towle **Second:** Mr. Russel

Vote: Unanimous in favor

Mr. Lemieux summarized his case:

He bought the land in 1995; it was a pit; the pit shows a driveway as requested by the Planning Board; prior to purchasing it from Don Clark, he went to the Planning and Zoning (office) and was told "you're fine" though there is nothing in writing to confirm this; that according to RSA 155:e, the city was to have notified the pit owners (of new requirements) and there's no record that this was done; that a letter from Arnold Craig (given to the Board) states that they never stopped hauling out of the pit (even though the number of loads would vary widely from year to year); that Ed MacGlaflin said that the only reason the subdivision got done was because the land couldn't be farmed, that he was not a "pit owner"; the Town never said anything to him (Mr. Lemieux) in the twenty years he's owned the land; he pays taxes as a pit (industrial rates); took the land out of current use and paid the penalty; paid the excavation taxes every year (he gets billed \$0.02/cubic yard) which the town signs; he was notified in August of the 155e requirement and is currently doing it through NH DES; that through the Town's actions

and his he has a grandfathered pit. He said there had not been any complaints about his operation until this year. He claimed that the Town's files are not complete and they are not always right so he cannot provide the proof that the Board is seeking. He said he felt he had done his due diligence.

Mr. McCrory asked the Board how they felt about the information that Mr. Lemieux had provided. Mr. Hurd said that the pictures gave the Board an accurate footprint. Mr. McCrory said he didn't know that – that what was presented was a small-scale CAD drawing the he can't interpret. He said that as staff, he cannot advise one way or the other if it's accurate. He said it doesn't seem to match the aerial photos of 2014. Mrs. Towle said there were no dates on the pictures. Mr. Russel said they should be allowed into the record.

Motion: To allow Mr. Lemieux's pictures and CAD drawing into the record.

Made by: Mr. Russel **Second:** Mr. Collins

Vote: Unanimous in favor

Mr. Hurd asked Attorney Taylor if an abutter's roll call was necessary, to which Attorney Taylor replied no.

Mr. Hurd called on each of the abutters to present any new information to the Board that they might have.

Mr. Allard said he had nothing new.

Phil Mudge said he had nothing new.

Mrs. Cook said her land had been posted, apparently by Mr. Lemieux's surveyor. She was called by several people to whom she had given permission to hunt on her land. She said Mr. Lemieux's operation is causing problems for people beyond just the operation itself.

Mr. MacGlaflin was not present.

Mr. Ruetz, Mr. Bastion and Mr. Andrew – none had anything to add.

Mr. Herbert said that in his opinion Mr. Lemieux had failed to provide evidence that his pit was grandfathered. He said he had no objection to Mr. Lemieux getting a permit for the pit or quarry as long as he meets the requirements of state, federal and local law.

Mr. Tim Bergeron, 65 Springfarm Road, questioned why the pit is noticed as being on Alden Road when there is a large road from the pit onto Springfarm Road. He said the pit had been inactive for many years. He said he had concerns about the quarry. In the summer the noise from the quarry is loud enough for him to have to close his windows. The drilling, blasting and crushing are an expansion of the operation. He said he bought his property "near an abandoned gravel pit" that has evolved over the course of the last 13 years to what it is today – a drilling, blasting, crushing quarry operation. He said the blasting had knocked pictures off of his walls on two separate occasions. He said he had not had any prior notice of the blasting, perhaps because he is not an abutter. He has filed a claim with his insurance company because he has lost both volume and pressure in his well since the blasting began. He has to change the filter in the well once a month now instead of once a year. He said he had to pull his car out of the mud twice last spring because DPW had allowed trucks to drive over a portion of it (in excess of the 6-ton load limit).

Mr. Hurd called for any other comments from the public or from staff. He then invited Mr. Lemieux to respond one more time.

Mr. Lemieux said he had done a sound study and never got a reading over 50db on Springfarm Road.

Mr. Nichols asked Mr. Lemieux, “How do you feel that you have proven that there was a grandfathered property prior to you buying it?” Mr. Nichols said that he felt Mr. Lemieux had been given ample time to produce evidence, which the Board has yet to see. Mr. Lemieux said that 155e states that in 1979 “the regulator” was supposed to have notified the pit owners in writing and that was not done. He felt that the Town had not done its due diligence – they never notified him or Mr. Clark. There is nothing in the records. He bought the property as a pit. He went to the Town and asked them and was never given anything in writing. He has been operating in the open for twenty years. The Town knew it was there and never said anything.

Mr. Nichols asked Mr. Lemieux if he was willing to get permits to which Mr. Lemieux said absolutely. He has hired a consultant to do his 155e plan and has done traffic studies, noise studies, and hired Tom Dombrosky.

Mr. McCrory said that 155e sets the regulatory authority on the local community. Beyond any environmental permits that are required from the state, it is a local regulatory process and an excavation permit from the Planning Board will still be required. A Special Exception permit from the Zoning Board may also be required, but it depends upon what the proposal is. He said he understood that the 1979 legislation required operators to file plans by 1981, regardless of what the local towns did.

Mr. Lemieux said he wants the pit grandfathered and to get his 155e and that he doesn't want to have to come in front of the Zoning Board again for a Special Exception.

Mr. McCrory clarified for the Board: the grandfathering is about sand and gravel extraction (he referred to Section 22-147(10) – extraction of sand and gravel – a Special Exception is required). He said this is their understanding of the historic use of the site. Section 22-174(3) addresses gravel processing plants, including rock drilling and crushing operations. Hypothetically, if the Board finds there is a grandfathered use, then that is for sand and gravel extraction. The processing however is a separate issue. A Special Exception would be required for the processing.

Public Hearing Closed

There were no further questions or comments. Mr. Hurd called the public hearing closed.

Board Discussion – Part 1 – Is it a grandfathered sand and gravel pit?

Mr. Nichols said he had not seen any documentation to show that the pit could be grandfathered. He stressed that he was not opposed to a pit on that property. Mr. Hurd cited the letter from Arnold Craigue and what Mr. MacGlaflin said when he was purchasing the fields. He said Mr. Lemieux had testified that he has paid the gravel taxes

since he bought the property in 1995. He said the Board doesn't know what Mr. Craigie or Mr. Clark had for arrangements. There is no evidence before 1995, back to 1979.

Attorney Taylor directed the Board to the criteria outlined in the December 4th Staff Memo for deciding if the operation is grandfathered and if it needs an Earth Excavation Permit. These are criteria Attorney Taylor has derived from case law. To determine if a use is an existing, non-conforming use, the Board must find:

- a) The use was a legal use that existed prior to enactment of a restriction on its current use; *and*
- b) The use has not been discontinued or abandoned (for commercial uses, this means continued *commercial* use); *and*
- c) The use is not a nuisance, harmful to the public health and welfare or injurious to the community; *and*
- d) The use has not been expanded or changed.

Motion: To find that the Zoning Administrator was not in error in determining that the use of the site for gravel extraction was not vested.

Made by: Mr. Nichols **Second:** Mrs. Towle

Discussion on the Motion:

- a) The use was a legal use that existed prior to enactment of a restriction on its current use: Mr. Hurd said someone had stated that in 1971 it was a pit, but the Board does not know if it was a commercial active pit. Commercial use has been shown from 1995 to the present. Mr. Nichols said the Board has no proof that the use existed prior (to the enactment of restrictions). Mr. Collins said the Board doesn't know (about the use existing prior).
- b) The use has not been discontinued or abandoned (for commercial uses, this means continued *commercial* use): Mr. Hurd said there is no proof that operation of the pit was or was not discontinued. Mr. Nichols said he felt there is proof that it had been discontinued as a commercial use. Mr. Collins said that it had ceased operation at one time.
- c) The use is not a nuisance, harmful to the public health and welfare or injurious to the community: Mr. Hurd stressed that this finding must be made on the sand and gravel extraction only, not to include drilling, blasting, etc. Mrs. Towle said she had a problem with this criterion. She said there are fifteen people and abutters that have had problems with this - problems that have not been rectified at this point. She said she would have to vote "no" on this. Mr. Russel said there are fifteen people here that are complaining. Mr. Nichols said that the testimony of the public makes the nuisance criterion a problem for him. Mr. Collins said that the noise is definitely a nuisance for the public.
- d) The use has not been expanded or changed: Mr. Hurd said he had a problem with this criterion. The operation has gone from sand and gravel to stone. He

said Mr. Lemieux had testified that he had excavated some gravel when he bought it. But, Mr. Hurd said, the use has changed. Mr. Russel said the biggest concern he had was the change from sand and gravel to stone. Mrs. Towle said that it is an extension of the use and she would have to vote “no”. She said she substantiates what the Zoning Administrator said. Mr. Nichols said he felt the use had both expanded and changed. Mr. Collins said that the use has definitely been expanded.

Roll call vote on the motion:

Mr. Russel – yes
Mrs. Towle – yes
Mr. Nichols – yes
Mr. Hurd – yes
Mr. Collins – yes

Board Discussion – Part 2 – to determine if an Earth Excavation Permit is required (rock drilling and crushing)

Mr. Hurd asked if Mr. Lemieux would be required to come back to the Zoning Board if the Zoning Board finds that Mr. Lemieux needs an Earth Excavation permit. Mr. McCrory said zoning review would be necessary if rock crushing is proposed, but that proposal has not yet been received.

Motion: The Zoning Administrator was not in error in requiring that the owner of the Property obtain an Earth Excavation Permit from the Planning Board.

Made by: Mr. Russel **Second:** Mrs. Towle

Vote: Unanimous in favor

To determine if an Earth Excavation Permit is required, the Board must find:

- a) The owner did not file a report with the City within 2 years following August 4, 1989, as required by RSA 155-E, I(d): Mr. Hurd said a report had not been filed with the City.
- b) The owner has caused quarrying or crushing of stone to take place on the Property: It was the consensus of the Board that quarrying or crushing of stone had clearly taken place on the property.

Mrs. Towle asked that all activities at this site cease until all permits are in place. Mr. Russel said he didn't think it was the Zoning Board's job to do that. Mrs. Towle said she wants to make it clear that that is what should happen. Attorney Taylor asked if it was the intent of the Board that the Zoning Administrator should tell Mr. Lemieux that all activity at the site should cease until he has received all of the necessary permits. The consensus of the Board was that it was their intent.

Motion: To take a five-minutes recess.

Made by: Mr. Russel **Second:** Mr. Nichols

Vote: Unanimous in favor

Mr. Hurd called the meeting back to order following the recess.

Mr. Russel said he may have to recuse himself from the next application. He said he sometimes works for the daughter of one of the abutters, Lori St. Sauveur. Mr. Russel said Ms. St. Sauveur had contacted him regarding this application. Mr. Russel advised her to contact the Planning and Development office, write a letter to the Board, or simply come to the meeting. He did tell her that he could not talk about the case. Mr. Hurd stated that the Board had received a letter from Giselle St. Sauveur, Ms. St. Sauveur's mother. Mr. Russel said that if Ms. Sauveur had an issue with Mr. Russel hearing the case, he would gladly step down. No one had a problem with Mr. Russel hearing the case.

IV. New Business

- A. (ZO 2015-00017) Ian & Tonia Gates, 8 Bessie Avenue** – seek a variance from Section 22-209, R1 District Yards, of the City Zoning Ordinance to permit a deck within the side yard at **8 Bessie Avenue**. Tax map 129, Lot 66. Zoning District R-1.

Mr. Hurd read the public notice. Mr. McCrory read the abutter's roll.

Mr. McCrory stated that staff had discovered that a deck had been constructed without any permits. This was confirmed by the applicant. This lot is an existing nonconforming lot, like many others in the neighborhood. Zoning currently requires a minimum lot size of 10,000 SF; this lot, like others around it, is just over 6,000 SF. The building line, which is the width of the lot where the building would stand, needs to be 100 feet; this lot is 64 feet wide. The lot was created before zoning.

The zoning regulations allow development and improvement of these nonconforming lots as long as the development and improvements comply with the current zoning ordinance. In this case, the deck was constructed within the 10-ft side yard. Staff identified this as a violation of zoning and instructed Mr. Gates to obtain an after-the-fact variance for the deck.

Mr. Hurd asked for the footage from the deck to the property line. Mr. McCrory said he had not received any boundary line survey information, and had to rely on GIS for an approximation of about 3-4 feet to the adjacent (northern) boundary line. He said the fence is the best indication of the property boundary. Mr. McCrory said the adjacent lot (to the deck) is vacant, but he felt this could not be a consideration in this case.

Mr. McCrory stated that the purpose of zoning is to prevent overcrowding of land. The Board had no further questions for Mr. McCrory.

Mr. Hurd invited Mr. Gates to speak. Mr. Gates identified himself and stated that he was seeking a variance for the existing deck structure. Mr. Gates said the deck is 55 inches from the property line in the front and 47 inches from the line in the rear. Mrs. Towle asked when the deck was built. Mr. Gates said in the spring of 2007. Mrs. Towle asked him if he sought a building permit, to which he said no, he didn't realize, as

a young, first-time homeowner, that he needed one. She also asked if the property had been surveyed, to which Mr. Gates stated not as far as he knew.

Mr. Russel asked if there were stairs or a door on that side of the house when Mr. Gates brought the property, to which Mr. Gates replied no.

Mr. Collins asked how far the house is from the property line. Mr. Gates was unsure. Mr. McCrory stated that the house is approximately 10 feet from the line.

Mr. Russel asked if the deck is on footings, to which Mr. Gates replied yes, concrete footings four feet down.

Mr. Hurd asked that Mr. Gates have the property surveyed so that the Board could be certain of the setbacks. It was later clarified that a full survey of the lot would not be necessary, but rather a surveyor's confirmation of the lot's boundaries.

Mr. Russel asked if the Building Inspector had inspected the deck. Mr. McCrory said he had visited the site with the Building Inspector to see what the site conditions were and determine whether or not it needed to go to Zoning. The Building Inspector at that time said he could not proceed until it complied with zoning. Mr. Russel suggested to Mr. Gates that he get a contractor to look at his building and deck before the survey is done to determine if they will meet the building codes.

Motion: To give the applicant 90 days (to obtain the information requested by the Board) – to come back to the March meeting or sooner.

Made by: Mr. Hurd **Second:** Mr. Russel

Vote: Unanimous in favor

- B. (ZO 2015-00018) Ian & Tonia Gates, 8 Bessie Avenue** – seek a variance from Section 22- 114, Nonconforming Structures, and Section 22-209, R1 District Yards, of the City Zoning Ordinance for an expansion of a nonconforming structure making it more nonconforming at **8 Bessie Avenue**. Tax map 129, Lot 66. Zoning district R-1.

Motion: To continue this hearing until the Board receives the information requested for application ZO 2015-00017.

Made by: Mr. Hurd **Second:** Mr. Russel

Vote: Unanimous in favor

Mr. Gates asked for permission to cover the structure that is in progress so as to protect it from the elements while the case is pending. Mr. Russel said he could use strapping and plastic to cover it.

V. Communications

VI. Other Business

Mr. McCrory thanked the Board for their hard work. Mr. Hurd thanked the Board for another year of dedication and for volunteering their time for the City.

VII. Adjournment

Motion: To adjourn the meeting.

Made by: Mrs. Towle Second: Mr. Russel

Vote: Unanimous in favor.

The meeting adjourned at 9:50 PM.

Respectfully submitted,

deForest Bearse