



TOWN OF BOW

Zoning Board of Adjustment

10 Grandview Road, Bow, New Hampshire 03304

Phone (603) 223-3970 | Fax (603) 225-2982 | Website www.bownh.gov

Approved as presented on March 19, 2019.

MINUTES

January 15, 2019

The Town of Bow Zoning Board of Adjustment met on Tuesday, January 15, 2019 at 7:30 PM in the Meeting Room 'C' of the Municipal Building, 10 Grandview Rd, Bow, NH. Chair Harry Hadaway called the meeting to order with an introduction of the Board.

Members present were Harry Hadaway, Chair, Tony Reynolds, Donald Burns, Secretary, Maya Dominguez, and Stephen Buckley. Robert Ives, Vice-Chair was excused. Tom Fagan was absent. Also present were Matt Taylor, Community Development Director, and Alvina Snegach, recording secretary.

Mr. Hadaway stated that all the members present would be voting, thus appointing Alternate Buckley to vote in place of Mr. Ives and then directed the attention of the Board to Agenda item I.I.

PUBLIC HEARING

Case #101-19 (previously Case #104-17), Applicant: Stan and Pete, Inc. Refiled appeal of administrative decision interpreting the applicability of RSA 155-E to a complaint and determining that property located at 350 River Road, Block 2, Lot 159-E is not currently being used for a commercial earth excavation.

Mr. Hadaway read the item into the record. Mr. Burns addressed the Board and the audience with a statement responding to an email sent in by Mr. Phelps asking for Mr. Burns' recusal due to the fact that Mr. Burns submitted a discussion draft before the meeting on November 14, 2017. Mr. Burns explained that he felt that he had to review the details and statutes pertaining to this complex case, thus he thought it would be helpful to express his findings on paper. Mr. Burns said that the discussion draft was strictly an interpretation of statutes and analyzing the legal issues, and that he believes he would give Mr. Phelps a fair hearing. However, he wants to make sure that Mr. Phelps does not feel like he is denied a fair hearing; therefore, Mr. Burns recuses himself from this case. Then Mr. Burns sat in the audience.

Eugene Sullivan introduced himself as an attorney for Stan and Pete Inc., and gave a brief summary of what had transpired since his client initially brought on a complaint to the Town, and then an appeal to the Zoning Board of Adjustment (ZBA), about his neighbor's excavation operation. The final result was that the Planning Board (to which the case was referred by the ZBA) approved a minor modification of Mr. Phelps' site plan (presented as an as-built) with mutually agreed upon conditions and the appeal was dismissed with a right to refile. Mr. Sullivan stated that his client does not believe that the site plan approval conditions have been enforced and that is why the appeal has been refiled. Mr. Sullivan also added that he was not personally

notified of this meeting until the day before, and the engineer Mr. Scamman had an earlier commitment and was not able to attend tonight; therefore, he would like to request another opportunity to discuss the issue with Mr. Phelps to see if the parties could move forward with the agreement, or allow his client to present the appeal de novo with the engineer present. Mr. Sullivan added that he felt that it was not fair to continue this discussion given that some members were not on the Board during the first round of review.

Mr. Buckley noted that the ZBA could simply make a decision on the merits of the Administrator's Decision and the applicability of RSA 155-E to this particular case, as he believed that this was a dispute between the two neighbors, which the ZBA should not be in the middle of. Mr. Buckley added that he would not second guess the Administrator's decision; however, should the applicant request another hearing, to which he would bring the engineer to provide more details, the Board may do that; although, there should be a time when this has to come to an end.

Mr. Sullivan responded with a statement about factual issues that support their view of this excavation as commercial in nature, which, in his opinion, was substantiated by Mr. Burns' analysis. He also stated that the Town of Bow put the ZBA in the position to regulate the matters pertaining to RSA 155-E; therefore, he would like to request that the engineer presents their case at a future hearing.

Ms. Dominguez elaborated on the issue of hearing the application de novo and that being a constraint on the ZBA's ability to simply decide on the merits of the decision tonight. She also noted that if that would be the case, the past record will not be part of the review. However, if the ZBA was asked to enforce the agreement between the two parties, it was not in the position to do so.

Mr. Sullivan agreed with Ms. Dominguez about the enforcement of the agreement. He believes that the application is de novo, as it has been dismissed with a right to refile and that is what his client was doing.

Mr. Hadaway opened the public hearing at 7:46 PM. The following individuals addressed the Board.

Rick Geddes, 27 Dunbarton Center Road, introduced himself as an abutter and said that he was aware of the clean up on Mr. Phelps' property since the beginning. He made a drawing of the side cut of the 'cliff' that Mr. Phelps' excavated in an attempt to clean up the side of this property where erosion was creating an unsafe situation. The job was not commercial in any sense as it was performed over a weekend and by Mr. Phelps' father in law, who took the fill (about 20 loads) to use at one of his jobs, thus, there was no exchange of money. Mr. Geddes also added that there has been a lot of rain since the slope was regraded and there were no issues with erosion. The slope soils are sandy and the water does not collect in this area at all. Mr. Geddes concluded that if the RSA-155-E was to apply to Mr. Phelps, it would mean that any in ground pool excavation would be considered a commercial excavation.

Mr. Sullivan responded by showing picture of trucks filled with sand/gravel and an aerial image of before and after conditions on Mr. Phelps' property, claiming that the site had been expanded. He also said that the barter exchange did take place, where Mr. Phelps expanded his commercial

site in exchange for the fill (that is quite valuable these days) that his girlfriend's father took to use for his commercial operation. Mr. Sullivan said that the statute does not allow to disturb a reclaimed or abandoned excavation and go very close to someone else's slope, and the work that Mr. Phelps did now endangers the safety of his client's operation as the buffers between the two lots are too thin and slopes are too steep.

Ms. Dominguez asked Mr. Sullivan to reiterate his statement about the commercial nature of this excavation in light of the swimming pool analogy made earlier.

Mr. Sullivan responded that it would depend on how much soil is taken and for which purpose. The pool site will not produce as much soil as in case of Mr. Phelps, and having the pool within ten feet of the property line will be problematic even given the fact that gunite would be used to reinforce the edges. He added that his clients would not be opposed if a wall was built to reinforce the newly created slopes to prevent a piece of heavy equipment going down the slope accidentally. Mr. Sullivan also stated that if the pool site is located at a reclaimed or pre-existing excavation site, then any soil taking would be considered commercial.

Mr. Geddes spoke about the right of way along the southeastern side of Mr. Phelps' property, which he owns, and explained how and where Mr. Phelps regraded the slopes along the sides of his property. He noted that there are trees growing on all three sides of Mr. Phelps' lot that would also serve as a buffer. In his view if anything was to go over the banking it would be only due to something extraordinary happening like equipment failure or someone impaired at the wheel. He reiterated that Mr. Phelps only tried to make the edge of his property safer and cleaner and in no way made it more dangerous for his abutters. The slopes have been seeded and there is brush starting to grow on them. Mr. Geddes also disagreed with the notion that the ZBA would put itself in a position to consider any earth taking an excavation.

Mr. Buckley asked Mr. Taylor about his decision that he rendered on September 17, 2017 in which he concluded that this was not a commercial excavation. Then he read the provisions of RSA 155-E2-a which states other excavation permits exclusions such as work incidental to construction of a parking lot, and asked Mr. Taylor if the area Mr. Phelps excavated was deemed to be a parking lot, would that provision apply to him?

Mr. Taylor said that he viewed the job as incidental to the business and that it was just a cleanup.

Peter Emanuel, the co-owner of Stan and Pete, Inc. said that Mr. Geddes' depiction of the issue was not very close to what had actually happened and he was not sure if he would be able to challenge his statements at this meeting or wait until the case is presented fully by an engineer as it had been discussed before. He also answered a question posed by Mr. Hadaway about the agreement the two parties had reached and said that, in fact there is an agreement, later substantiated by the Planning Board, with conditions that the other party never completed.

Mr. Phelps, 350 River Road, interjected and said that he does not have any money to throw at things like that and he made sure that the applicant is aware of this fact.

Mr. Taylor said that the Planning Board served in a referee capacity in this case as it is a matter between the two private parties. It was the Planning Board's call to treat this as a minor site plan modification, and there was an agreement that was worked out between the parties, which the

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Planning Board found acceptable. Mr. Taylor tried to explain to Mr. Sullivan in a previous conversation that at this point he was not sure what could be done as the Planning Board does not enforce anyone acting on an approved site plan. He also said that the modification submitted was not an as-built plan, as Mr. Sullivan had claimed earlier, but as a plan that showed that the things that would need to be done. The as-built for this site that is on file with the Town from the year 2000 and it shows the graded area as just sand. That was the reason why Mr. Taylor was at a loss as to how to proceed with this kind of an enforcement where the work has not been done yet. And he also said that he believed that this was a dispute between two parties and it would be hard for any Board to get involved.

Mr. Emanuel and Mr. Sullivan both stated that the work has been done and that Mr. Phelps expanded his site, and was supposed to finish up with remediation measures that were the conditions of approval of the site plan modification. Mr. Sullivan added that Mr. Burns and Mr. Taylor discussed whether other provisions of the Bow Zoning Ordinance would apply and one of them said that he believed that this could be viewed as something that would require a site plan modification. Mr. Sullivan agreed with that statement and continued to say that this commercial site was expanded and it could be seen on the photographs that it is being used for further commercial use. The Planning Board filing that Mr. Phelps submitted was an as-built and also showed that they moved the lot back. The cleared area was supposed to be reseeded and restored, none of which has been done as of yet. There was a site walk that the ZBA conducted last year and many of who were present here today saw the amount of work that has been done. Mr. Sullivan concluded that his client would like to present all this information in full.

There was a short discussion about notification to Mr. Sullivan and his name or signature not being present on the ZBA application.

Ms. Dominguez made a motion to close the public hearing. Mr. Buckley duly seconded. Mr. Emanuel noted that he disagrees that this was simply a disagreement between two parties as there are RSA's that are involved and state law has been broken. He added that the two parties also had an agreement and one of them has not lived up to it.

Mr. Hadaway then closed the public hearing at 8:09 PM.

Ms. Dominguez said that even though the ZBA had the ability to make a decision at this meeting, given the contentious nature of this issue and the applicant's request to hear the application de novo at a future date, it would be best to have a future hearing and start with a clean record. She added that she saw some people's concerns about the Board's involvement between the two parties, she believed that there is a need to provide a decision that could either be taken to court for enforcement or appealed. There were issues that are beyond the control of all present here that prevent the matter from being resolved quickly.

*Ms. Dominguez made a motion that the application should be heard de novo with all the witnesses both parties wish to bring at a later date.
Mr. Buckley duly seconded.*

Discussion ensued about the need to conduct another site walk, which would require to wait for snow to melt. General consensus, upon agreement of the applicant to waive the timelines, was that the public hearing should be continued to May 21, 2019.

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Ms. Dominguez made a friendly amendment to her motion to continue the public hearing for the application #101-19 to the regular ZBA meeting on May 21, 2019 at 7:00 PM at 10 Grandview Road.

Mr. Buckley duly seconded and motion passed with a unanimous vote.

Annual report

The members reviewed a draft of the draft 2018 ZBA submission for the Town Report and general consensus was that it did not need any changes.

REVIEW OF MINUTES: 10/16/2018

Mr. Hadaway read the item into the record. Minutes were reviewed and no changes were made. Motion was made by Mr. Buckley to approve the minutes as presented, duly seconded by Mr. Burns, and passed by a unanimous vote.

Motion made by Mr. Buckley, duly seconded by Ms. Dominguez, and unanimously voted to adjourn the meeting at 8:15 PM.

Respectfully submitted,

Don Burns, Secretary