

**Ashland Zoning Board of Adjustment
February 12, 2014
Minutes**

Members Present: Eli Badger (**EB**) Elaine Allard (**EA**)
Don Latulippe (**DL**) Michelle Fistek (**MF**)
Patricia Tucker (**PT**) (alternate, non-voting)

Planning Board Representative: Sue MacLeod (**SM**) (non-voting)

Others Present: Don Lester (property owner); Tony Guyotte (contractor); Scott Bell and Frank McBournie (abutters); Douglas P. Hill (attorney)

Members of the Public Present: Jeanette Stewart, Norm DeWolfe, Kathleen DeWolfe, Fran Newton, David Toth

The meeting was called to order at 6:30 pm, in the Ashland Elementary School Library, by Chairman Eli Badger. Roll call confirmed that all members were present.

Chairman Badger opened the hearing for the **McBournie-Bell Administrative Appeal and Motion for Re-Hearing of Planning Board Case #2013-03, December 18, 2013, Meeting.**

Parties present for the hearing: Dr. Lester, Anthony Guyotte, Susan MacLeod representing the Planning Board, Frank McBournie, Scott Bell, and Doug Hill, Attorney.

Acceptance of Application
Discussion

PT: The parties are asking for administrative appeal for case #2013-03, December 18 meeting. That was not a meeting and not a continuation either. We left the meeting on December 4, with the Planning Board making a decision with a condition that a noise abatement plan be delivered on December 18. It's more than 30 days since the date of the actual case hearing (Dec 4).

DL: I agree with Patsy regarding the time frame, but I did not stay for the PB hearing after the ZBA meeting.

SM: We (PB) granted a conditional approval with 2 conditions attached on Dec 4. Dr. Lester would have a plan ready by December 18 Planning Board meeting. I said that it would be on the agenda; the abutters also attended. On Dec 18, the PB members said the conditions were met and that the PB had to vote to approve the site plan.

EB: The ZBA notice of decision was timely, granted the setback, and stated that the Planning Board would hear an acceptable noise abatement plan. It was up to the PB to figure out what an acceptable noise abatement plan was, at their December 18 meeting.

Minutes of Dec 4 – PB granted approval of site plan w/special exception & variance, with conditions of indicating location of outside kennel on site plan and submission of noise abatement plan to Planning Board. There was no mention of meeting being continued.

SM: There is a procedural issue. The Planning Board signed a different site plan (with kennel location marked) than what the Zoning Board had approved (without the kennel location). An attorney indicated that it should have been sent back to the ZBA because of the special exception attached to it.

Attorney: The Planning Board action was not complete until the noise abatement plan was received, reviewed and determined that the plan conformed with site plan regulations and zoning ordinance. The PB could not have approved the noise abatement on the 4th because it did not have it. The crux of the case is whether or not there is adequate thought given to the sound issues. There was nothing appealable on the decision of PB on the basis that the noise abatement was not satisfactory because it did not exist then. On the 18th, there was never a public hearing, because it was simply an administrative procedure to sign the plan. It was procedurally wrong, because there should have been a public opportunity to comment on the noise abatement plan. The ZBA's action approved an amendment to the prior special exception subject to a noise abatement plan. The ZBA's job is to decide whether the applicant has shown that they have satisfied all conditions.

[Packet of materials distributed by the abutters' attorney]

Attorney: There was nothing appealable from Dec 4. The conditions had not been satisfied and the public and abutters never had an opportunity to respond because there was no public hearing. The plans were signed on Dec 18 and we have filed an administrative appeal within that 30 day window. Our position is that there was never a final approval because the public hearing was never re-opened to determine whether the noise abatement plan complied with the ordinance and state statutes. This has been going on since 1993 when the home occupation veterinary clinic was approved by the ZBA and PB.

EB: Procedurally, there is enough doubt that the PB handled their meeting on Dec 18 properly to allow for a rehearing. We don't have all the minutes from the 1993 period.

Attorney: The 7/27/93 minutes show PB approval that Dr. Lester would live on the property and have an office. Then it was referred to the ZBA (9/28/93 minutes) which approved site plan for use only as a veterinary hospital (home occupation).

MF: On Dec 4, we did not discuss the use issue; that was not a part of our actions on Dec 4. We are discussing right now whether to give them an appeal of the PB decision (Dec 18).

PT: There was no decision on the 18th; the PB just accepted the plan as required by the Dec 4 meeting.

MF/EA: We assume they want us to tell the PB to hold another public hearing and look at the noise abatement plan. If it has changed in the meantime, then the PB has to bring it back to us. The appeal is to have the PB re-do what it's supposed to do. And if there are any changes, then it comes back to us.

Motion by Elaine Allard, second by Michelle Fistek – To accept the application for administrative appeal. Vote: Yes – 4; No – 0. Motion passed unanimously.

Administrative Appeal

Discussion

Attorney: *[reviewed the appellants' memorandum]* It's important that we get the sound piece right. We are forced by statutes and court rules to proceed this way; we are willing to consider non-litigated resolution. There would be no objection to expansion of the building or conversion of the business from home occupation to non-home occupation so long as the sound issue is dealt with by a professional engineer submitting a sound

abatement plan that ensures that sound will not be going off the property at high decibel level.

Our administrative appeal – The PB had no jurisdiction to approve site plan until it was established that the proposed expanded commercial use was permitted under zoning ordinance or was permitted by the ZBA. Animal hospitals and kennels are not permitted in this district. In 1993 letter, PB approval indicated that Dr. Lester must live on the property. The BOS 2011 letter to Dr. Lester indicated he was not approved for outside kennel purposes. The Paul Branscombe email confirms that no kennel is shown on site plan. Those issues were never approved. The other issue is whether it's used or will be used as a commercial boarding facility; there seem to be inconsistent comments on that. There has never been approval of this facility as a non-home occupational veterinary hospital. The 2013 action filed was for the expansion of the existing business, for the expansion of the building. But the underlying use has been changed and that needs to go through the process first. ZBA approved an expansion of business by constructing an addition to existing building. You approved an expanded structure for the existing use, on condition of there being a noise abatement plan. There has been no approval, with or without conditions, for a non-home occupation veterinary clinic. There needs to be a special separate proceeding for that. It needs to be sent back to ZBA and held in suspension until the underlying use is issued and, after that underlying use issue is addressed by the ZBA, then the PB would conduct a full hearing on the noise abatement plan as part of the site plan review. The Dec 18 meeting never became a public hearing (simply stamping of the plan) and there has never been a public review of the noise abatement plan. There is more detail in our memorandum; it is a complicated set of requests, which will require board members to review the town's records, the memorandum and the sound abatement information. We're not expecting a decision tonight.

MF: You asked for review of what PB did. You need to apply for the non-home vet clinic issue, because we didn't deal with that, we did not discuss that on Dec 4.

Attorney: We're appealing what the PB did – they took jurisdiction and approved a site plan for a use that has never approved. The ZBA jurisdiction is to send it back to the PB and tell them the rules.

SM: The 7/27/93 PB minutes mention Dr. Lester living on premises, but there was no vote to accept the application at that time; it was recommended that there be a joint hearing. The 7/27/93 meeting was a conceptual pre-application discussion which was non-binding to either side. Then the next set of minutes are 9/28/93. Somewhere in August there was a ZBA/PB joint meeting that made a decision as to exactly what this thing was. The September minutes merely say it is veterinary hospital with no other conditions attached to it. The missing components are the notices of decision of both boards to establish what exactly had been approved at that time.

EB: In 1993, a special exception was granted to have an animal hospital and that it would not go outside the confines of the house. The PB was of opinion that it should be somewhat like a home occupation. I was chair of the board and going from memory and trying to interpret the minutes. There would be no apartments there. The sole use would be as an animal hospital with Dr. Lester living there, to maintain a home occupation feeling. Outside kennels would not be allowed, but dogs might be out on a leash with somebody. It was established by ZBA as an animal hospital. Have there been any subsequent

approval of changes or other rulings to that special exception?--No, not through any of the Boards.

SM: A BOS letter (2012) said the outdoor kennel was illegal.

Dr. Lester: I was told I could not board dogs and I complied with that cease & desist (2011), but dogs would still need to go outside to use outside facilities

EB: Original site plan did not show outside kennels (another structure outside of the building).

Dr. Lester: When first opened, we took dogs outside with a person to go to the bathroom (in area where fence is now). Chain link fence area was put up later. Some vet hospitals do have such an area, some take them out on leashes.

ZBA members: Chain link fence is 6ft high. It should have gone to building inspector and, if more than 6ft or higher (a structure), should have then gone to PB/ZBA. Any modification or modification from 1993 to 2013 should have gone to the building inspector and then to PB and ZBA. The building inspector was in error and should have sent those items through the PB/ZBA.

ZBA members: Zoned rural residential, but taxed as a commercial property.

Dr. Lester: A local police officer lives in the apartment; apartment allowed through the bldg inspector.

PT: Do the abutters feel they should be able to review the noise abatement plan at a public hearing?

[Mr. Guyotte left the meeting]

EB: The PB is to accept a noise abatement plan. I understand Dr. Lester's position in being given permission (rightly or wrongly) by a town official for many things. His actions were in good faith, went through the procedures that he was told. He came into compliance when given cease and desist. Procedural errors have been made.

EA: Now that we know the issues, we can't let them go on.

Dr. Lester: Only the abutters have an attorney here tonight, neither the town nor myself. Will you defer this decision until meeting with town counsel? That will be my next step.

Attorney: We are not expecting a final decision tonight. One way to approach a complicated issue like this is to have application filed as it is now, approve it as it is now, review it under the ordinance as it is now and then go from there. We are most concerned about the proposal to do a major modification to this facility; regardless of what happened before it has to go through under the current ordinance. These are major changes to a commercial site in a residential zone, so must get the baseline by having an application filed for what is there now. We have to take these measures -- if the noise issue is not addressed now, and if the town approves a major change, then it's going to make the noise situation worse, because it moves the kennel closer to the appellants' home.

Attorney: Our basic concern is that there be a noise abatement plan. Both boards have a duty to decide if that plan is appropriate and adequate and public has the right to comment. Has to be public proceeding. PB has obligation to determine if the site plan regulations are satisfied, including the concern for what happens to the neighbors. ZBA has to determine if complies with special exception (6.3) provisions. We're not trying to make Dr. Lester take the vet hospital away. We are trying to make sure that when it is reconstructed, rebuilt, enlarged, altered, modified, etc. that it does not continue to or exacerbate the past impact of dog noise on the neighbors. This issue could be resolved by Dr Lester hiring an appropriate professional engineer and bringing in a plan with a professional engineer's conclusion that the noise issue will be ameliorated by special measures in construction. It

would be resolvable and then the town would have base line that is approved for going forward. Forced by statues and regulations to take these appeals and will continue if we have to.

Dr. Lester: Plans were presented by the abutters to the Board about windows, construction and different materials, so they did present what they thought was adequate. We presented what we thought was adequate. Then approval was granted. Also, there have been no other neighbors' complaints (other than the appellants) and no noise ordinance violations at my facility.

PT: The addition to the building did go before the board and was approved.

SM: The site plan that showed the expansion to the building was approved by the ZBA and setback variance was granted by ZBA. There was no other reason to not approve the addition.

PT: You (the appellants) stated at the meeting that you did not have a problem with the addition.

McBournie/Bell: as long as there are no windows, no outdoor kennels, no doors, and properly insulated. It's how the outdoor area is used (leaving dogs out there).

SM: I randomly called others in rural settings with neighbors – most would leash and walk dogs outside. An enclosure can imply that you put the dogs out and leave them unattended.

McBournie/Bell: We can hear them barking on a quiet evening from the center of the house.

PT: If noise abatement plan is approved and accepted, Dr. Lester said he would put up another fence (sound barrier) if he had to, if this noise abatement plan did not work.

Dr. Lester: Yes, the agreement with the PB states that within reason we would construct additional noise abatement materials -- if reasonable.

MF: We asked that noise abatement be done, but did not order that it be done the appellants' way.

Attorney: The way to address this issue is to have an appropriate professional come to the boards with a plan and say 'in my professional opinion, I believe this will ameliorate the sound issue.' -- someone that Dr Lester would hire who would say this is reasonable. A design by a professional in that business is what we want.

PT: It's almost too late to make him go to a sound engineer when we gave him permission to move forward as long as he submitted a noise abatement plan., acceptable to the PB.

Attorney:and to the ZBA because it's in 6.3, because your job is the special exception.

MF: We granted a special exception conditional to the PB receiving the plan.

EB: It's obvious that what we thought we said is not the way that it came out. In the past, the ZBA has given conditional approval to variances or special exceptions if the PB signs off on the condition. Mr. Hill has made it obvious in his interpretation that we haven't done that, that we should have upon the PB accepting the noise abatement plan, it should have come back to us for a hearing to make sure that the PB did what it's supposed to do.

Attorney: You can't assign to another board your responsibility to make a determination under the zoning ordinance which exclusively gives to the ZBA the task of determining whether or not the criteria in the zoning ordinance are satisfied by a special exception or variance.

PT: I would request that we contact our attorney and have him give a legal opinion to us -- including the site plan issue.

EB: The ZBA has gone on past practice of putting conditions on approvals. We need to continue this hearing. If Dr. Lester would like an attorney present, he may. And we perhaps will have our attorney also.

Attorney: Before the Board now is a request to change a commercial use in a residential district through a variance or special exception. We did not object to the variance (setback issue). The question to be asked -- Should both boards conduct a review to determine whether the noise abatement plan is satisfactory and therefore that the condition has been satisfied under the zoning ordinance and the site plan review regulations? The State statutes set up jurisdictions that are complicated. There is the zoning ordinance and procedures under the zoning ordinance for the ZBA to determine compliance with the special exception criteria. It is the obligation of the applicant to show that it's satisfied and it's the job of the ZBA to make the decision. The PB makes its own decision based on the site plan review regulations.

No action was taken on the administrative appeal.

Continuation of Hearing

EB: Abutters' notices were sent out for tonight's meeting. (A question was raised regarding whether we can continue the meeting without re-noticing the abutters.) We need to continue the meeting to a date at least 20 days forward.

Motion by Elaine Allard, second by Michelle Fistek – *To continue the meeting to March 13, 2014, at 6:30 pm, in the Elementary School Library.* Vote: Yes – 4; No – 0. Motion passed unanimously.

Attorney Hill suggested that the three attorneys (himself, Dr. Lester's attorney, ZBA attorney) might contact each other.

Disposition of Minutes:

Disposition of previous minutes was tabled.

Other Business

Rules of Procedure:

Suggested rules of procedure were previously shared by Patsy Tucker with the board. Elaine will look for rules she previously used. The ZBA needs to review and re-establish rules of procedure. Documents will be forwarded to the ZBA members to review.

Requiring Applicant to submit all plot plans electronically in addition to paper requirements:

Would that be a problem for some people? Plot plans are usually available electronically. Issues brought up – archiving of electronic plans in the office, difficult to read details of some electronic plans, some file sizes are too large for regular email. Consensus was to ask for electronic and hard copy, and see how it works.

ZBA Secretary:

We need to convince the BOS that we should have a new secretary, and other issues also need to be discussed with them. The amount allowed in the budget is \$550 for the new

year; Patsy had been charging a rate of \$15/hour. We need to request Mr. Branscombe to advertise for a secretary. Mrs. Badger will do the minutes until we have a replacement.

Monthly Work Sessions:

Mr. Badger suggested that there be monthly work sessions to review new laws/rules, procedures, rulings from other boards, specificity of conditions, etc. Consensus was to do so as needed (rather than monthly) and to share materials by email when possible.

Non-Public Session – None

Adjournment

Motion by Elaine Allard, second by Michelle Fistek -- *to adjourn the meeting*. Vote: Yes – 4, No – 0. Motion passed unanimously. The meeting was adjourned at 8:07 pm.

Minutes taken by Mardean Badger