

Hopkinton Zoning Board of Adjustment
Minutes
December 22, 2009

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Tuesday, December 22, 2009, at 7:00 PM in the Town Hall. Members present: Toni Gray, Harold Perkins, Dan Rinden and Gregory McLeod.

I. Motion for Rehearing.

The purpose of the meeting is to review and take action on a **Motion for Rehearing submitted by Attorney Christopher H.M. Carter on behalf of Graham and Lisa Baynes**, dated December 2, 2009, and received on December 3, 2009. Motion for Rehearing pertains to the Zoning Board of Adjustment decision of November 3, 2009, in which the Board denied the Applicant's request (Case #Z02009-11) for a SPECIAL EXCEPTION to foster/shelter no more than four rescued dogs, at any given time, as a home business. The property is located at 1445 Hatfield Road, shown on Tax Map 216 as Lot 4 in the R-4 district (Hopkinton Zoning Ordinance section 3.6.A.7). Testimony by the Applicant or public will not be accepted.

In reviewing the Motion for Rehearing, Mr. McLeod specifically addressed the argument that the Baynes' need not satisfy the requirements for a Home Business as what they do is "on a volunteer basis". Based on a review of the Licensing Statute, NH RSA 437, plus what the Applicant had presented and outlined as the activities of their operation, Mr. McLeod believed that the use "looks, feel and acts as a business". Mrs. Gray concurred, adding that if Applicant did not believe that they needed to satisfy the requirements for a Home Business then they had the option to apply for an Administrative Appeal.

Mr. McLeod stated the Board is now being asked to reconsider the application based on what the Applicant believes the use should now be classified as, which is not relevant. At the time of the Board's review of the application, the Applicant was clearly requesting approval for a Special Exception to foster/shelter dogs as a Home Business. Mr. Perkins concurred, noting that the Applicant had asked the Board to consider their request as a Home Business. Now that they have chosen to abandon that request that is not something for consideration at this meeting.

With respect to the argument that the Board, during its review, considered whether the use was an agricultural/farming activity, Mr. McLeod stated that the Board's consideration of whether the business was an agricultural/farming activity was a matter brought up by the applicant, not the Board. During the hearing, the Applicant had stated that the use was an agricultural use as they were raising fur-bearing animals.

In reviewing paragraphs 24 - 27 of the Motion for Rehearing, Mr. McLeod stated that while there is no definition in the Ordinance for the term "business" there is a definition of the term "commercial". He stated that Camp Kyra or the Baynes, as they have conducted their operation, are acting as agents to ADAR Rescue (Alabamians Defending Animal Rights) and ADAR is a business. Therefore, the commercial definition satisfies the relationship between the Applicant and ADAR as a business entity thereby making the Baynes' argument moot.

Mr. Perkins pointed out the reason the Board had reviewed the Applicant's request as a Home Business is due to the fact that the Applicant had asked the Board to do so by submitting their

application for a Special Exception as a Home Business. To now request that the Board consider their use as non-business is irrelevant.

With respect to Applicant's argument that the fostering/sheltering of dogs is included in section 3.6 Table of Uses, Mr. Perkins stated that he understood the argument to allege that the Board acted unlawfully because the Board did not consider whether the Applicant was operating a "kennel" which is a permitted use (special exception) under section 3.6.F.9 of the Ordinance. Mr. Perkins understood that when the application was being discussed and filed Mrs. Robertson was told by the Applicant that they were not operating a kennel. Mrs. Robertson agreed, stating that the Applicant had believed that they were a shelter since they were licensed by the State as a shelter.

Mr. Perkins noted that if the Applicant were to have applied as a kennel that would have been a second principal use of the property. The current principal use being the residential use. Section 4.4.3 of the Ordinance states only one principal use shall be allowed. Mr. Perkins stated that it is not the Zoning Board of Adjustment's job to sort through the Ordinance to decide what the Applicant should be requesting. However, if the Board had considered the use as a kennel, the Applicant would still have had to satisfy the requirements for a Special Exception. The Board found clearly that this conduct (activity) did not qualify as outlined in the Minutes and Decision of the Board. A change in the determination of the use classification would not change activities as outlined to the Board; therefore, it would not change the Board's findings with respect to the Special Exception criteria.

Mr. McLeod stated that the Motion for Rehearing suggests that a permit issued to the prior owner should have justified the Board's consideration of the use as a kennel. Mr. McLeod noted that the permit formerly issued was a building permit and not a use permit. In support, the Applicant provided a letter from Town Counsel Attorney Hilliard; however, the letter specifically mentions that the building permit is allowed because there is "no kennel use" at the property. The Applicant by way of their Motion for Rehearing now requests that the Board consider their activity as a kennel, but take away the notion that the activities would be commercial even though the definition of a kennel specifically refers to the activity as being a "commercial activity". If the use is now not to be considered commercial, then the use would not qualify as a kennel as defined in the Ordinance and furthermore would not be considered an "accessory use" as also being argued. Mr. Perkins concurred, noting that the suggestion that the Board should have considered the use as described by the Applicant as an "accessory use" is not supported by any argument, justification or explanation as to why consideration should have been given. In fact there was no explanation as to what the use should have been considered accessory to when considering the uses listed in the Zoning Ordinance.

Mr. Perkins acknowledged that the Board did not consider the use as a kennel, questioning what was meant by a "*de minimus* Kennel", and that the Board had no reason to consider anything other than what was requested by the Applicant which was to foster/shelter dogs as a Home Business. Again, whether the use is classified as a kennel or a shelter doesn't change the activities as presented to the Board by the Applicant. Therefore, no matter what the use classification the activities still would not change the fact that the Applicant failed to qualify for a Special Exception. It was then noted that the operation of a kennel would still require a Special Exception. In fact, the Applicant would need a Variance for two principal uses and a Special Exception for the kennel.

Mr. Perkins stated that the Board heard evidence from the Applicant and Abutters and concluded that the Applicant failed to satisfy the requirements to be granted a Special

Exception. In reviewing section (c) of the Motion for Rehearing, it appears that someone had read the record of the meeting and did not agree with the Board's decision, which is irrelevant. The Board held two hearings and thoroughly reviewed the information submitted and testimony presented by the Applicant and Abutters in making its decision.

Mr. Perkins noted that the only basis for which he would agree to a rehearing would be if the Board had concerns with the fact that they did not consider the activities as a kennel. He stated that any rehearing based on that fact would be on the limited issue of the use being a kennel. Mr. Robertson inquired for the record as to whether Mr. Perkins would agree to allow all other eight points for a Special Exception to be addressed at a rehearing. Mr. Perkins replied no, stating that there is nothing in the motion that would have changed his opinion that the activities as presented to the Board did not qualify for a Special Exception. Any rehearing granted would be to address the classification of the use only. Mrs. Gray suggested that it would be irrelevant to allow a rehearing based on the use classification as the Applicant would not be allowed to readdress those points for a Special Exception that they had failed to satisfy. Mr. Perkins concurred, but noted that he would vote with the majority should they wish to grant the rehearing based on the use argument.

Mr. McLeod stated that he would not grant the Motion for Rehearing, noting that the Board was never asked to consider anything other than the fostering/sheltering of dogs as a Home Business, with the exception of the Applicant stating at one point during the hearing that they were raising fur-bearing animals as an agricultural use. He believed that the alternative use classifications outlined in the Motion are irrelevant to the Board's decision. The activity, whether it is fostering, sheltering or a kennel for dogs, is the same as was originally presented to the Board.

A motion was made by Toni Gray, seconded by Harold Perkins, to deny the Motion for Rehearing based on reasons specifically outlined in the record of the meeting. With five members voting, all five voted in favor of Mrs. Gray's motion. **The Motion for Rehearing was denied.** *Summary of review:*

- *The Board considered the description of the activities as had previously been explained by the Baynes'; the NH Animal Shelter License; the definition of Commercial Use as set forth in Section 2.1.C.3 of the Zoning Ordinance, and the language of NH RSA 437 in consideration of whether the use as described by the Applicant is a commercial business with the Applicant acting as agent for ADAR Rescue (Alabamians Defending Animal Rights).*
- *The Motion for Rehearing is a result of the Board's denial of the Applicant's application for Special Exception to operate a Home Business. In submitting the Motion for Rehearing, the Applicant cannot now abandon that request and instead ask the Board to consider an entirely different request.*
- *Applicant had every opportunity to submit an Administrative Appeal, rather than submitting their application for Special Exception to operate a Home Business.*
- *During the November 3, 2009 hearing, the Board did respond to the Applicant's request for a determination as to whether the use as described could be considered an Agriculture, Farm, Farming activity as it relates to fur-bearing animals. Note: Board had determined that the use did not qualify.*

- *While the Motion for Rehearing suggests that the Board should have considered the use, as now requested by the Applicant, as a “kennel” as defined in Section 2.1.K.1 of the Ordinance, the Board acknowledged that they did not consider other use listed in the Ordinance as the Board was not asked to do so. The Applicant had not submitted an Administrative Appeal, but rather submitted a request for a Special Exception to foster/shelter dogs as a Home Business.*

In reviewing the Motion for Rehearing, the Board considered whether a different classification of the use would have changed their findings with respect to the Applicant’s failure to satisfy other criteria to be granted a Special Exception e.g., change in essential characteristics of the residential neighborhood; appropriate location; health and safety of residents; detrimental to the use of neighboring properties, and spirit of the Ordinance.

- *A Kennel as defined by the Ordinance is listed as a principal use requiring a Special Exception. In this particular case, the Applicant would have had to apply for a Special Exception for the commercial kennel and a Variance to allow more than one principal use (residential and commercial kennel) on a lot in accordance with Section 4.4.3 of the Zoning Ordinance.*
- *While the Motion for Rehearing suggests that the Board should have considered the use as described by the Applicant as an “accessory use” there was no argument, justification or explanation outlining why consideration should have been given and what the use would have been accessory to when considering the uses listed in the Zoning Ordinance.*
- *In denying the Applicant’s request for a Special Exception to operate a Home Business the Board had considered the use, as described by the Applicant, which included testimony and information submitted by the Applicant and Abutters. Refer to decision of November 3, 2009.*

II. Other Business.

- Mrs. Robertson informed the Board of the applications to be reviewed at their January 5, 2009 hearing.

III. Adjournment.

With there being no other business the meeting, Mr. Perkins, seconded by Mrs. Gray, moved to adjourn at 7:35 PM. The next regular scheduled meeting of the Board is Tuesday, January 5, 2009, at 7:00 PM in the Town Hall.

Karen L. Robertson
Planning/Zoning Director