

**Town of Milford  
Zoning Board of Adjustment  
December 1, 2011  
Case #13-11  
Carolyn Magri-Halstead  
Special Exception Request for Rehearing**

Present: Kevin Johnson, Chairman  
Fletcher Seagroves  
Michael Unsworth  
Laura Horning  
Steve Bonczar

Absent: Len Harten – Alternate

Secretary: Peg Ouellette

**MINUTES FOR CASE #13-11 RE-HEARING, DEC 1, 2011 MEETING, WERE APPROVED ON JAN 19, 2012.**

Kevin Johnson, Chairman, opened the meeting by stating that the hearings are held in accordance with the Town of Milford Zoning Ordinance and the applicable New Hampshire Statutes. He continued by stating that, there being one item of old business and no new cases on the agenda, he would skip reading the procedures as normally done.

**Case # 13-11 Carolyn Magri-Halstead – Motion for Rehearing.**

K. Johnson stated the pertinent facts are stated in RSA 677:2 : *Within 30 days after any decision of the Zoning Board of Adjustment, the selectmen, any party to the proceeding, or any person directly affected thereby may apply for rehearing, specifying in the Motion for Rehearing the grounds therefore and the board of adjustment may grant such rehearing if, in its opinion, good reason is stated in the motion.*

K. Johnson further read from RSA 677:3: *A Motion for Rehearing shall set forth fully every ground upon which it is claimed that decision is unlawful or unreasonable.*

K. Johnson also read pertinent portions from the Handbook for Zoning Boards of Adjustment published by the NH Office of Energy and Planning: *A Motion for Rehearing must describe why it is necessary and why the original decision may be unlawful or unreasonable.*

*The meeting to consider a Motion for Rehearing is a public meeting and anyone has the right to attend; but all the board is acting upon is the motion in front of them. It is NOT public hearing and no testimony is taken and does not involve comments by the applicant, petitioner, or abutters. If the board believes there are sufficient grounds to reconsider their original decision, the motion should be granted; if not, the motion should be denied. If the Board decides to grant the rehearing, a new public hearing is scheduled and all legal actions, such as public notice (as required for the first hearing), must be followed. If possible, the same board members from the original hearing should be present at the rehearing. If the board decides not to grant the rehearing, all they must do is inform the petitioner that the rehearing was denied and that the petitioner then has 30 days to challenge the decision by appealing to Superior Court.*

*A person has a right to apply for a rehearing and the board has the authority to grant it. However, the board is not required to grant the rehearing and should use its judgment in deciding whether justice will be served by so doing. In trying to be fair to a person asking for a rehearing, the board may be unfair to others who will be forced to defend their interests for a second time. It is assumed that every case will be decided, originally, only after careful consideration of all evidence on hand and on the best possible judgment of the individual members. Therefore, no purpose is served by granting a rehearing unless the petitioner claims a technical error has been made or he can produce new evidence that was not available to him at the time of the first hearing. The evidence might reflect a change in conditions that took place since the first hearing or information that was unobtainable because of the absence of key people, or for other valid reasons. The board, and those in opposition to the appeal, should not be penalized because the petitioner has not adequately prepared his original case and did not take the trouble to determine sufficient grounds and provide facts to support them.*

K. Johnson then read into the record the request for rehearing, a letter from the applicant dated November 3, 2011 addressed to Kevin Johnson, Chairman, Zoning Board of Adjustment, Town of Milford: "RE: Zoning Board of Adjustment Appeal Request: Case #13-11 Special Exception – Article VI, Section 6.02.6:B (Wetland Buffer Impact), Map 52, Lot 18-1 Dear Chairman Johnson, Please consider this letter an official request for a re-hearing to appeal the decision of the Zoning Board of Adjustment on Case #13-11, voted on at its October 6, 2011 Meeting. A re-hearing of this case is warranted based on the following items of concern and new information that was not presented at the October 6<sup>th</sup> meeting: 1) A review of the minutes of the October 6, 2011 meeting indicates that the seven (7) items in Section 6.02.7 Criteria for Evaluation, which were required for me to address for the Special Exception were not entered into the minutes as provided with my application, nor was I given the opportunity to present these criteria for the official record prior to the hearing being closed to my presentation and public comment. 2) Additional conceptual grading plans will be presented quantifying the proposed environmental impact

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and soil disturbance which will result if I am required to construct a new driveway access from the frontage on Melendy Road rather than maintain use of the existing access road from NH Rte 13 South. 3) Evaluation of the existing drainage patterns and watershed of the proposed wetland buffer disturbance area to show the negligible potential for increased flooding resulting from the driveway upgrade in the wetland buffer zone. 4) Presentation of a wildlife habitat evaluation of the project area to quantify potential impacts to flora and fauna within the proposed buffer zone impact area. In addition to the new information outlined above, I have asked that a representative of Fieldstone Land Consultants be available to present the technical information and documentation that supports the Special Exception application; for wetland buffer disturbance associated with bringing the existing access road from NH Rte 13 into compliance with the Town of Milford driveway regulations. With the new information available I respectfully request the Zoning Board grant my request for a re-hearing. Thank you. Carolyn Magri-Halstead”

K. Johnson also stated that attached to the letter was a multi-page document from Fieldstone Land Consultants providing numerous general criteria and the five criteria for a special exception. He did not read that into the record, as it is available at the Town office.

K. Johnson then opened the meeting for general discussion.

M. Unsworth said he didn't know if this is new evidence or the applicant just didn't present all the facts. He didn't know if bringing Fieldstone in is new evidence.

L. Horning said it looked like the applicant had gone out of her way to present a substantial amount of new evidence. At the first meeting, she (L. Horning) stated several times that some of the questions were not directly addressed. It is new material and applicant states that a review of the minutes shows that the seven criteria were not introduced into the minutes.

K. Johnson stated that it had not been the practice of the Board to have the entire application read into the record. The applicant answers that question, as well as for other applicants for a special exception, answer those questions as part of # 3c, Additional Information, and they don't have them read all into the record. It had not been the practice of the Board to have the applicant read the entire application – only Section 2.

L. Horning said she had no response to that.

S. Bonczar said he was not present for the case, but he has spent time looking at it and reviewing the minutes. As a member of the board for many years, he has felt that an error at the first meeting was discussing whether the applicant intended to subdivide the land and that should not have been part of the application or been considered. The application states it was for wetland impact of more than 1800 square feet – not consideration of a subdivision, which had no bearing on the special exception. He didn't know if that fact had any bearing on the decision. He felt the applicant deserved another rehearing where the information regarding the subdivision is not part of the discussion and is totally focused on the wetland disturbance. Regarding the material the applicant presented, he felt it was a gray area as to whether that is new information that could have been presented if the applicant had been prepared. He knows the board goes out of its way and if the applicant is unprepared they are given a chance to go back and complete. Some of this information was late; there was an error in allowing any conversation as to the subdivision to be brought into the discussion.

K. Johnson stated that the first thing was that the code enforcement officer commented that this was a subdivision. The application did not state that. The board felt the application would be denied as it stood because there was no successful justification. The applicant was asked if she wanted to provide additional information as to the subdivision and then considering that this was for wetland impact for the subdivision, the board tabled it to give her time to provide information, specifically the site plan.

S. Bonczar said he respected that opinion, but disagreed. He said the board needs to stay with what the application states. Any other information should not be discussed. Whether that influenced any decision,

he did not know; there is enough doubt in his mind that it may have, and it should not have been allowed into the discussion.

L. Horning said she felt this was new evidence. Whether the applicant was ill-prepared or not was hard to determine. When they ask questions they use some legal terms that some people may not be familiar with. For her, this was new evidence which addresses concerns she had in the first place. The reason the applicant wanted the driveway in back of the house or why the applicant wanted a driveway is not her consideration. She felt this new Fieldstone packet was new evidence and applicant was entitled to a new hearing.

K. Johnson disagreed, saying in the original application the applicant specifically named Fieldstone as a representative but they were not there. All the information in their report is not dated. It may have been completed prior to the initial application. The fact that she was unprepared. .. He felt there was no information in the Fieldstone report that was not available to her prior to the application. There is nothing in the report that things have changed since the original application. Therefore, it should not be considered new information.

F. Seagroves felt this was new information but agrees there is no date on it; there is no signature, either. This was information the board asked about during the hearing. He would like to see who did the report; have an expert come in and explain it. If applicant brings in an expert and explains it, he will go along with a rehearing.

M. Unsworth said he got a letter from Bill Parker today by e-mail.

K. Johnson said it was addressed to him and copied to everyone earlier but not included in the official packet. He said it was addressed to Kevin Johnson "Thoughts on rehearing Oct. 6 case" from Kathy Bauer. "Since you are considering the Halstead request for a rehearing again tomorrow I would like to share my thoughts on the case. I believe the applicant has technical grounds for requesting a rehearing as stated in #1 in her letter of Nov. 3 requesting a rehearing. I watched the initial hearing on Oct. 6 and again today on line, and noticed that you did not address with the applicant her answers (submitted in the packet) regarding the 7 wetland criteria. She asked at the end of presenting the first 5 criteria "should I continue on?" and you answered no. After she sat down and you continued your non-public portion of the meeting, you discussed with the board the 5 required criteria for special exception and the seven additional criteria required for wetlands. Here again you had lengthy discussion but the applicant's answers to the 7 criteria were not addressed. I believe that due process requires her answers to be in the minutes. At best she should have had an opportunity to address the 7 criteria during her presentation. For the record. But they were not mentioned at all during the meeting. I think she should be granted a rehearing on the above grounds. As to the additional information provided in the request for rehearing regarding answers to the 7 wetlands criteria by Fieldstone, which are quite detailed, I realize that they should have been provided at the original Oct. 6 hearing and the ZBA is under no legal obligation to discuss them at a rehearing. However, since several board members based their no votes on the lack of information in the paperwork provided to the board, including lack of detail in the memo from the Conservation Commission, it might be in the best interests of the board and the applicant to allow the additional info at a rehearing. I think it would clarify the basis of the original application. I do not personally know the applicant. My concern is that the town give due process to any citizen who requests relief from the ZBA. And that the citizens of the town are served fairly whenever possible under the requirements of the State and the Town. As a selectmen's representative to the ZBA, I make these suggestions in an advisory capacity only."

L. Horning said even on a technicality they should be taking a look at a rehearing and should consider a rehearing very seriously. People in New Hampshire have a right to do with their land as they choose. People come in front of the board and the board may not always be infallible. She felt this was new evidence, it was detailed, and fell under the guidelines of a technicality which is what rehearsings are for.

S. Bonczar said normally rehearings are usually not granted because conditions are not met. If something is denied, it is not automatically reheard. There are criteria and reasons that rehearings should be granted and other times they should not be granted; applicants cannot come back over and over. He wanted the public to understand that whether or not this is granted, it is not setting a precedent. Each case stands on its own.

K. Johnson then called for a vote on the criteria for granting a rehearing.

**1. Was the Motion for Rehearing filed within 30 days after the date of the board's decision?**

F. Seagroves – yes, M. Unsworth – yes, S. Bonczar – yes, L. Horning – yes, K. Johnson - yes

**2. Does the petitioner have standing to file the Motion for Rehearing (a selectman, a member of the Zoning Board of Adjustment, a party to the action, or a person directly affected by the action)?**

F. Seagroves – yes; M. Unsworth – yes; L. Horning – yes; S. Bonczar – yes; K. Johnson - yes

**3. a) Does the petitioner claim that the board has made a technical error or**

**b) Has the petitioner provided new evidence that was not available to the petitioner at the time of the hearing on the underlying action or**

**c) Would an injustice be created if the Motion for Rehearing is denied?**

F. Seagroves – yes; M. Unsworth – no; L. Horning – yes; S. Bonczar – yes; K. Johnson – no

K. Johnson called for a motion for holding a rehearing.

L. Horning made a motion to rehear Case #13-11 at a time when all the required notices and paperwork are completed.

F. Seagroves seconded.

**Final vote:**

**S. Bonczar – yes, L. Horning – yes, Fletcher Seagroves –yes, M. Unsworth – no, K. Johnson – no**

Motion to rehear Case #13-11 was approved by 3-2 vote.