



Town of Hopkinton

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HOPKINTON ZONING BOARD OF ADJUSTMENT MINUTES JANUARY 5, 2012

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Thursday, January 5, 2012, at 7:00 PM in the Hopkinton Town Hall. Members present: Toni Gray, Charles Koontz, Daniel Rinden and David Brock.

- I. **Motion for Rehearing** submitted by Attorney Stephan Nix on behalf of Jamie & Kathleen Schoch and Richard & Jayne Schoch, dated December 14, 2011, and received December 15, 2011. Motion for Rehearing pertains to the Zoning Board of Adjustment decision of November 17, 2011, in which the Board denied the Applicant's (Case ZBA#2011-10) ADMINISTRATIVE APPEAL of the Selectmen's decision of September 12, 2011, granting Stuart Nelson a one-year extension of a previously granted building permit to construct a residence at 46 Bass Lane. The appeal was associated with Zoning Ordinance subsection 15.8.3 Variances and 15.10 Representations. There will be no public testimony taken.

Note: To assist the reader the following is a chronology of the Motions referenced in these minutes: Motion for Rehearing, dated December 14, 2011, filed by Attorney Nix; Objection to the Motion for Rehearing, received via email on December 30, 2011, filed by Attorney Puffer; Motion to Strike Nelson's Objection to the Motion for Rehearing, dated January 3, 2012, filed by Attorney Nix; Objection to Motion to Strike Nelson's Objection to Motion for Rehearing, received via email on January 5, 2012, filed by Attorney Puffer.

Chairman Krzyzaniak opened the meeting by explaining that the Notice of the Meeting specifically indicated that there would be no public testimony received; therefore, she assumed that Attorney Nix wasn't planning on giving additional testimony. In response, Attorney Nix stated that he understood that this would not be a public hearing, but rather a public meeting and that the Board would not accept public testimony or evidence of any kind. However, after the notice of the meeting was published there was an Objection to the Motion for Rehearing filed by Attorney Puffer in which Attorney Nix had to respond by filing a Motion to Strike Nelson's Objection to the Motion for Rehearing. Attorney Nix asked if members of the Board had received Attorney Puffer's Objection to Motion to Strike Nelson's Objection to Motion for Rehearing. Mrs. Robertson replied no, stating that the Board is aware of the Motion to Strike and the Objection to the Strike, but have not received copies.

Attorney Nix then questioned whether the Board was in receipt of an Objection to the Motion for Rehearing that had been filed by Attorney Puffer. Mrs. Robertson replied yes, indicating that the only documents the Board received were the Motion for Rehearing and the Objection to the Motion for Rehearing.

Attorney Nix expressed concern in moving forward with the meeting as it had not been published as a public hearing allowing arguments to be made by all parties. He believed that

his clients' position had been significantly compromised because of their inability to respond to Attorney Puffer's Objection to the Motion for Rehearing. The recommended solution is to either re-notice this meeting as a public hearing and accept public testimony or grant the rehearing and hear the entire case.

Mr. Brock responded by advising that some of the Board members have not seen the Objection to the Motion for Rehearing. He questioned what would happen if the Board were to only consider the Motion for Rehearing and not accept or consider other documents being referred too. In response, Attorney Nix stated that if the Board were made up of all trained jurist who had experience with this type of situation then that would be different, but a majority of the Board is made up of lay people.

Mrs. Gray stated that she had not read Attorney Puffer's Objection to the Motion for Rehearing because after printing two pages her printer stopped working. Chairman Krzyzaniak then stated that she was able to print the document, but had not read it.

Mr. Koontz said that while he may not be a trained juror he has had a lot of experience on legal cases and is certainly capable of putting aside a document in a case in which he understands the principals. In fact, the Board has had a great deal of experience with the same.

Attorney Nix stated that it his clients' position is that their procedural due process rights have been harmed with the submission of Attorney Puffer's Objection to the Motion. Attorney Nix requested that the Board re-notice the meeting as a public hearing and let all parties make their arguments or grant a rehearing where everything can be presented at one time.

Mrs. Gray questioned why the Board should not move forward and only consider the Motion for a rehearing. Again, Attorney Nix responded that his clients' procedural due process rights have been harmed since they were not given ample opportunity to respond to the Objection to the Motion for Rehearing. He suggested that if the Board were not to grant the rehearing and if the matter goes on appeal to Superior Court then there is a high probability that the matter would be remanded back to the Board in order to address the procedural matter.

Mr. Koontz suggested that if the Board were to consider Attorney Nix's theory concerning documents being submitted that would mean that any party could force a rehearing by presenting documents within a period of time that would not give the other party ample time to respond. In response, Attorney Nix advised that the Zoning Board of Adjustment's public notice specifically stated that there would be no public testimony. However, Attorney Puffer submitted testimony by filing his Objection to the Motion for Rehearing.

Mr. Brock asked Attorney Nix to provide the Board with specific testimony referenced the Objection to the Motion for Rehearing that he believed that his clients have not had the opportunity to address. In response, Attorney Nix stated that he would be able to respond orally, but under the rules of the noticed meeting he is not able to do so because the Board had indicated that no public testimony would be received.

Attorney Puffer addressed the Board stating that in Attorney Nix's Motion for Rehearing he attached five exhibits lettered a. through e. Exhibits a. and e. were new. Exhibit a. was a complete transcript of the October 2, 2007, Zoning Board of Adjustment meeting and exhibit e. were copies of exhibits that had been submitted to the Board by Attorney Puffer for the Board's June 5, 2007 meeting.

At this point, Attorney Nix objected to Attorney Puffer addressing the merits of the case. Chairman Krzyzaniak agreed, and asked Attorney Puffer to stop; however, Attorney Puffer went on stating for the record that in his Objection to the Motion for Rehearing he did not introduce any new testimony or evidence that was not already before the Board.

When Chairman Krzyzaniak asked Attorney Nix if he wished to respond to Attorney Puffer's comments Attorney Nix replied no.

Mrs. Gray addressed the Board stating that it is her understanding that the Board can only grant a rehearing if it is determined that there is an error of law or evidence that was not available at the time of the hearing. While she did not believe that there was new evidence that was not available at the time of the hearing, she did believe that there was an error in law when the Board determined that the statements made concerning the distance between the residences was not an implied condition.

Mr. Brock reminded the Board that they have 30-days to act on the Motion for Rehearing; otherwise, the Board could lose jurisdiction. The Board briefly discussed the possibility of postponement of any action until sometime next week, staying within the 30-days.

Mrs. Robertson suggested the Board follow their standard protocol by going through the specifics of the Motion for Rehearing.

Mr. Brock questioned why Attorney Nix felt that Attorney Puffer did not have the right to respond to new information that he may have provided in his Motion for Rehearing. In response, Attorney Nix suggested that there may be a misunderstanding in the documents. He filed the Motion for Rehearing in which he raised arguments of law and fact. That document was filed before Christmas. The notice of the meeting was then sent out which indicated that, "There would be no public testimony". However, a few days ago Attorney Puffer filed an Objection to the Motion for Rehearing that addresses what Attorney Nix believed to be factual issues. Therefore, the Objection to the Motion for Rehearing constitutes additional testimony that his client has not had an opportunity to respond to. Attorney Nix stated that the statutes indicate that a party may file a Motion for Rehearing; however, it does not indicate that the opposing party can file a response.

Mr. Brock asked for specific information in Attorney Puffer's filing that Attorney Nix feels he has a need to respond to. In response, Attorney Nix stated in paragraph seven there is discussion regarding Attorney Puffer acknowledging factual information. He then stated that if the Board had made the decision to allow further documents to come in then that would be fine; however, the Board sent out a notice indicating no further testimony.

Following discussion, it was Mr. Brock's opinion that the Board should grant the Motion for Rehearing so to avoid any possible procedural issues from coming back to the Board. Should the rehearing be granted, he assumed that the two parties would focus on the issues raised in the Motion for Rehearing that is distance between the Nelson residence and Schoch residence. Attorney Puffer responded by stating that on November 17th the Board determined that the distance was not material and therefore denied the appeal.

Mrs. Robertson suggested that the Board could limit the scope of the rehearing so that other issues, such as the Substantial Justice criterion which was reviewed in 2007 would not be open for discussion. Mrs. Robertson asked that if the Board were to grant the rehearing that

they indicate for the record their reason(s) for granting the rehearing. For example, is it because of a procedural issue or an error of law? If the rehearing is granted, it will be held on February 7th.

At this time, Mr. Brock drafted language limiting the scope of any rehearing, should a rehearing be granted.

Attorney Nix had discussed with his clients the scope of any rehearing and agreed that the issue to be discussed at a rehearing would be the materiality of the building to the original Variance. As part of that they had raised the issue of the applicability of subsection 15.10 of the Zoning Ordinance. They were agreeable as long as the restriction on the scope of the rehearing allowed discussion on subsection 15.10.

Attorney Puff expressed concern with having a rehearing on the ground that he filed an Objection to the Motion for Rehearing. He stated that his Objection to the Motion for Rehearing only references records and transcripts of the Board's meetings. It does not reference new information. Furthermore, Attorney Puffer believed that he had every right to file an Objection to the Motion for Rehearing which was intended to point out where there is evidence in the record that supports the Board in not granting the rehearing.

Mr. Brock asked if the parties would be agreeable to limiting the issues on rehearing to the discrepancy between the approximate 339' or 279' distance between the Schoch structure and the Nelson structure and whether that was a condition of approval and relevant to the granting of the Variance requested by Nelson, and include subsection 15.10 as referenced by Attorney Nix. In response, Attorney Nix expressed concern with the Board referencing the distance as a condition of approval, rather than questioning whether it was material to the approval. Mrs. Gray agreed, suggesting that if it were something that was stated at the meeting then it is a matter of condition of approval, but is not the same as if the Board had actually imposed specific conditions. Mrs. Robertson noted that subsection 15.10 references the words, "condition of approval". Attorney Nix agreed, realizing that the same language is referenced in Zoning Ordinance subsection 15.10.

Attorney Puffer stated the rehearing should not be granted, unless the Board finds that there was an error as a matter of law or new evidence that wasn't available at the time of the original hearing. However, if a rehearing were to be granted Attorney Puffer agreed to the limited scope as suggested by Mr. Brock. He then noted that the only issue is whether the statement concerning the distance was an "implied condition of approval".

Mr. Rinden suggested that the Board not hear the same information that was heard at the first hearing, but rather only hear new information that pertains to the two issues agreed upon. Attorney Puffer agreed and believed that the hearing should also be limited to new information that was not available at the first hearing.

In response, Attorney Nix stated that the issue is whether there was an error of law and to determine that the Board needs consider how the facts apply to the law. Attorney Puffer believed that the Board already reviewed the facts and considered the law and made the decision by vote of 3-2 to not grant the appeal.

Attorney Puffer offered to give Attorney Nix time to respond to the Objection to the Motion for Rehearing. He then noted that statute does not indicate that failure to act within the 30-days

is an automatic granting or denial of a Motion for Rehearing; nor does it indicate that the Board would lose jurisdiction.

Motion made by Mrs. Gray, seconded by Mr. Brock, to vote on the Motion for Rehearing with the language as previously discussed limiting the scope of any possible rehearing.

At this time, Chairman Krzyzaniak had Mrs. Robertson provide the Board with language concerning any rehearing in typed format.

Attorney Puffer inquired whether it would be the same five board members should there be a rehearing. Chairman Krzyzaniak replied yes, stating that the Board tries to have the same members at any rehearing.

The Board and parties discussed the estimated time frame for any rehearing.

Attorney Puffer inquired as to whether any of the members have read his Objection to the Motion for Rehearing. The majority of the members replied no at which time Attorney Puffer offered to withdraw his objection so that the Board could review the Motion for Rehearing on its merits.

At this time, Chairman Krzyzaniak read the motion as made by Mrs. Gray and seconded by Mr. Brock with the understanding that both parties were agreeable to the stipulation should the rehearing be granted.

“Motion is to vote on the Motion for Rehearing and if granted, it shall be limited to the issue of whether the discrepancy between the approximately 339’ or 279’ distance between the Schoch structure and the Nelson structure was an implied condition of approval based on subsection 15.10 of the Zoning Ordinance and whether it was relevant to the granting of the Variance requested by Nelson.”

With five members voting, three voted in favor (Gray, Brock and Krzyzaniak) and two voted in opposition (Rinden and Koontz). The Motion for Rehearing was granted and the hearing is scheduled to be held on Tuesday, February 7, 2012, at 6:30 PM in the Town Hall.

Mrs. Gray and Mrs. Krzyzaniak voted in favor as they believed that there had been an error of law when the ZBA decided that representations made as to the distance between the Schoch structure and Nelson structure was not material to the application for Variance approved on June 5, 2007 and on October 2, 2007. *Note: Zoning Ordinance subsection 15.10, as referenced in these minutes, states “Representations made at the public hearing or material submitted by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking, or use which are subject to regulation pursuant to subsection 15.8.2 or 15.8.3 shall be deemed conditions upon such special exception or variance.”*

Furthermore, Mrs. Gray, Mrs. Krzyzaniak and Mr. Brock agreed that holding a rehearing with a limited scope of review, as agreed upon by the two parties, will address any procedural discrepancies that may or may not have occurred during the Motion for Rehearing process.

II. Review of the Minutes and Notice of Decisions of December 6, 2011.

Review of the Minutes and Notice of Decision was deferred to the February 7, 2012 meeting.

III. Adjournment.

Mrs. Gray, seconded by Mr. Koontz, moved to adjourn at 8:20 PM. Motion carried unanimously.

Karen L. Robertson
Planning/Zoning Director

History:

1. *April 4, 2006, ZBA denied Variance (Nelson).*
2. *June 1, 2006, ZBA denied Motion for Rehearing (Nelson).*
3. *March 15, 2007, Merrimack County Superior Court remands to ZBA Substantial Justice Criterion.*
4. *June 5, 2007, ZBA approved Variance (Nelson).*
5. *August 15, 2007, ZBA approved Motion for Rehearing (Schoch).*
6. *October 2, 2007, ZBA approved Variance (Nelson).*
7. *September 14, 2009, BOS approved Building Permit (Nelson).*
8. *September 12, 2011, BOS approved a one-year extension of Building Permit (Nelson).*
9. *November 17, 2011 ZBA denied Administrative Appeal (Schoch).*
10. *January 5, 2012 ZBA approved Motion for Rehearing (Schoch).*