

**Town of Milford
Zoning Board of Adjustment Minutes
August 1, 2013
Paul Cunningham
Case #2013-07 (M6 L40)
Request for Rehearing**

Present: Fletcher Seagroves, Chairman
Zach Tripp
Laura Horning
Kevin Taylor
Mike Thornton

Katherine Bauer – Board of Selectmen’s representative

Absent: Paul Butler

Secretary: Peg Ouellette

Request of Paul Cunningham for a rehearing of Case #2013-07; filed in accordance with RSA 677:2 and 677:3, and the Rules of Procedure, Rule XII, of the Town of Milford Zoning Board of Adjustment.

Minutes approved November 21, 2013

Fletcher Seagroves, Chairman, opened the meeting and stated this was a request for a rehearing and was a public meeting, but there would be no public input; there would be discussion among the Board members. He read the description of the case. This case was tabled from the July 18 meeting because there had been only four Board members present.

F. Seagroves read from the OEP Handbook, page IV-3 which recommends that it not be a public hearing and that no testimony be taken. Anyone has the right to attend but all the board is acting on is the motion in front of them and should not involve comment from the applicant, petitioner or abutters. If the board believes there are sufficient grounds to reconsider, it shall be granted. If not, the motion shall be denied.

F. Seagroves also read from page IV-5, which said that “the coming to light of new evidence is not a requirement for granting a rehearing. The reason for granting a rehearing should be compelling ones. The Board has no right to re-open the case on the same set of facts unless it is convinced that an injustice would otherwise be created. But a rehearing should be seriously considered if the moving party is persuasive that a mistake has been made. Don’t reject a motion for rehearing out of hand merely because there is no new evidence. To routinely grant all rehearing requests would mean that the first hearing of any case would lose all importance and no decision of the board would be final until two hearings had been held. The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the Court.” He stated the board would consider new evidence but there would be no discussion of it, only see if there is new evidence. They will also look at whether any mistakes were made in the first decision. He asked if that was clear to all of the Board members. They indicated it was.

Z. Tripp began by going through notes he had made. He stated it was a very detailed 30-page request for rehearing, possibly overdone, but he applauded the applicant’s rigor. He stated he did not agree with all of Section V in the request: 1) *Maintaining control of the public hearing during the public comment* - the ZBA does not have control over what the public will comment on or say, and in certain cases they do get comments that may not pertain to the case. Some of the comments made during the original case were either reaction to the petitioner’s comments and observations and/or other public comments that could be concerned in favor of the applicant. The ZBA continuously weighs what pertains and what does not. After the case was closed a member of the public made an unsolicited comment that did not pertain to the original case, about a garage built in the 1980’s. 2) *the applicant claimed the ZBA did not have deliberations* –each of the ZBA members discussed their interpretation of the facts presented and their rationale for their vote. He believed this constituted deliberation, and was not grounds for a rehearing. The board should not grant a rehearing based on a subjective opinion of inadequate deliberation. 3) *Improper wording of the motion* – this is a volunteer board; they are not legal scholars. In hindsight the motion could have been worded differently. The manner in which it was worded had the desired intent and outcome as the proposed alternate wording. If the request for rehearing is granted, maybe the board could get advice from legal counsel. He did not believe the wording was grounds for a rehearing and believed that if the motion for rehearing is granted it should not be based on the wording of the motion. 4) *...not making a formal motion to accept into the official record the correction of the ‘error of fact’ that was made by the Zoning Administrator....*” Regarding the oversized garage. This is not grounds for rehearing because with the applicant’s own logic, it does not pertain to the case at hand which was an appeal of an administrative decision regarding the discontinued use of a non-conforming use. He didn’t believe the applicant’s assertion that the board needed to make a motion to accept the correction since Suzanne Fournier’s letter in the application received by the board and

therefore was already evidence. Secondly, Mr. Parker's own testimony agreed to the date the garage was built. 5) *not providing Mr. Cunningham written reasons for disapproval of his appeal* – this is not grounds for rehearing. He believed this was an administrative item and hoped the applicant would work it out with the Community Development office. First, according to the application, it appears the rationale given was pretty cut and dry, in his (Zach's) opinion. Second, the applicant was present at the entire hearing and (per their request for rehearing) had access to the video which, he felt, would be better than a letter summarizing each member's vote. Given the 30-page request for rehearing, the ground of inadequate written reasons doesn't seem a valid reason for rehearing.

Z. Tripp continued, that taking all of those items together in the aggregate, he didn't believe they were grounds for rehearing. The concept is that the board made a mistake; this is a list of mistakes. They could possibly grant a rehearing to correct these mistakes, but it would have to serve an administrative purpose but he didn't think it would benefit the applicant because he didn't think it would affect the 3-2 vote and would not change the evidence that was provided. They covered. He said that covers six of the applicant's 30 pages, and he wouldn't go into the other 24 pages. He said the three things the Board needs to consider:

1. For a rehearing, the applicant needs to have standing. He quoted from the Handbook "The board should evaluate the potential impact of ZBA action on the person requesting the rehearing to determine if they are aggrieved and have standing to file the motion. The motion should not be granted if the person requesting the rehearing is not impacted differently than the public at large." He believed the applicant has standing as he is an abutter.

2. There should be no new facts or information. The Handbook states "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." After rereading the original case and the 30-page request and re-watching the video he did not believe there was any new information that was not available during the original hearing. He referred to the letter and e-mail to Bill Parker of July 14 with seven items of new information which is on the third page of the application, which he addressed:

- i.) On page 15, paragraph 2, "Delisted by Better Business Bureau." Z. Tripp didn't believe this was new information since it would have been available at the time of the original hearing.

- ii.) Page 15, Paragraph 4, the date in 2010 when the bankruptcy was filed – this is not new information. It was in the applicant's original application at the original hearing in the form of an article in the July 24, 2010 Telegraph.

- iii.) Page 15, paragraph 5, the heir and president stated he had no intention of continuing the business. Z. Tripp said he re-reviewed the evidence and did not see that in the original application and request for hearing except for that verbiage. Regardless, that information would have been available at the first hearing.

- iv.) Page 16, paragraph 1, stating no employees continued the business and went on to start their own. Again, not new information. There were newspaper articles in the original application that covered that.

- v.) Page 16, paragraph 3, re confirmation that there was no occupancy of the premises by the sons or any tenants. This is not new information. Mr. Kenison gave testimony that it was a warehousing facility and occupation is not necessary for a business.

vi.) Page 16, paragraph 5, re condition of the driveway and building at Savage Rd as described in the June 20th testimony of the current owner. By definition, that is not new information because it was testimony at the first hearing.

vii.) court cases of developed law pertaining to “nonconforming use and structure” and within the meaning of the applicable ordinance (2.03.1.B) that are discussed throughout the memorandum (Sections I, II, II, IV, V) , especially case law dealing with “use” of grandfathered property in whole or in part, (i.e. storage) discussed in Section IV. This is not new information. The case law was referenced in the original application. He didn’t believe all the cases for rehearing apply to this case. He believed what the applicant was getting at was the notion that the board made a mistake or error.

3. Per the Handbook, Oct. 2012, page IV-5, “but a rehearing should be seriously considered if the moving party is persuasive that the Board has made a mistake.” Not surprising, being in the minority, he believed the majority made a mistake. He didn’t like the phrasing “mistake” He believes there is a reason for a 5 member board. Each member can hear the evidence and draw his or her own conclusions. Simply not siding with an applicant is not a “mistake.” Likewise, not agreeing with his conclusion is not a “mistake.” Regardless, if he feels the majority should reconsider their decision, the burden is on the applicant to supply significant rationale for rehearing due to error in judgment of the majority. To obtain this rationale, he reviewed Colla v. Town of Hanover. On page 3 of the Supreme Court’s decision “*Thus, to comply with this statute [RSA 677.3], a motion for rehearing to a zoning board must ‘set forth fully every ground’ on which the party argues that the decision was ‘unlawful or unreasonable’*” In this Supreme Court decision, the applicant’s rationale was that they believe the ZBA misinterpreted *Boccia*, which is another Supreme Court decision. On page 4 of the Supreme Court opinion, the court ruled that this motion satisfied the spirit and letter of RSA 677:3. He believed the applicant had satisfied the spirit and letter of RSA 677:3 on page 4 of 30 of his application with rationale (a) through (d), but he believed (c) did not apply (he read those into the record).

He referenced the section applicant’s request for rehearing that he felt specifically applied to items he felt the majority should reconsider via a rehearing:

- a. Although it may not be clear in his deliberation discussions in the original case, he does not believe the Sept. 2012 date (when the State of NH dissolved the corporate entity) should be used to determine that there was intent to or evidence of continued use. This is stated on last paragraph of page 9. Paraphrasing from the request for rehearing, the new owners took ownership in February 2012 which would imply that the previous business was still conducting legitimate business during this time frame (until Sept. 2012).
- b. Majority should consider what constitutes continued use or intent to use a parcel for business use. Paraphrasing from page 8 of the application, the provision of the ordinance applies to land use, not the actual business. Mr. Kenison testified that Joseph Devine the person (or the trust) owned the property, not the corporate identity. Therefore, per applicant’s request, he believed the board should reconsider whether there is any evidence the property owner used the property for normal, legitimate business activity or had intention to. The application provides additional provides additional items for consideration regarding actual use or intended use, page 17, first paragraph, which says that the Ayotte’s son-in-law/attorney, Mr. Kenison, testified the property was a tear-down and there were trees growing in the driveway.
- c. Finally, his reflections on the original hearing. In his opinion the board did not spend much time discussing the reasoning of the Community Development Director in concluding that there was not a lapse of one year and whether it was a valid conclusion. They may want to

rehear the case with a review of case law. The request for rehearing mentions one narrow sentence in the handbook regarding definition of abandonment of non-conforming use. The board should reconsider this case with the entire Abandonment of Nonconforming Uses section of the handbook section in mind.

Conclusion: Given the complexities and nuances of this case he felt it was in the best interest of the board to approve the request for rehearing because the applicant does have standing. Even though the applicant did not provide any new information, the applicant provided compelling reasons why the board should reconsider. The board, including himself, should consider what the use was and what constitutes a continued use of the property by the property owner and whether the rationale behind the zoning administrator's decision were valid.

F. Seagroves commented he was glad to see that on page 23 of the application for rehearing he hit on the five errors mentioned by the applicant, talking about procedures.

The chair asked Laura to speak. She requested to take time to review some of her own notes before speaking.

K. Taylor and M. Thornton requested time to digest what Z. Tripp had presented.

F. Seagroves said he would discuss page 23 (of the application for rehearing), where they address some of the procedures that they felt the board used.

1. They stated that the Chair used too much time dealing with discussion during the public hearing focused on items that didn't pertain to the case. He said they were talking about use and he opened it up to the public. An abutter came forward and was talking about slash and trees and the area and applicant felt the Chair let that discussion go on too long. F. Seagroves said he feels that abutters or the public have time to come forward to speak their piece. The meetings last to ten p.m. and he felt they have plenty of time and abutters should come up to express their opinions. He didn't think that was reason for a rehearing. Re the discussion and deliberation among board members, he thought they did that very well. He wanted everyone to express why and give reason why they voted that way—he wasn't looking for a reason because it was right or wrong. He was looking for a reason why they were voting that way. That is the way they run the board. There are five members with five different opinions.

2. The wording of the motion – Some concern with board members and how they worded it. The original was a petition against the zoning administrator's decision. By speaking that they were going to agree with the zoning administrator that meant they agreed with everything in his article, not just the use. That is the way he viewed it. Whether the use was there or not. They were going by what the zoning administrator said.

3. They discussed the garage or barn. He felt the garage or barn had no bearing. It is a question of use. The board wanted to know if the use had a year lapse. The garage/barn, he believed the zoning administrator made an error on the date it was built. He corrected the error during the meeting. F. Seagroves didn't think they should have done more. It was in the minutes of the meeting.

4. The written reason for disapproval – This is something that normally the office takes care of. Normally, the cases are either a variance or special exception and the office will notify the applicant if they were granted or denied the variance or special exception. The board is looking at changes. It was brought up they should do a little more, but they are not going to write a book. There are minutes. They will start saying now “your variance was not approved” and for what reason, i.e. no hardship. Anything further will have to be gotten from the minutes.

That is how he felt on those five questions. In going through the petition he looked up some of the cases quoted and did some research. In two instances they quoted cases that took place

in Oregon. NH does not look to any cases outside NH. If for some reason it was something new that came up they may look elsewhere, but if it is in NH they go by NH cases that have been decided. He also found that one of the cases, unless he read it incorrectly, had to do with child support. Another on a shed that was burned down and it was grandfathered and people got a permit to rebuild. They didn't rebuild it within a year and lost the grandfather. Another case was re teachers' union. The Pike Industry case was good. Pike had a building in which they were making asphalt. After two years they wanted to make cement there but couldn't because they lost the grandfather. Applicant brought up some good items. In his case, he was looking at the time the business was abandoned and that is how he came up with his decision. He didn't think there was any new evidence. He didn't see the board made any drastic errors. In the notification, he didn't see it was a drastic error. The petitioner was present. It would be nice; it is something they will correct. They will still have the minutes.

K. Taylor said he put in numerous hours on this. He didn't see that the Board, and as one of the majority, made a technical error. He did question them not being notified.

F. Seagroves said he didn't know they weren't notified, but it is the reason for the decision.

K. Taylor said common courtesy would be a letter or something sent to anybody but this was during a time of staff changes. New cases, new evidence – he didn't see anything pertaining to it they didn't cover. He wanted more input from the Board because he could go either way. He was leaning toward a rehearing but wanted to get the rest of the Board's input because the evidence doesn't sway giving a rehearing.

F. Seagroves asked if they really need new evidence.

Z. Tripp said it is a tough call. Is the 3-2 vote going to change? He struggled with the Supreme Court guidance. It is a complex case.

F. Seagroves agreed it is a difficult case because they have to look at when the business was abandoned. It is very hard to tell when this type of business is abandoned.

Z. Tripp agreed. It is not a typical business or textbook industry.

F. Seagroves said, such as manufacturing a product.

Z. Tripp agreed because it was a business running out of a residence.

L. Horning said it was almost a warehouse. They don't know the level of activity. It is predicated by a person's perception of what they see or don't see. She would like to hear what M. Thornton had to say after reviewing the case and the tape.

M. Thornton said the biggest problem was determining exactly when the lapse in business occurred and the next business started. Because that is the year and that is what the applicant has as the contention. Page 15, the State of NH Attorney General filed a lawsuit in 2010 and said no more business. Do they accept that as demarcation line and look for the next ongoing business, and what constitutes beginning of the business? Does the business not run while renovations are under way? Those are good questions that were brought up and he knows the diligence of the Board. In the first case they tried to determine exactly when the business stopped and started again. He didn't see good clear-cut, absolute, defensible answer on any of them. His feeling is to ask when was the last possible date business was done?

F. Seagroves said they were getting away from what they were there for. We are here to discuss whether there is any new evidence that was not brought before us on the case. This new evidence had to be something that was not available at that time. If it was available at that time and not brought before the us, that is not the Board's fault. The applicant has to convince us when the business ended. It is not up to the Board to decide.

Z. Tripp said, or if the applicant was persuasive enough to argue that their decision was unlawful. He thought there was enough complexity in this case that the Board may want to have a second chance on some of the items brought up.

L. Horning said they can refer back to the handbook, page IV-4 which says "a person has the 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. "The balance is in not having to go back to a second hearing to re-hear the evidence all over again. Court is clear in Chapter 4, page 5. For her in walking that tightrope to find that balance; she had to ask if there was any new evidence or compelling reason brought by the applicant that there had been gross miscarriage of justice or some, as the applicant put it, "erroneous error" on the part of the Board. She took it as implying almost a deliberate malice on the part of the Board. She agreed with Z. Tripp that applicant did an admirable job of putting together a well-thought-out request. In reviewing it, she didn't see any new evidence or compelling reason for rehearing when she went back to the book. In looking at the request for rehearing she understood the point Z. Tripp made. But in looking at the Court guidance, they are looking for the Board to strike a balance rather than go back and look back at it all over again. There would have to be some blatant error. She made her decision based on the fact there was no compelling evidence, in her opinion, in the timeline of the abandonment of the property. She didn't see compelling reason for her to go to rehearing on this case. She didn't see any particular gross misunderstanding by the Board or any erroneous interpretation of the way the ordinance is constructed. The applicant stated that the Board has the right to discontinue use for any reason. That is true, and the Board can take into consideration and weigh the facts and may not choose to discontinue use, so there has to be balance. The ordinance was written to minimize impact as much as possible, but that also goes to the justice of the landowner who has the right to seek relief and use his property and pay taxes and use it within the confines of the ordinance. She didn't believe applicant had provided her the compelling reason to rehear the case. She didn't see any new evidence from the applicant to compel her to change her decision. It would have to be significant. She didn't see that in the request.

F. Seagroves said he would find out when the business actually was abandoned, which is the term used in Concord, as he was told. He didn't want to get back into the case. He picked one thing and said that was when he thought the business was abandoned. He felt if they rehear it they would rehear same things all over; and would they come up with the same vote? For him, there was no new evidence here. He didn't think they did anything wrong.

K. Taylor concurred. He looked at it and the Board didn't do a technical error or do anything wrong in their decision. He didn't see anything to ask for rehearing except for notice to the applicant of the decision.

F. Seagroves said there was nothing wrong with the decision.

K. Taylor said it was nothing to do with the Board. He agreed with F. Seagroves. If they rehear, will they overturn their decision? He felt it would probably be the same outcome.

F. Seagroves said the other thing to consider, which the courts will look at also, is how long they draw this out. This is affecting the new owners.

L. Horning commented that is why she read from the book. She looked at that, too. The Supreme Court weighs that heavily in these cases. She agreed with him re addressing the request for the rehearing, the testimony given by any abutter or individual that raises an issue- the Chair or anyone on the Board has the right to speak to that because now it is in evidence. Whether the applicant or abutter agrees with it or not. The Supreme Court is going to say what they have already said in many decisions, which is how does it balance

with the person being argued against, balance between the applicant and the person who is the subject of the complaint.

F. Seagroves said it is a unique business. He said he didn't see the problems going away, because of the internet. People start selling on the internet. How do you know when they started a business? Then he steered back to the case.

L. Horning said not necessarily. She didn't see any gross technical error by the Board or erroneous error by the Board.

F. Seagroves asked if other Board members wanted to speak. There were no other comments.

F. Seagroves asked if everyone got a copy of the letter from the attorney. He would not read that into the record.

Z. Tripp asked if it was part of the original application.

F. Seagroves said it was.

F. Seagroves called for a vote on the criteria.

1. Was the motion for rehearing filed within 30 days of the date of the ZBA decision?

L. Horning - yes

Z. Tripp - yes

K. Taylor - yes

M. Thornton - yes

F. Seagroves - yes

2. Does the petitioner have standing to file a motion for rehearing/

L. Horning - yes

Z. Tripp - yes

M. Thornton - yes

K. Taylor - yes

F. Seagroves - yes

3. Has petitioner shown that the ZBA has made a technical error or has the petitioner provided new evidence that was not available to the petitioner at the time of the hearing or the underlying action or would an injustice be created if the motion for rehearing was denied?

L. Horning - no

Z. Tripp - yes, on C he feels the application for motion for rehearing was in line with Colla v. Town of Hanover

K. Taylor - yes, because of C

M. Thornton - yes – he saw no new evidence. Doesn't see the Board made a technical error but agrees that C has bearing.

F. Seagroves – no

The Chair requested a motion.

Z. Tripp made a motion to approve Case #2013-07 for a rehearing.

K. Taylor seconded.

Final Vote:

L. Horning – no

Z. Tripp – yes

K. Taylor – yes

M. Thornton – yes

F. Seagroves - no

F. Seagroves asked if the Board wanted to set a date for the rehearing.

Z. Tripp suggested the next regularly scheduled meeting on Aug. 15. He asked whether the applicant must resubmit a package of evidence. If so, is that enough time?

Bill Parker, zoning administrator was asked to respond. He stated he was not sure what needed to be submitted. Also, he needed to check on abutter notification.

Z. Tripp suggested leaving it up to the office, but making it as soon as possible.

F. Seagroves informed the applicants the motion for rehearing was granted.