

Town of Newington, NH

ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 15, 2014

Call to Order: Chairman Matt Morton called the September 15, 2014 meeting at 6:30 PM.

Present: Matt Morton, Chair; Ted Connors; Ralph Estes; Jim Weiner and Jane Kendall, Recorder and Martha Roy, Town Administrator

Absent: John Frink

Public Guests: Newington Town Counsel, Attorney Walter Mitchell; City of Portsmouth Attorney Jane Ferrini; City of Portsmouth Attorney, Robert Sullivan; Portsmouth Deputy Manager, David Allen; City of Portsmouth Mayor Robert Lister and Councilor Ester Kennedy; Attorney Alec McEachren; Paul Bogan with Sea-3; Steve Haight of Haight Engineering; Pan Am Counsel, Robert Culliford; Attorney John Ratigan; Denis Hebert; Bernie Christopher; Chris Cross; Mike Marconi; Jack Pare; Justin Richardson; Rick Stern; Newington resident, Edna Mosher; Bill and Sandy Sweeney; Portsmouth Residents, Richard Dipentimo and Lou Salomi

Public Hearings: The City of Portsmouth's appeal of the Newington Planning Board's decision to approve the **Sea-3** site plan for property located at **190 Shattuck Way, Tax Map 20, Lot 13, and Map 14, Lot 2.**

Chairman Morton informed the public that the City of Portsmouth and Sea-3 were not able to come to an agreement in a private meeting so they were going to continue with their appeal that was postponed on August 25, 2014. He also announced that the Board was short one member, and that all four members present would be voting. He asked the City of Portsmouth and Sea-3 if they were willing to go forward with the hearing without five voting members. Attorney Alec McEachren, representing Sea-3 said they wanted to go forward with the appeal and Portsmouth City Attorney, Jane Ferrini also agreed to go forward with the appeal.

Town counsel, Attorney Walter Mitchell recommend that the Board determine whether they had jurisdiction over one or more of the appeal issues before they proceeded with discussing the merits of the appeal. He said the only jurisdiction the Board had was on the interpretation, construction and application of the zoning ordinance. He said he would provide his interpretation of the appeal document and the relationship between the questions and application of the zoning ordinance and recommended that the Board then listen to responses from the City of Portsmouth's attorney and Sea-3's attorney on each issue before making a decision.

Attorney Mitchell said there were three questions raised in the appeal and the first question was regarding the non-conforming use of the existing tanks on Lot 13 and

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Lot 2 where the zoning line passed through. He said the tanks contained hazardous materials that were not permitted by the current zoning ordinance and the appellant claimed that the expansion of the non-conforming use was therefore prohibited. He said it was a proper question and Board members should speak up if they disagreed or they would go onto the next question. All the Board members concurred that the question was valid.

Attorney Mitchell said the second question on page 10 of the appeal had two parts with the first being that the Planning Board did not require and review a new safety hazard assessment. He said the second was that the Planning Board required that an update to a safety assessment that was done 15-20 years ago be submitted to the appropriate officials, but it would not be available for public review and comment. He said the question was whether this complaint had anything to do with the interpretation, construction or application of the zoning ordinance. He said the argument was that there was an effort to pull that complaint under the language of Article 1 and Section 3 of Article 1 of the zoning ordinance regarding promoting the health, safety and general welfare of the community. He said the theory in the appeal was that those goals couldn't be satisfied if the Planning Board declined to require safety assessments. He recommended that appeal was outside the Board's jurisdiction because it was outside the meaning of the statute, which would subject all Planning Board decisions to ZBA appeals.

Attorney Ferrini disagreed with Attorney Mitchell's characterization of Article 1 and Article 3 of the zoning ordinance was not properly before the Board. She said the fundamental premise of all zoning was to protect public health, safety and welfare and even though the articles were broadly written, the specific application in the appeal was a safety study. Attorney Ferrini said the first issue was whether the Planning Board appropriately denied the numerous requests for safety studies. She said the Planning Board denied the requests, concluding that they complied with the zoning ordinance and that their approval of the application would be a benefit to the public. She said paragraph 5 of the decision stated that studies had been done previously and that they would be updated and given to the appropriate officials in Newington. She said she asked for the original file from 1975 on three occasions and was told that it was missing so it would be impossible for the Planning Board to review it for updates. She said there were six separate, all encompassing studies done by Sea-3 in 1995 that totaled 200 pages. She said the Planning Board also required additional studies in 1995 and recommendations by two experts were part of the Planning Department's approval at that time. Attorney Ferrini stated that any analysis of those 200 pages outside of a public hearing process would not be appropriate and those studies should have been reviewed as part of the determination of whether the project was compliant with the zoning ordinance and the public's health, safety and welfare. She said she was surprised that there was such resistance to a review of safety studies in 2014 that would include climate, marine safety, and evacuation in the event of a catastrophic event and believed it would be appropriate.

Chairman Morton asked Attorney Ferrini if she had a copy of the 1995 studies and she said she did.

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Attorney McEachren said he agreed with Attorney Mitchell they would be opening a Pandora's box if the Board went along with the City of Portsmouth on this point. He said the zoning ordinance was intended as a guide and their questions went back to the purpose of the zoning ordinance. He said counsel for Portsmouth was not pointing to any provision that said a safety study was required in every instance. He said there were extensive studies in 1996 for the second expansion. He said the fire chief also had an opportunity to tell the Planning Board if he didn't approve of the application.

Attorney McEachren referenced the Supreme Court's Atwater decision that said anyone that disagreed with a Planning Board decision needed to appeal within 30 days and not wait for the final decision and therefore, the appeal had not been timely filed and was not properly before the Board.

Attorney McEachren said the site already had three rail loading berths and the Planning Board had approved five. He said the City of Portsmouth was approaching the application as if it was a new project, but it was actually an expansion of an existing rail facility. He said it would be appropriate that existing studies be referenced instead of doing everything over from scratch.

Mr. Paul Bogan, Vice President of Operations for Sea-3 said to the best of his knowledge of the six studies that were quoted, the Planning Board only requested one study that had to do with the construction of the additional tank. He said the others were from the EPA, the Coast Guard, and OSHA.

Board member, Jim Weiner asked Portsmouth's counsel why they had not requested an appeal within 30 days and Attorney Ferrini said she didn't attend May 5, 2014 meeting, but did attend the May 9, 2014 meeting where there was a straw vote and a lot of discussion. She said deliberation occurred on May 19, 2014 and the Board's alternate member raised an issue of a rail study. She said that decision was not closed and it was the City's position that there was still an open issue and the request for an appeal was not untimely.

Attorney John Ratigan, representative for the Planning Board invited them to read the May 5, 2014 meeting minutes. He said the decision was the decision and it was not jurisdictional because the appeal was not filed within 30 days of May 19, 2014, but was filed on June 17, 2014. Attorney Mitchell said the timing issue raised by Attorney McEachren may or may not have merit, but it was something no one heard prior to the meeting to review closer so he recommended that the Board not take any action on that request. He said those issues could be argued later if the issue went to court, but right now the Board needed to decide if there was any jurisdiction to hear matters on the second appeal.

Board member, Ralph Estes added that their bylaws were about land use and there was nothing there about studies.

Mr. Justin Richardson of 32 Old Post Road and Planning Board member said he thought Section 5 of the zoning ordinance for both the Industrial and Waterfront districts said the building inspector would issue a permit upon findings of the Planning Board. He said the Planning Board wrestled with whether the language required a safety study and it was determined that they were only required to make a finding.

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Ted Connors moved that the Board had no jurisdiction on the second appeal. Jim Weiner seconded the motion and all were in favor.

Attorney Ferrini said their question was not just in regards to the purpose and timing of a safety study, but the second piece was that the outcome of the study would be outside of the public hearing process. Mr. Mitchell said the motion were only in response to the subject matter and had nothing to do with timeliness.

Attorney Mitchell said the third issue of the appeal claimed that the City and other abutters were prejudiced in the Board's delay in declaring the application a development of regional impact and also that abutters were not given notice in error before the variance proceedings at the end of 2013. He said he didn't believe that had anything to do with the Planning Board's decision and recommended that the Board find no jurisdiction in the matter.

Chairman Morton said he recalled discussing the matter with the Town planner and recalled that all commercial abutters were notified, but some individual homes were not actual abutters to Sea-3 so he didn't think that complaint was valid. Attorney Mitchell said the Planning Board was not mentioned anywhere in that item.

Attorney Ferrini said the issue on notice was that the Planning Board received information relative to a regional impact, and the Town of Greenland wrote to the Town planner on October 28, 2013 requesting that the project be deemed one of regional impact so the issue was not the notice of abutters, but that none of the surrounding communities received a regional impact notice so they couldn't fully participate in the hearings.

Attorney McEachren said the statute said the Board had jurisdiction on the construction and application of the zoning ordinance and this question did not relate to the zoning ordinance.

Jim Weiner moved that item 3 failed and was outside of the jurisdiction of the Board. Ralph Estes seconded and all were in favor.

Chairman Morton said the appellant could now address the first issue of the appeal.

Attorney Ferrini said the industrial and waterfront district bisected the tank that was owned by the railroad and hazardous and explosive materials were prohibited in the general industrial "I" zone, stating that LPG propane in any form would fit that description. She said the files were missing so there was no way to know the details of the findings for the original site construction in 1975, but the Planning Board findings said the expansion was consistent with a long standing use in the industrial zone, despite the use not being permitted. She said the May 19, 2014 minutes again referred to uses permitted in the industrial zone, which it said was intended to promote economic development and employment opportunities. She went on to read paragraph 51 of the minutes that said that the terms of the site plan application, the proposed location, construction and operation would not injure present or prospective development in the district or the health and welfare of resident districts in the vicinity. She said the Board

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found that this application was the type of business development that land use in the industrial district intended to protect and promote. She reiterated that the use was not appropriate for the “I” district and could be an exception in the waterfront district so long as they complied with the EPA.

Chairman Morton commented that the use had been in operation since 1975 and Attorney Ferrini said if it was a non-conforming use, then it was an expansion of that use and an intensification, which could not have a negative impact on its neighbors. She said she understood that the jurisdiction of the rails were addressed, but the City of Portsmouth was saying it put a strain on shared transportation routes, rivers, rails and roads.

Mr. Estes asked if the City of Portsmouth was asking for the removal of the operation and Attorney Ferrini said they wanted a safety study on the issues raised and the ZBA had the authority to remand back to the Planning Board for a study.

Mr. Weiner said the existing tanks were there, the proposal was for an expansion with three new tanks on the water district side that met the requirements of that district and nothing had changed on the industrial side. Attorney Ferrini said she believed the rail and truck transportation would increase on the industrial side.

Attorney McEachren said all improvements proposed would take place in the waterfront district where it was allowed. He said there would be no changes to the tank in the industrial area.

Mr. Steve Haight of Haight Engineering agreed that there would be no improvements in the industrial section of the site and showed the plan where the zoning line bisected the smaller tank and the new tanks would be placed in the waterfront. He said the Town’s transportation expert concluded that there would be no change to in the volume of trucking from the original approval because the site could not support an increase. He said the majority of LPG supply had previously been received by ship from international sources and the proposal was to increase the rail delivery capacity. He said the site had been in operation for nearly 40 years without incident.

Mr. Weiner asked if the expansion would create additional shipping exports and Attorney McEachren said they had received 180 million gallons of LPG from 12-13 ships a year, but under the new delivery configuration by rail they would probably only export one to two ships during the summer.

Mr. Estes asked if this project would alleviate the shortage of propane the region experienced last year and Attorney McEachren said the regional demand was growing at 8% per year. He said there was a declaration of emergency declared by the Department of Safety that referenced their site last year. He said the international prices were above the domestic prices and rail was the way to bring it in. He said 75% of the propane coming into New England came by rail.

Attorney Mitchell asked if there was an acknowledgement that the LPG product Sea-3 handled was an explosive and hazardous material as described under Article 5, Section 5C of the ordinance. Attorney McEachren agreed that it was flammable material as referenced under that section of the ordinance. Attorney Mitchell said the City of Portsmouth’s attorney was suggesting that the Planning Board said something contrary that was not consistent with the ordinance. Attorney McEachren said it was a non-

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conforming use. Attorney Mitchell inquired if the City of Portsmouth had suggested that this was an illegal non-conforming use and Attorney McEachren said they had not. Attorney Mitchell asked if it was an extension of a non-conforming use and Attorney McEachren said there were no changes to the tank in the industrial district and there would be no difference in how the propane would be distributed by truck from the site.

Portsmouth resident, Richard Dipentima said there was an intensification of the use of the existing tanks in the “I” zone that was inconsistent with the zoning ordinance. He said Sea-3 had received most of their product by ship with only a few rail cars and now they were proposing to receive 16 rail cars six days a week throughout the year.

Planning Board member, Justin Richardson said he made the motion on the Planning Board’s decision and the Planning Board looked at each criteria in the zoning ordinance phrase by phrase when they made their findings. He said they were concerned that there might be an increase in traffic, but noted that the truck deliveries would be limited due to the capacity to load.

Mr. Bogan said they previously used only a small number of rail cars, but it was not their primary means of transportation because rail transportation was expensive. He said they used to have more truck distribution, but international prices went up and put them out of business over the last couple of years and now they were proposing a change to their business with rail deliveries so that their truck deliveries would return to the same number as before when business was doing better. He said they could only put out 48 trucks with 16 rail car deliveries a day and the traffic study said the roads could handle that amount of traffic.

Attorney Ferrini commented that Sea-3 was a subsidiary, which could absorb losses. She said she was not convinced that Sea-3’s expansion would solely serve domestic shortages because the Planning Board minutes gave testimony from an attorney in Maine that said they could make more money exporting to foreign sources than they could by providing to the domestic market.

Denis Hebert, Chairman for the Planning Board agreed that they never approved an increase of truck traffic beyond their current loading capacity, but it would increase from slow years to busy years.

Mr. Weiner asked if Attorney Ferrini wanted to comment on the traffic issue and Attorney Ferrini said the use seemed quiet over the last couple of years and the new change would increase the traffic and that would be an intensification of use.

Attorney Ratigan said he had presented a memo to the Board to address the issue, which agreed that the Town’s traffic engineer confirmed the number of trucks and the City had not presented any evidence to contradict those findings. He said the number of ships had been a permitted use for a long time and would be changing from 12-13 to one or two in the summer.

Attorney Mitchell said the claim was that the LPG storage tank was not allowed in the industrial zone and boats and trucks had nothing to do with the issue. He said Attorney McEachren acknowledged that it was a non-conforming use that had apparently been grand fathered so the only issue in the appeal was if the plans would result in an enlargement, extension, or expansion of LPG storage in the tank that was partly in the industrial zone which was prohibited in the ordinance.

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Discussion ensued on the wording of the motion. Attorney Mitchell recommended that Attorney McEachren admitted that the storage of an explosive substance was not permitted in the Industrial zone, but was grandfathered. He said the question was whether there was an expansion in that zone. Chairman Morton commented that they hadn't expanded the tank.

Jim Weiner moved that there was no proposed expansion of the LPG storage in the industrial zone. Ralph Estes seconded the motion and all were in favor.

Mr. Lou Salomi of 142 Spinnaker Way said he thought a representative of Sea-3 had said earlier in the meeting that there would be a safety or environmental study of the study that was done 18 years prior and he wondered who would purchase a product that had a safety study that had been done 18 years ago.

Adjournment: ***Ted Connors motioned to adjourn, and Ralph Estes seconded. All were in favor, and the meeting adjourned at 7:47 p.m.***

Respectfully
Submitted by: Jane K. Kendall, Recording Secretary