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Town of Goshen
Zoning Board of Adjustment
Minutes of September 12, 2012

Members Present: Doug O'Clair, Chair; Ray Porter, Vice-Chair; Mark Rissala; Mike Chilson, Alternate; Clark Wamsley, Alternate

Chair O'Clair called the meeting to order at 7:10 p.m.

Chair O'Clair explained to the Board members and the members of the public that an appeal for a rehearing of the Zoning Board's July 25th hearing of Newport Sand and Gravel (NS&G) has been received Kim Gaddes. An appeal request needs to come from someone who is directly affected by the Board's decision. Kim Gaddes qualifies as someone directly affected by the Board's decision and is therefore legally qualified to make an appeal. If, after hearing Ms. Gaddes' arguments, the Zoning Board of Adjustment (ZBA) decides to rehear the application based on the information Ms. Gaddes presents, the cost of the rehearing e.g. public notices, will be borne by the appellant. If the ZBA decides not to rehear the application, Ms. Gaddes has 30 days to make an appeal of the ZBA's decision to the NH Superior Court.

Chair O'Clair declared that the same Board members will preside over the appeal for the rehearing; Mr. Chilson will sit in place of Mr. Hall, and Mr. Clark will sit in place of Mr. Johnson. He explained that this hearing has no public input per statute. Deliberation takes place solely among the Board members, and the Board members will make a decision whether or not to rehear the application. The appeal to rehear the application is strictly based upon the information received in a letter received from Ms. Gaddes. No other information can be considered, per statute.

Chair O'Clair asked if there were any members of the public that had any questions regarding the proceedings as explained.

Question was asked if the public was allowed to stay to listen and observe the Boards' deliberations.

Chair O'Clair emphasized that this is a public meeting, and everything that is discussed and decided is public.

Being no further questions, Chair O'Clair closed the meeting to the public.

Mr. Chilson read Ms. Gaddes letter of appeal.

- POINT 1. *The disqualification of Board members Douglas O'Clair and Mark Rissala.*
- a. *Both members signed a petitioned warrant article generated by Newport Sand and Gravel which petitioned for a change to Section V A.A. which would have deleted the existing clause in its entirety and would now cause it to read: #4 Further, Earth Removal Activities permitted in the Light Commercial District shall not be deemed an*

1 *undue hazard or offensive business under Paragraph A.1. Section V of this*
2 *Ordinance. Section V a.1. now reads: Undue Hazards or Offensive Business: “No*
3 *business shall be allowed which could cause any undue hazard to health, safety, or*
4 *property values, or which is offensive to the public because of noise, vibration,*
5 *excessive traffic, unsanitary condition , noxious odor, or similar reason.”*
6 *This would have left the town without the protections afforded by this article.*
7 *Misconceptions as to the fact that 155:E would have made up for this are not true. If*
8 *they were the exercise afforded by this petition article would be redundant. I quote*
9 *from a Planning Board public hearing January 24, 2012:*

10 *Q: ‘What is the point of (deleting Section V A1) if you would still be subject to*
11 *state law (155:3) if the Town decides this would now be a permitted use?’*

12 *A: ‘where a town has made a decision through its zoning ordinance to either*
13 *allow by special exception or to allow is as permitted use those provisions of 155:E*
14 *would not be applicable.’ Stated by Timothy Britain Esq., legal counsel for NS&G*
15 *(tape available for review)*

16
17 *b. Petitioned for #4: ...The provision of Section III.R (Noise Regulations) of this*
18 *Ordinance shall not pertain to Earth Removal Activities. Further, Earth Removal*
19 *Activities permitted in the Light Commercial district shall not be deemed an undue*
20 *hazard, etc...’*

21 *The desire to grant these articles which would leave the Town of Goshen without*
22 *sufficient protection (see Atty. Britain’s quote) suggest extreme bias on the part of*
23 *these still sitting Board members. Furthermore, under RSA 673:14 I., ‘No member of*
24 *a zoning board of adjustment, ...shall participate in deciding or shall sit upon the*
25 *hearing of any question which the board is to decide in a judicial capacity of that*
26 *member would be disqualified for any cause to act as a juror upon the same matter in*
27 *any action at law.’ When a board member has signed a petition which would be*
28 *favorable to the applicant, prejudice has been shown.*

29
30 Chair O’Clair stated that recusion of Mr. Rissala and himself was addressed at the July 25th
31 meeting, and the Board was following legal advice. He reminded the Board that at the July 25th
32 meeting, he asked if there was any member of the public or the Board that disagreed with he and
33 Mr. Rissala remaining seated on the Board as voting members for reasons stated at that meeting.
34 No one from the public or the Board voiced their opposition. Additionally, nothing in the
35 regulations has been deleted. Mr. O’Clair stated that he disagrees with Ms. Gaddes’ argument in
36 Point #1 since legal counsel and he believes he and Mr. Rissala were legally qualified to sit on
37 the Board as voting members; and no one said otherwise when given the opportunity.

38
39 Mr. Porter stated that Attorney Waugh claims the issue of recusion for Chair O’Clair and Mr.
40 Rissala is a non-issue, and he leans toward take counsel’s advice.

41
42 Mr. Wamsley stated that the special exception issues were totally different from the previous
43 application and does not see Ms. Gaddes’ Point 1 as a reason to rehear the application.
44

1 Mr. Chilson stated that the proper procedures were followed and the opportunity was given to
2 rebut and nothing was said, therefore Ms. Gaddes' Point 1 is not a reason to rehear the
3 application. Mr. Chilson read Ms. Gaddes' next item for consideration to rehear.

4
5 POINT 2. Denial by ZBA Chairman to Ms. Gaddes' request to introduce into the minutes
6 material from the 2000 application whereby Judge Mangones upheld the ZBA decision to deny
7 the Route 10 egress as part of the 2000 application.
8 *Gaddes also wanted to submit substantial information regarding dust and noise, complaints, etc.*
9 *pertinent to the 2000 application which included the Route 10 haul road. She was told that 'this*
10 *is a new hearing and has nothing to do with 2000 or any prior hearing. This is a new*
11 *application. What happened in 2000 means nothing.'*
12 *However, as regards submission of prior material (anything not before the Board at the*
13 *moment), O'Clair did allow NS&G to submit a letter from Mary Pinkham-Langer, Sand and*
14 *Gravel Appraiser for the DRA, dated March 5, 2001.*
15 *Further acquiescence to the receipt of 2000 information by NS&G can be found under the*
16 *acceptance of the 2000 Driveway Permit. Also, a letter from Ridgely Mauck, DES is in the*
17 *present application dated June 8, 2009 re the Alteration of Terrain Permit. It would seem that*
18 *any information that would further the applicant's proposal is allowable whereas like*
19 *information from a dissenter is not allowed. This shows bias on the part of the ZBA members.*
20

21 Chair O'Clair stated that he would not allow something to be pulled out of a past file and added
22 into this application. This is a new application and needs to be considered as such with new
23 information and testimony. There has been no bias; and according to town Counsel, the previous
24 application(s) should not be relevant consideration of the new application. The primary
25 difference between the two applications is the use of the Haul Road. The driveway to Haul Road
26 was permitted by the State DOT. The Town does not have control over a permit and driveway
27 that is permitted by the State. Chair O'Clair stated he did not think it was necessary for the
28 Board to overturn its original decision based on Point 2.

29
30 Mr. Porter stated that the driveway permit was relevant to the new application. Mr. Waugh's
31 interpretation of the issue supports the Board's decision. There should be no rehearing based on
32 Point 2.

33
34 Mr. Rissala stated that he agrees with Chair O'Clair and Mr. Porter.

35
36 Mr. Chilson stated that the proper procedures were followed and the application was
37 substantially different from previous applications and satisfied the criteria.

38
39 Mr. Wamsley stated that he agrees with the comments made by the other Board members and
40 sees no reason to change the Board's decision based on Point 2.

41
42 Mr. Porter commented that the material Ms. Gaddes was referring to was not presented to the
43 Board at the hearing of July 25. The Board cannot make a decision based upon information that
44 is not presented.

45
46 Mr. Chilson read Ms. Gaddes' third and final point for consideration of appeal.

1 POINT 3. RSA 676:3 Issuance of Decision II. *‘Whenever a local land use board votes to*
2 *approve...an application...the minutes of the meeting at which such vote is taken, including the*
3 *written decision containing the reasons therefore and all conditions of approval shall be placed*
4 *on file...and shall be made available for public inspection etc., etc.’ the written decision did not*
5 *meet these requirements.*

6
7 SUMMATION

8 *The application is for an exemption from Section V (Articles F&I) and Section IX. B of the*
9 *Goshen Zoning Ordinance. Section V.I. states that ‘Such special exception may be granted only*
10 *if all standards contained A through F above are followed.’ This includes Section V A.I. which*
11 *specifically says: ‘No business shall be allowed which could cause any undue hazard to health,*
12 *safety, or property values, or which is offensive to the public because of noise, vibration,*
13 *excessive traffic, unsanitary condition, noxious odor, or similar reason.’*

14 *The information presented on all these subjects was minimal, at most to exceeding six*
15 *paragraphs. Mr. Johnson commented that the traffic issue is beyond the purview of the ZBA. He*
16 *was not contradicted by any other member thereby ignoring Section V.A.I. Each criteria for the*
17 *Special Exception was not deliberated and voted on, thereby making the ZBA’s decision to*
18 *accept unlawful and/or unreasonable.*

19 *The meeting was closed in one hour and 23 minutes. The deliberation took five minutes during*
20 *which Mr. Porter is quoted as saying that ‘this proposal is as user friendly as it can get.’ We*
21 *appeal this decision on the above grounds. We, also find the inadequacy of the application and*
22 *the Board’s lack of attention to procedural law to not be in the best interests of our Town.*

23
24 Chair O’Clair commented that the decision was posted the following day after the hearing and
25 the meeting minutes were posted five days after the hearing date, both within statutory time
26 limits. The decision was based on the application; therefore he stated that he did not feel it was
27 necessary to rewrite the application as part of the decision. There was no discussion or concerns
28 for changes in the application content; that is why the decision was written as it was. Even if it
29 the decision was not posted on time, the only penalty is that the time for appeal is extended by
30 the number of days the notice was tardy in being posted.

31
32 Mr. Porter commented that the town’s attorney is confident in the Board’s handling and decision
33 of this application. The meeting minutes of July 25 were complete and accurate, and posted in a
34 timely fashion.

35
36 Mr. Chilson commented that the procedures were followed correctly; everyone had the
37 opportunity to get information gathered for presentation at the July 25 hearing. Based upon Ms.
38 Gaddes’ letter of appeal to the Board, there is nothing substantial to warrant a rehearing or
39 change in decision.

40
41 Mr. Rissala commented that if the town’s attorney is comfortable with the Board’s actions, then
42 he feels in favorable to stand by the Board’s decision of July 25.

43
44 Mr. Wamsley commented that the conditions for the special exception were met, and the appeal
45 was addressed properly.

1 Mr. O'Clair stated that no appeal should be taken lightly. The Board must decide if it has done
2 something procedurally wrong, or I there is something in the appeal that the Board did not know.
3 He commented that he does not know why the previous hearings went on for days, since he was
4 not present at those hearings. However, the applicant submitted the application weeks ahead, as
5 required by statute. The Board did its homework in order to be prepared to make a fair decision.
6

7 **Mr. Chilson made a motion that the ZBA not grant Ms. Gaddes' appeal for a rehearing of**
8 **the ZBA's July 25 decision to grant NS&G a special exception for a gravel pit. Mr.**
9 **Wamsley seconded the motion. All in favor.**

10
11 Chair O'Clair notified Ms. Gaddes that she has 30 days to appeal to ZBA's decision this evening
12 to the Superior Court.

13
14 **MINUTES**

15
16 The Board reviewed the minutes of September 12, 2012.

17
18 **Mr. Hall made a motion to accept the minutes of September 12, 2012 as written. Mr.**
19 **Porter seconded the motion. All in favor.**

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22 **UNFINISHED BUSINESS**

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24 None

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26 **PUBLIC HEARINGS**

27
28 None

29
30 **NEW BUSINESS**

31
32 None

33
34 **COMMUNICATIONS**

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36 None

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38 **OTHER BUSINESS**

39
40 **NS&G use of Haul Road**

41
42 Ms. Gaddes asked Chair O'Clair which Board has the authority to request moving the location of
43 the Haul Road egress.

44
45 Chair O'Clair commented that a legal opinion is needed to be sure. According to everything he
46 has read, the Planning Board is the Board that can change anything approved by the ZBA.

1
2 Ms. Gaddes commented that her legal counsel said the Board of Selectmen has the authority to
3 bring that question forward because the ZBA is still appointed. She stated that it is not her
4 intention to try to have the application denied, but she would like to have the egress moved. She
5 asked who is supposed to bring that ball forward.

6
7 Chair O'Clair stated that he will ask town counsel and let Ms. Gaddes know what he says.

8
9 Mr. Hall commented that Mr. Bell from the Board of Selectmen could also research that issue.

10
11 Chair O'Clair emphasized that the application was brought forward with the use of Haul Road
12 because that way the application was materially different than past applications.

13
14 Ms. Gaddes commented that the application would still have been able to have been considered
15 materially different based upon other points that were changed in the application without
16 changing the access to Haul Road.

17
18 Mr. Hall commented that he would like to see a one-way route through the gravel pit, in through
19 Haul Road and out through Lear Hill, or vice versa. That way, each egress only sees 50% of the
20 trucking traffic.

21
22 Mr. Chilson commented that it is better for the applicant to get the approval on plan submitted,
23 and then ask for an amendment if desired. Moving the access through Haul road will be a large
24 expense and therefore unlikely.

25
26
27 **Mr. Chilson made a motion to adjourn. Mr. Wamsley seconded the motion. All in favor.**
28 Meeting adjourned at 8:00 p.m.

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30
31 Next meeting: to be determined by the Chair. Nothing on the agenda for October at this time.

32
33 Respectfully submitted,

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37 Linda Plunkett
38 Recording Secretary
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