

Approved at the January 23, 2018 meeting.

**GILFORD ZONING BOARD OF ADJUSTMENT
MINUTES
NOVEMBER 28, 2017
CONFERENCE ROOM A
7:00 P.M.**

The Gilford Zoning Board of Adjustment met on Tuesday, November 28, 2017, at 7:20 p.m. in Conference Room A.

Chairman Scott Davis led the Pledge of Allegiance.

Members present were Chairman Scott Davis, Regular Members Ann Montminy and Bill Knightly, and Alternate Members Larry Routhier and Glen Aldrich.

Members absent were Vice Chairman Stephan Nix and Regular Member Andy Howe.

Also present for the Town were David Andrade, Code Enforcement Officer; Sandra Hart, Technical Assistant; and Attorney Laura Spector-Morgan, Town Counsel with Mitchell Municipal Group, P.A.

S. Davis introduced the application and asked G. Aldrich and L. Routhier to sit in as voting members.

**1. Ryan and Koleen Crawford
Application #2017000538**

Applicants are requesting an Appeal from an Administrative Decision pursuant to RSA 676:5, III. Applicants are Appealing a decision made by the Gilford Planning Board at its meeting of October 16, 2017 regarding the following Planning Board Application:

ANDREW & MARTINA HOWE – Applicants propose to host agriculture-related “farm-to-table” events including serving meals on the farm and hosting weddings, receptions, and other events on the farm. Proposal includes conducting the events in a tent and/or in a barn with remote off-street parking provided off site. Property is located at 263, 285, and 300 Gunstock Hill Road on Tax Map & Lot #225-002.100 (tent site), #225-001.100 (barn site), and #225-013.000 (off-site parking area), in the Single Family Residential (SFR) Zone. Site Plan Review. Application #2015000369. **Remand of previously approved Site Plan to review added conditions of approval per agreement reached through NH Supreme Court’s Appellate Mediation Program.**

Attorney Jason Dennis of Bianco Professional Association, representing Ryan and Koleen Crawford, asked if S. Davis would recuse himself due to his relationship with Andrew and Martina Howe. S. Davis said that he didn’t feel that he would be biased or prejudiced, but said if there was anyone else that would like him to recuse himself he would. William Seed of 177 Gunstock Hill Road, said he felt strongly that S. Davis should recuse himself. W. Seed said he personally knows that they ski together and go on vacations together and that he has photos of them together on vacations. W. Seed said he feels that S. Davis should have recused himself in previous hearings as well.

S. Davis said that if he steps down there would be only four voting members tonight.

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J. Dennis said that based on what he learned, the Crawfords have submitted a valid case for recusal and he makes that request official, and will proceed with a four-member board.

J. Dennis stated that neither he nor the applicants received the certified notice of the meeting. L. Spector-Morgan said that it was mailed in a timely fashion and the statute requires only that it be mailed, not received.

B. Knightly took over for S. Davis as Chairman for this application.

Presentation

J. Dennis stated for the record that they had filed an appeal to both this board and the Supreme Court. He said that RSA 676:5.III allows a person to challenge a decision as a preliminary matter of course. He said the Crawfords are abutters to a small piece of the Howe property and live across the street from the events. He said it is pretty clear that the Crawfords were at the past meetings and if you go back through the minutes they have participated in the Planning Board meetings. He said that when the weddings took place, it sounded like they were happening in their back yard, so everything that was a nuisance or hazard to a direct next-door neighbor, those same issues such as noise, traffic, and other nuisances apply to them. He said this case has been around and around, and ultimately the decision of October 16, 2017 was more or less to say "okay" to the mediation and agreement between M. Twomey and the Howes. So the use of the farm for weddings and other events is permitted and that was what the decision was based on.

J. Dennis said the issue with that is that the mediation at the New Hampshire Supreme Court level never resulted in the case being briefed, never resulted in an argument before the Supreme Court and never resulted in any decision from the Supreme Court, which they otherwise undid or invalidated the Belknap County Superior Court's decision that the use that the Howes had put forth was not a permitted use in the Residential district where the property lies. J. Dennis said the judge made the right decision, that it's not a permitted use as agriculture and that was appealed to the Supreme Court and never undone.

J. Dennis said that as part of the resolution of this appeal, the parties agree that the decision of the Superior Court must be vacated to permit the proposed uses of the Howes' property, to allow the parties to effectuate the terms of the agreement, and to proceed with the accordance of the Planning Board decision of the Feb. 8, 2016 site plan approval. He said this means that without a current decision that is in place of the Belknap County Superior Court decision, the Planning Board is not permitted to determine the Howes' use is a permitted use. J. Dennis said the Planning Board's decision cannot legally stand unless and until the Superior Court's decision on the use is vacated and it has not yet been vacated. He said as of now the Planning Board's decision is illegal and it violated the Superior Court's order which has never been modified. He said a mediation agreement between two parties does not change an order.

J. Dennis said a decision, though based on a mitigation agreement, is not based on the law that applies to the use that has been requested by the Howes and granted by the Planning Board; so as it stands today, no legal question as to the use not being permitted was changed and the last judge to rule on it ruled that it was not a permitted use. He said he couldn't imagine a more clear case of a decision that was made that can't remain. He said it was not necessarily made in bad faith, but it cannot remain. He said the Planning Board is allowing a use that is not permitted by approving the site plan and it must be overturned. He said the Planning Board had no authority to make the decision that they did.

G. Aldrich asked what year the mediation agreement was made. J. Dennis said that it happened this year and Judge O'Neil's decision was issued in February of 2017 and the order on the motion was

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made May 3, 2017. J. Dennis said the Town had backed out at that point, so the mediation was between Ms. Twomey and the Howes, and he thinks the agreement was made in October of this year. J. Dennis said the Howes filed a motion to reconsider but in the judge's order on that motion to reconsider dated May of 2017, the judge said that he already made that decision and it hasn't changed.

A. Montminy said that the original Planning Board decision as to the use was made in February of 2016 and the appeal should have been filed within 30 days of that decision. She asked why an appeal of that decision wasn't made within 30 days of that decision.

J. Dennis said there was an appeal already on the same legal issue and though they were not an intervenor, the question that was asked of the Superior Court was the exact same question. He said whether or not it was the Crawfords or Ms. Twomey who appealed, the answer is the same. The Planning Board made a decision to approve it despite the court decision. He said at the Supreme Court there are remedies for things like that, but it is different when a decision was already made and then not complied with. He said what is being appealed today is the October 16th decision. J. Dennis said it is the same exact site plan, except with conditions and none of the conditions include no music or no alcohol. He said that in fact this issue wasn't even discussed, which he finds interesting.

A. Montminy said that she thought that by coming to a mediated resolution that the Superior Court decision was vacated. J. Dennis said that did not happen. The Howes were the ones that appealed the Superior Court decision because it was not in their favor, and the mediation removes the appeal from the Supreme Court docket, and so it's the Howes' appeal he is challenging which, he said, is his legal argument to the Board. He said what happens as a result of mediation is that the Supreme Court appeal is no longer.

G. Aldrich said what he understood J. Dennis to have said is that the Crawfords didn't file an appeal because there already was one. J. Dennis said that is correct. G. Aldrich said that does not absolve his clients from the 30 day rule within which to appeal the decision. J. Dennis said the decision was October 16, 2017 and the appeal to this board was filed in a timely manner.

B. Knightly asked if in a mediation case the parties come to an agreement and file that with the Supreme Court. J. Dennis said that he doesn't know because it could be a confidential agreement. He then explained what would happen during mediation. A. Montminy said what is the point of mediation if the agreement cannot be implemented.

J. Dennis stated that Mr. Crawford said that Monique Twomey is in the process of selling her home so that is a large part of why she is getting over the issue, so that they could sell her property.

Public Input

Bill Seed of 177 Gunstock Hill Road said that he was at the hearing when Judge O'Neil ruled against the Howes and said that agritourism was not a permitted use under the Gilford Zoning ordinance at that time. The Howes appealed that to the Supreme Court and it is his understanding that the Supreme Court, because of the mediation, did not hear the matter and did not overrule Judge O'Neil, so O'Neil's decision stands. B. Seed said that in the mediation there were three parties present including the Howes, Monique Twomey, and the Town Attorney. L. Spector-Morgan said that she was not there and that she is the Zoning Board's Attorney. B. Knightly clarified the attorneys for everyone.

B. Seed said that the town attorney or the Planning Board issued an opinion that Judge O'Neil relied on that the use "agritourism" was not a permitted use under the Gilford Zoning Ordinance at the time. L. Routhier asked if he had the document on that. B. Seed said that he didn't have it, but it is of record.

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B. Seed said that many residents came to the meetings and hadn't been heard and they hadn't been given a fair hearing.

A. Montminy said she would have to disagree with B. Seed on that because in the early meetings there was a fair number of people who were in favor of the land being used in this way. She said that later on there was a group of concerned citizens that was opposed to this type of event taking place. B. Seed said he didn't agree with her on that, but noted that all he's saying as a resident of Gilford is that he feels that he hasn't been heard. He said the Howes filed two different warrants to change the zoning and they were defeated by the residents of Gilford and yet this continues.

B. Knightly noted that he serves the selectmen, but he works for the town of Gilford and he's just an average person sitting here listening and that he does represent the town.

J. Dennis said that a hyper-technical issue was that the Planning Director John Ayer explained that the decision was based on the site plan application from the date that it was originally submitted as agriculture not agritourism. He reiterated that they don't think it's permitted under either. He said the Planning Board was making a decision based on the Zoning Ordinance definition of agriculture at that point in October of this year, not agritourism and that is why the Superior Court order is applicable because that decision was made on agriculture and not agritourism, and so he's just trying to make it clear of the particular definition that was being applied at that time of the meeting and the decision.

Ethan Wood of Patrick Wood Law Office, PLLC, representing Andrew and Martina Howe, asked the Board to table this application until the Supreme Court rules on the final docket markings and the stipulation at which point if they approve the use, the issue becomes moot. L. Spector-Morgan said she doesn't know how long the ruling would take, but she can't imagine that it will be more than a couple of weeks. Discussion ensued as to the request to table the application.

J. Dennis explained the difference between an order being vacated and a legal decision being made.

E. Wood said this board has made four decisions regarding whether or not the use is a valid use. The first was on September 29, 2015 and affirmed on December 1, 2015. There was a Planning Board decision regarding the use on December 7, 2015 which was appealed to this board on December 22, 2015 and reaffirmed on January 25, 2016, so regardless of any other argument it hears, even if the vacating of the decision is supposedly not going to eliminate the use, this board has determined that the use is a valid use. E. Wood said the point of the matter is that there have been decisions made on the use, one of which was by Ms. Twomey. He said there was no use decision made by the Planning Board. They basically said that the last decision that we have to go on is the ZBA's decision saying that it is a permitted use.

L. Spector-Morgan said that if the Superior Court's decision is vacated, then we will not have a judge's decision about the use. Sometimes this board is the final decider. If there is not a Supreme Court decision to vacate the Superior Court ruling by December 19, 2017, then the Board can continue the matter again. L. Spector-Morgan further said that to not to interrupt A. Montminy's vacation, she could participate by speaker phone.

J. Dennis said that if there is not an order by the December 19, 2017, then he would like to see the matter tabled to another date specific so that everyone doesn't have to come out. L. Spector-Morgan said that the Board would have to convene to retable it. Discussion ensued about competing use of meeting rooms on that date.

Motion

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Motion made by L. Routhier, seconded by A. Montminy, to table the application to December 19, 2017 at 4:00 p.m. Motion carried with all in favor.

S. Davis returned to the table.

He closed the public hearing portion of the meeting and continued with the business portion.

MINUTES

October 24, 2017

S. Davis decided to hold off until the next meeting on the minutes of October 24, 2017.

ADJOURNMENT

Motion made by B. Knightly, seconded by A. Montminy, to adjourn the Zoning Board of Adjustment meeting of November 28, 2017 at 7:56 p.m. Motion carried with all in favor.

Respectfully submitted,

Sandra Hart, Secretary