

Town of Swanzey, New Hampshire  
**Swanzey Zoning Board of Adjustment**  
Meeting Minutes – November 26, 2012

*Note: Minutes are not final until reviewed and approved by the Board. Review and approval of minutes generally takes place at the next regularly scheduled meeting of the Board.*

The regular meeting of the Swanzey Zoning Board of Adjustment (ZBA) was called to order at 7:07 p.m. by Chairman, William Hutwelker. Present were Chairman Hutwelker, Keith Thibault, Vice Chair, Bob Mitchell, Jerry Walker, and Beverly Bernard, Recording Secretary. The Recording Secretary called the roll and read the Agenda for the meeting.

**Others Present:** Mr. J.R. Davis, representing the law firm of Sheldon, Davis, Wells & Hockensmith, PC, Sara Carbonneau, Town Planner, and several residents of the Town of Swanzey.

**Minutes:** The Minutes for the meeting of September 17, 2012 were deferred by **motion** from Thibault, seconded by Mitchell. It was noted that Mr. Cowing's name is misspelled in the minutes of August 20, 2012. All in favor. **Motion passed.**

- **PUBLIC HEARING – Request an Equitable Waiver –**  
Applicant: Andrew and Rene Bosworth  
Property Owner: Andrew and Rene Bosworth  
Property Location: 91 Wilson Pond Road, Tax Map 19, Lot 23  
Zoning District(s): Residence and Shoreland Protection Overlay District.

Andrew and Rene Bosworth request an equitable waiver to retain an existing improvement constructed without permits or a variance from Section XI.B.1. of the Zoning Ordinance. The property is located at 91 Wilson Pond Road, shown at Tax Map 19, Lot 23 situated in the Residence and Shoreland Protection Overlay districts.

**Motion** by Mitchell to allow public discussion of the letter addressed to William Hutwelker, Chair for the Zoning Board of Adjustment for the Town of Swanzey written on October 3, 2012. The motion was seconded by Walker, no discussion. All in favor. **Motion passed.** The document was comprised of a brief letter identifying accompanying documents as Objection to Rehearing and Motion to Rescind Decision Granting Rehearing, signed by Attorney G. Jeremy Hockensmith, Esquire. Attorney J. R. Davis representing Sheldon, Davis, Wells & Hockensmith, PC stood and stated that it was the opinion of the law firm that the Town of Swanzey ZBA doesn't have jurisdiction to call for a Rehearing of a decision made on August 20, 2012. Attorney Davis also stated that the law firm would be requesting a continuance of the public hearing regarding the Request for Equitable Waiver if their objection was denied, as there were only 4 ZBA members present and the applicant desired a full board. Hutwelker told Attorney Davis to proceed. Attorney Davis continued and stated that the Board did not have legal authority to grant a rehearing pursuant to NH RSA 677:2 in which it is stated that Selectmen, any party to the action or proceedings, or any person directly affected thereby are the only parties with standing; members of the Board cannot legally make the request for a rehearing. Therefore, Attorney Davis

requested a reinstatement of the original decision made on August 20, 2012 in which there were four (4) votes in favor and one (1) not in favor of granting the Bosworth's request for an equitable waiver regarding a recently constructed porch enclosure. Attorney Davis further stated that under Roberts Rules the motion to reconsider can only be filed by someone in the majority. He further respectfully submitted that the basis for a rehearing doesn't meet the statutory requirements. He stated that a rehearing should only be granted for technical error or new evidence. He stated that the Board did not meet the requirements for rehearing; a request for rehearing can only be made by a Selectman (on behalf of the Town), and the person must be in the majority of the vote.

Mitchell pointed out that the paragraph in question regarding a rehearing from NH RSA 677:2 says "any party to the proceedings" and he believed that Mr. Thibault, who requested the rehearing, was a party to the proceeding. Attorney Davis responded that the status of "party" is an applicant, similar to a litigant, someone before the Board with interest in the action. He stated that the Town's representative is a Selectman.

Hutwelker asked if any Board members had questions. None did. Attorney Davis repeated that he is objecting to the fact that the person who requested the rehearing is not from the majority which prevailed. He also repeated the contention that the only individual who can request a rehearing according to RSA 677:2 is the applicant or a Selectman if they think there was a mistake of the facts. He contended that a rehearing should not have been granted. The Equitable Waiver statute specifies that the procedures of certain identified statutes will apply. He further stated that the person who requests a rehearing has to be someone who has standing: selectman, applicant, or abutter. It was his contention that the Board did not have the jurisdiction to grant the request for a rehearing.

Hutwelker stated that according to his understanding, the ZBA can request a rehearing based on a denial of a rehearing. Attorney Davis stated that the request from the rehearing has to come from a different party, not the Board, once there is a sense of an error being committed. He stated that a Board member could ask a Selectman to ask for a rehearing.

Hutwelker recognized Sara Carbonneau, Town Planner. She stated that she doesn't disagree with the basic interpretation by Attorney Davis of RSA 677:2 but that in the case of Cox versus Nashua, the court expanded a municipal board's power to reverse itself, if the interest of justice is required. She further stated that she did not believe that the State of New Hampshire Legislature intended that Zoning Boards have no rights to rehear in order to correct mistakes. Planning Boards also have 30 days to reconsider a decision they have made. She stated that when the Court made a more expansive allowance for Boards, it has the same weight as a statute does. Carbonneau stated Cox versus Nashua was a case determined in year 2007. It was her contention that through this case, Board members do have the right to file a motion for a rehearing, Boards have the right to correct their own decisions, and they can call for a rehearing on their own. She stated that the Court would rather have issues corrected on the local level. Based on Cox versus Nashua, Carbonneau stated that the Board has the right to request a rehearing.

Attorney Davis responded that he agrees that Carbonneau quoted the case properly but he submitted that the part she quoted isn't the actual holding of the case. He referred to Page 5 of the document. He mentioned that Planning Boards (PB) are different in taking an appeal than the ZBA. Procedures are

imposed on the ZBA. He contends that the Cox versus Nashua does not apply because an abutter requested the rehearing in that case, and the abutter had standing.

Carbonneau stated that many municipal attorneys have agreed with the interpretation Carbonneau has made, i.e. that the ZBA and PB do have the authority to reconsider their decisions during the appeal period.

Hutwelker asked if there were any questions from the members of the Board. Resident Bruno Kosheleff who lives on Wilson Pond, requested to be heard. He referred to the fact that justice should be served, it's not just about making points of law. He wanted the Board to consider that. He stated that he thought that reconsideration can be done by the Board, and in every case, the majority should prevail.

Hutwelker stated that at the September hearing there were two requests for a rehearing: the first request was by Keith Thibault; the Board deliberated and did grant the request, so it was a majority of the Board. The second appeal was not considered. Resident Fletcher Abbott wanted to know what the mistake that was made that the Board discovered. Carbonneau referred Mr. Abbott to the September 17, 2012 meeting minutes. Hutwelker said that Carbonneau can provide Abbott with the minutes to read.

Hutwelker indicated that he was ready to close the public hearing but wanted to first ask Carbonneau about her conclusion regarding the issue. Carbonneau stated that two handbooks are issued by New Hampshire Office of Energy and Planning to Zoning Boards and Planning Boards which discuss Cox versus Nashua and in those books it is stated that municipal boards "on their own" have a right to request a rehearing within the statutory period of 30 days. She further stated that Attorneys at seminars have held that ZBAs and PBs do have the authority to reconsider their decisions. Hutwelker asked Carbonneau if in regard to RSA 677:2 had there been any modifications to the RSA subsequent to the Cox versus Nashua law case. Carbonneau stated there have not been any changes to the statutes subsequent to the decision in Cox. Carbonneau stated that case law has as much standing as statutes in the law. She stated that prior to 2007, RSA 677:2 did not allow Board members to request a rehearing. The authority subsequently comes from Cox versus Nashua. Since the Board looks to the Town Planner Carbonneau for advice, she is advising the Board that they did request a rehearing properly at the September, 2012 meeting.

Attorney Davis stated that he agrees that Cox is the controlling case law. He stated that it isn't about Cox being a good law, but how broadly it is interpreted. He stated that the holding by the Court was narrow in the conclusion, and that the Board has authority to reconsider so long as the party of standing requested the rehearing. He contended the filing of the request was not done properly. He repeated that the Board does not have standing. Davis also stated that the Board shouldn't make a decision on what the court might say in a future case.

Hutwelker asked why the court would open the area so broadly, and then narrow it down in conclusion.

Davis said it is a common way of writing opinions. He said that it is common for court at appellate level to weigh all the pertinent information, including dicta, which is more than needed for the case before them. He submits that the Board should act based on the statutes, not on what interpretation might

occur in the future based on other cases. Davis repeated that the ZBA members do not have the authority to request a rehearing.

Hutwelker asked Davis why would there be so much difference in the interpretation of the Cox versus Nashua case. Walker asked Davis about his contention that only three individuals can request a rehearing in the context of an equitable waiver. Walker asked Hutwelker about the other applicant who asked for a rehearing. Walker wanted to know if that person was an abutter. Carbonneau responded that the applicant was not an abutter. Hutwelker said that this issue isn't germane to this discussion since that motion was not considered. **Public hearing closed at 8:00 p.m.**

In the discussion by the Board, Mitchell stated that he would have thought the chairman of the ZBA would have been included in the list of applicants who are "party to the action or proceedings". Mitchell further stated that the Board should follow the direction of Carbonneau. Walker said he agreed with Mitchell because the Board relies on Town officials to guide them. Hutwelker asked for any other discussion. **Motion** by Mitchell to deny the Objection To Rehearing And Motion to Rescind Decision Granting Rehearing submitted by the law firm of Sheldon, Davis, Wells & Hockensmith, PC, seconded by Walker, three (3) votes in favor of the motion. Thibault abstained. **Motion passed.**

**Public hearing on the Request for Equitable Waiver opened at 8:05 p.m.** Hutwelker asked Carbonneau to comment on posting of legal notices. Carbonneau responded that Legal Notices were posted in three public places and on Town's website, as well as published in the Keene Sentinel. Also legal notices were sent to all abutters via certified mail and notices sent to Department heads. Tax Map and assessing card provided, noting that water is public and sewer private at the property.

Attorney Davis requested a **continuance** in order to have a full five member board for the rehearing of the application. Carbonneau had no further comment regarding a continuance. Mitchell indicated that the Board has entertained such requests in the past. Walker agreed. **Motion** by Mitchell to continue public hearing to December 17, 2012 at 7:00 p.m. without further notice, seconded by Walker, all in favor. **Motion passed.**

Hutwelker called a 5 minute recess at 8:09 p.m. to allow residents and Attorney Davis to leave.

Hutwelker called the meeting back to order at 8:14 p.m. Carbonneau stated that beginning in January the Planning Board will move up their meeting start time to 6:00 p.m. She asked the members of the ZBA if they wished to do so as well. Hutwelker and Walker stated that a 6:00 p.m. start time does not work for them. It was agreed that the ZBA would continue to meet at 7:00 p.m.

Carbonneau asked for support for the family of Deb Crowder, Chair of the Conservation Commission, who has been hospitalized recently.

**Motion** to adjourn by Walker, seconded by Thibault. All in favor. **Motion passed.** Meeting adjourned at 8:20 p.m.

Respectfully Submitted,

Beverly Bernard, Recording Secretary