

**GILFORD ZONING BOARD OF ADJUSTMENT
MINUTES
FEBRUARY 27, 2007
CONFERENCE ROOM A
7:00 P.M.**

The Gilford Zoning Board of Adjustment met in a regular session on Tuesday, February 27, 2007 at 7:00 p.m. in Conference Room A.

Present were: Chairman Andrew Howe, Vice-Chairman Don Chesebrough, Charles Boucher, Richard Foley, Pat LaBonte and Alternate Robert Dion.

Also present was John Ayer Planning Director, Megan Hefler, Court Reporter, in attendance based on the request Sheehan, Phinney, Bass & Green, attorney's representing Cumberland Farms and Stephanie Verdile Philibotte, Administrative Assistant.

Chairman Howe led the Pledge of Allegiance.

A. Howe introduced the first case.

1. **Bo Realty, LLC-David Devoy**

Application submitted for an Administrative Appeal of a decision made by the Gilford Planning Board on January 2, 2007. The appeal is regarding the Planning Board's decision to accept the Cumberland Farms, Inc. application to build a convenience store and fuel dispensing station as complete and their interpretation of regulations regarding prohibited uses in the Aquifer Protection District. The property is located on Tax Map & Lot #201-015.000 at 1434 Lakeshore Road in the Commercial Zone and the Aquifer Protection Overlay District. File #Z07-02.

Bruce Marshall, attorney for Bo Realty, LLC-David DeVoy, represented the application.

A. Howe asked B. Marshall to explain how the application meets the criteria for having legal standing as an aggrieved party. He offered B. Marshall time to respond to a letter from Doug Hill and Rob Miller, attorneys for Cumberland Farms, regarding legal standing as an aggrieved party. B. Marshall said he has not received the letter and would like time to respond. A. Howe offered a deadline of March 13, 2007 to respond to the letter. B. Marshall accepted the March 13, 2007 deadline. He continued with his presentation to the Board as to why his client qualifies as having legal standing as an aggrieved party.

B. Marshall explained D. DeVoy has been paying taxes in the Town of Gilford since 1999. He discussed how the Planning Board made an error by interpreting the EPA and NHDES definitions regarding subsurface regulations and applying them to the Cumberland Farms application. He cited court decisions that refer to Webster's dictionary for a definition of a term if it is not defined in local regulations. He said the Planning Board should have Webster's definition of subsurface and not adopt another agency's definition.

A. Howe explained the applicant has to prove they can meet four criteria in order to qualify as having legal standing as an aggrieved party as outlined in the Nautilus vs. Town of Exeter decision. The criteria are as follows:

- 1) The proximity of the plaintiff's property to the site for which approval is sought.
- 2) The type of change proposed.
- 3) The immediacy of the injury claimed.
- 4) The plaintiff's participation in the administrative hearings

B. Marshall said he would draft a response on how his client can meet the criteria for the March meeting. A. Howe said when they receive Marshall's response they will review it and discuss it at the March public hearing.

A. Howe allowed Rob Miller, attorney for Cumberland Farms, to respond to the legal-standing-as-an-aggrieved-party issues.

R. Miller discussed the definition of an aggrieved party as stated in RSA 677:2 and four factors determining standing as outlined by the courts in the Nautilus vs. Town of Exeter decision. He gave reasons why the plaintiff cannot meet the four criteria for legal standing. He discussed Cumberland Farms would be ¼ mile away from the Plaintiff's business and an existing gas station can not block a competing business from locating to the area; therefore cannot claim immediacy of injury. He said a perceived threat to the aquifer is also not enough to convey standing. He discussed why Bo Realty- D. DeVoy does not have standing because he is assuming there will be a fuel leak, assumes the leak will breach the holding tanks, assumes the leak will be large enough to affect the aquifer and then it will affect Bo Realty's business differently than other businesses in the area. He said based on all the factors determining standing, Bo Realty cannot meet the four criteria. He said Bo Realty must show any injury to them is different from any other business in the area and stated Cumberland Farms believes Bo Realty does not have standing and they should not consider the request for appeal.

R. Miller discussed preemption and said Bo Realty is opposed to the Planning Board's decision because of how the board defined subsurface. He explained the proposed design and layout of the fuel storage and piping systems, and said the vaults and piping system can be visually inspected, therefore they are not subsurface. Under the EPA regulations, Cumberland Farms' system is considered above ground because it is not buried in the earth but contained in a vault and the piping system is less than 10% of the total volume. He said subsurface is not defined in Gilford regulations because the NHDES and the EPA have defined subsurface. He referred to the NHDES regulations 14.01 & 14.02 defining subsurface and said the Cumberland Farms system meets or exceeds those regulations.

He explained local regulations couldn't supercede existing federal or state regulations. He said Bo Realty is asking the ZBA to overrule the federal and state regulations and the ZBA does not have the authority to do so. He said based on that the ZBA should deny the administrative appeal.

B. Marshall spoke about the preemption issue being included in his memo to the Board to be submitted on March 13, 2007. He discussed the authority of the Town of Gilford and the ZBA to regulate local land uses and pass ordinances. He said the Aquifer Protection ordinance does not distinguish between subsurface storage and transmission. He spoke about the Planning Board distinguishing between the subsurface tanks and the subsurface transmission lines as incorrect. He said if a term is not defined by regulations, the definition must be drawn from Webster's dictionary. He said the ZBA and the Town of Gilford made the mistake of determining the subsurface tanks and transmission lines are different when the zoning ordinance treats them as the same. He said his client asked the Planning Board to determine a variance is needed.

D. Hill said Mr. DeVoy has the burden of proof that the Planning Board's decision was wrong. He said in order for the ZBA to decide the request, the ZBA should hear what the Planning Board heard. He said the engineers from Cumberland Farms could make a brief presentation to the ZBA explaining the fuel storage system.

B. Marshall objected to another presentation by Cumberland Farms to the ZBA and said this hearing is not for Cumberland Farms to make another presentation. He said the issue is the Planning Board used the EPA & NHDES definitions of subsurface and B. Marshall said the Planning Board should have used Webster's definition not another definition from another agency to apply to the local regulations.

A. Howe said they are going to uphold B. Marshall's objection to the presentation and not allow Cumberland Farms to present the application at this time. A. Howe said they would refer to the information on record that was presented to the Planning Board.

D. Hill said they should be allowed to present to the ZBA because the proposed designs are specific for this particular site.

A. Howe asked John Ayer about the information presented to the Planning Board being available for the ZBA. J. Ayer said yes the tapes and plans are available.

R. Miller spoke about the issues related to standing and preemption and said they ask the ZBA to answer each question individually with reason. A. Howe said they would.

A. Howe closed the public hearing

Board Deliberations

D. Chesebrough spoke about the issues for the Board to decide. He said the applicant is going to provide more information and they should not rule on the issue of standing until they receive the information from B. Marshall. He said the other issues could not be discussed until they review that information.

1. Bo Realty, LLC-David Devoy

Motion made by D. Chesebrough, seconded by R. Foley, to table the Bo Realty, LLC-David DeVoy application until the March 27, 2007 meeting pending the submission of additional information from B. Marshall regarding the applicant's legal status of standing.

A. Howe called for a vote on the motion. Motion carried with all in favor.

2. **APPROVAL OF JANUARY 23, 2007 MINUTES**

Motion made by C. Boucher, seconded by D. Chesebrough, to approve the minutes from January 23, 2007. Motion carried.

3. **ADJOURNMENT**

Motion made by R. Foley, seconded by D. Chesebrough, to adjourn the February 27, 2007 Zoning Board of Adjustment meeting at 8:15 p.m. Motion carried with all in favor.

A. Howe noted that this would be R. Foley's last meeting as he has resigned from the Board and thanked R. Foley for his years of service to the ZBA.

Respectfully submitted,

Stephanie Verdile Philibotte
Administrative Assistant