

TOWN OF BROOKFIELD, NEW HAMPSHIRE
Office of the Zoning Board
PO Box 800, Sanbornville, NH 03872
August 13, 2009

MINUTES OF PUBLIC HEARING

Attendance: Jay Badger, Dick Peckham, Tom Lavender and Richard Mauser. Alternates: Dulcie Lavender and Bill Nelson. Selectmen Representative Ernie Brown.

Absent: Paul Tremblay

ZBA Attorney: Susan Slack

Reporter: Heather Terragni

Members of the Public: 32

Call to Order: Tom called the meeting to order at 7:00 PM. Jennifer led us in the pledge of allegiance. Bill Nelson will sit in for Paul Tremblay.

Tom opened public hearing. Jennifer read appeal, case #09-1; appeal from an Administrative Decision filed by Craig Evans. He is appealing the Planning Board's (PB) refusal at 06/08/09 meeting to require site plan review of Mr. Bourdeau and/or Moose Mountain Recreation, LLC regarding the planned improvement and activity at Map 30 Lot 2.

Attorney Callen, representing Craig Evans provided board with written submission regarding appeal from Administrative Decision: Former Moose Mountain Ski Area; the submission includes exhibits A-J. He explained that he will speak to the points of the written submission so the minutes of the hearing will be clear but asked the board to standby the written submission in the long run because it is more accurate. Attorney Callen began by apologizing for the misspelling of Mr. Bourdeau's name in written submission.

Attorney Callen began his presentation. Reasoning of two appeals filed were explained; appeal of decision made by boards of town officials regarding interpretation of provisions of the Zoning Ordinance (ZO) must be appealed to Zoning Board of Adjustment (ZBA) and appeals regarding PB decisions interpreting site plan or their other procedural regulations must appeal directly to Superior Court. The motion and decision made on June 8, 2009 by the PB was that the Mr. Bourdeau be required for site plan review both in accordance with the site plan regulation and the ZO, because this motion was denied an appeal has been filed in superior court regarding misinterpretation (misapplication) of site plan regulations, a second appeal regarding the planning board decision that he feels is a misinterpretation of the provision of the ZO regarding site plan review was filed to ZBA as required by law. The second is the hearing in front of us today. Craig Evans is appealing this PB decision as an individual not as a Selectmen board member. Attorney Callen explained that Craig Evans stood down from any Selectmen decisions regarding Moose Mountain. He further explained that anyone aggrieved by a planning board decision is allowed to appeal this decision to the Zoning Board of Adjustment. Mr. Evans close proximity to the Moose Mountain property provides impact from noise, light, storm water run-off and any number of other impacts caused by development.

Authority for the appeal reviewed; our own town zoning ordinance under article V, Section A provides after appeal authority for the ZBA to reverse or modify the decision of the PB. He also

explained the ZBA has authority to cease authorized operation in recreation zone until site plan review has been performed.

Legal context reviewed; RSA 674:43 provides authority for the town to require site plan review. Purpose of site plan review explained; it gives PB authority to allow legal, permitted uses within a district allowing the PB to decide how legal, permitted uses will fit into an area and provides PB to ensure adequate parking, lighting, buffers, landscaping, etc... are attended to.

Attorney Callen read Peter Loughlin's statement regarding site plan review; "Site plan review is one of the most useful techniques in modern land use control. It is an extremely important device to insure that uses which are permitted by the zoning ordinance are constructed on a site in such a way that they fit into the area in which they are being constructed without causing drainage, traffic, or lighting problems. Site plan review is also useful in preventing visual blight due to lack of landscaping." "The purpose of site plan approval is to assure that the details of a site plan for an authorized use of a particular property will be such that the development of the property will not offend the public interest." Attorney Callen reviewed some of Loughlin's examples of public interest; protection from danger or injury to health, safety, or prosperity of abutting property owners or the general public, parking and emergency access, effects on ground water...

Factual background relevant to this appeal reviewed, this includes lengthy chronology of town records detailing history of Moose Mountain from 1961 – present compiled by Craig Evans. Attorney Callen reviewed a few of the records starting with Moose Mountain Ski Area beginning in 1961, detailing several cease & desist orders issued to Moose Mountain Ski Area to in 1993 when the town hired SNO.Engineering (SNO.E) to research viability of Moose Mountain Ski Area. This resulted in a document compiled by SNO.E which concludes the Moose Mountain is not suitable for commercial development. Other issues in 1994 & 1996 regarding the property were detailed to the abandonment of the ski area around 2002. All of the details regarding this history are included in the written submission. Recent history was then reviewed, including property being lost to foreclosure and the 2007 charette performed by the Forest Society. Attorney Callen detailed changes beginning in 2008 when Mr. Bourdeau takes ownership of the property. At February 11, 2008 PB meeting Mr. Bourdeau introduces himself as purchase and sales agreement holder of Moose Mountain Ski Area and presents his ideas for the land. At this meeting the plans presented were snowboarding, tubing, skiing and snowmobiling during winter months, and events such as car shows during the summer months, other things mentioned at this time were introduction of night skiing and snowmaking as well as renovating the lodge for food service and wishes to serve beer and wine. Attorney Callen explained the items that come along with food service; including deliveries, trash pickup, employees, parking. At this meeting the planning board mentions site plan review may be required. At April 27, 2009 PB meeting Mr. Bourdeau appears before the PB and explains that phase I, renovation of lodge, is complete and he plans to begin on phase II. His plans including commencing snowboarding and tubing activities and events such as car shows, weddings and graduation parties. At June 8, 2009 PB meeting, Attorney Callen briefly discusses details regarding water removal from Hanson Brook and motion to require site plan review from Mr. Gaver who in his motion cites the ZO and site plan regulations for proposed activities and their related construction. Exact motion is included in minutes of June 8, 2009 meeting. The motion is defeated 5 to 2.

Legal Background relevant to this appeal reviewed. Attorney Callen reviewed March 1993 amendment to the Zoning Ordinance (ZO) declaring the area a recreational zone which at this time

included multi page provisions regarding the recreation zone, the 1996 change reduced the recreation zone to one paragraph and adds site plan review regulations. Attorney Callen reviews the changes in ZO from 1993-1996 and concludes from his research that the purpose, meaning, and context in the 1993 ZO is still the same but the details are now covered by site plan review. He then details the purpose of site plan review per our 1996 ZO. 1996 ZO article II, section B.1 reviewed, this details permitted uses in a recreational zone. Given the proposed uses for the site; commencing snowboarding and tubing activities, car shows, weddings and graduation activities, the above provision is the one in which Craig Evans feels the PB misinterpreted at June 8, 2009 meeting.

Other relevant ZO provisions reviewed. Issues of abandonment and its relevance reviewed. A non-conforming use discontinued for more than one year cannot be re-established. Some PB members have indicated that site plan review was not required because ski area is old use. Fact that proposed uses have not been in operation for more than 15 years pointed out. Attorney Callen pointed out that nothing being offered currently or planned to be offered has existed before abandonment, so a change of use has occurred.

Attorney Callen reviews how the law states the ZBA and PB are obligated to interpret and apply the provisions of the ZO. He also explains that the PB cannot permit a non-permitted use; this is only allowed through a ZBA variance. He reviews the purpose of Site Plan review explaining it is the process and mechanism to ensure public safety. Attorney Callen reviews some of the future plans and how they will require parking; he goes into great details of how parking should be done in a manner to protect public safety, avoid run off, ensure fire lanes are not blocked, etc.; these issues are usually covered by site plan review. Snow making reviewed and what is required to handle this operation; power, water, equipment. Refueling machines reviewed and the facilities required to provide this service. He feels these plans and details are covered by site plan review. He also adds that none of the proposed uses have been in existence for the last 18 years and are such not current uses. He then refers to article II, section B.1 of our ZO. He feels the only way to ensure the obligations of the ZO are met is through a process and this process is site plan review. Interpretation of the ZO reviewed, plain and ordinary interpretation of the words is required, and the words should be interpreted not in isolation but as a whole.

Attorney Callen details his argument and how it supports this appeal and explained that when a decision is made by the town not to require site plan the town is powerless to stop things that are not done in a manner suggested by site plan. After reading Selectmen and PB minutes he has determined why the PB is wrong and understands the fallacy in their reasoning. Attorney Callen reviews some of the points raised by the PB in defense of not requiring site plan review citing no site plan review required in this zone because some of uses were once allowed in this zone so no change is use or no need for site plan review because some of uses proposed are permitted. He points out that site plan only pertains to permitted uses. He concludes that these assumptions are false and feels the reasoning behind not requiring site plan review is wrong. Some final points were made including that if the ZBA makes a decision to require site plan review the PB will determine what is allowed; the ZBA will be involved only if non-permitted use. He adds that he does not feel some of the proposed events qualify as active recreation. In summary Attorney Callen asks the ZBA pursuant to ZO Section V.d to reverse the PB's June 8, 2009 decision, and find that site plan review is required for all of Mr. Bourdeau's newly proposed uses that are permitted as a right in the Recreational Zone and in addition as the ZBA to find that certain of the activities proposed for this Zone are simply not permitted, even with site plan review, as they are not "Permitted uses" of this Zone but asks the ZBA to primarily focus on reversal of site plan review.

Tom asked the board for questions; there were none.

Laura Spector, Planning Board Attorney thanked the board for granting the PB the time to review the appeal. Attorney Spector provided a written submission to the board with details and exhibits supporting the PB's position regarding the appeal of Craig Evans. She explained that it is the PB's position that this board lacks jurisdiction to hear Mr. Evan's appeal of the PB's decision that no site plan review is required for the reactivation of ski activities at Moose Mountain for two reasons. First, the PB's decision did not involve the interpretation of the zoning ordinance, and therefore, the appeal is not a matter within this board's jurisdiction. Second, the appeal to this board is untimely, in that it was taken more than 21 days after the April 27, 2009 decision, and therefore it must be dismissed. She adds, even if this board did have jurisdiction to hear this appeal, the appeal must be denied on its merits. Attorney Spector further explained that the PB's decision is based solely on site plan regulations; they did not interpret the ZO. In addition she adds that the June 8, 2009 vote should not be considered. Determination of when site plan review should be used reviewed, with Attorney Spector explaining this determination comes from the site plan regulations not the ZO. Jurisdictional issues reviewed with Attorney Spector providing the basis for why this appeal should be dismissed based on jurisdiction. If the ZBA does not agree with this then the appeal should be dismissed based on timing. Attorney Spector reviewed the PB's first vote on April 27, 2009 regarding requirement of site plan review, the vote was defeated 4-2, under the rules of the ZBA at this time appeal of this decision was to be taken within 21 days of the vote. She cites a NH Supreme Court case, Fisher vs. Dover, a board may not take a second vote on an issue it has already decided unless there is a material change in the circumstances or the second proposal materially differs in nature and degree from the first proposal, explaining that if repetitive votes could be taken on the same application or issue over and over again, there would be no finality in any decision any board made. Attorney Spector has concluded that the revote that occurred on June 8, 2009 has no legal standing. With regards to the 21 days to appeal Attorney Spector explained that the ZBA can grant a waiver of their rules but in this instance no waiver of the deadline has been requested.

Attorney Spector ends by stating that if the ZBA continues even after the hearing the points she has raised she asks the merits of Site Plan Regulations be reviewed in detail, specifically Article V. She also reviewed the three points of when site plan approval is required.

Before concluding Attorney Spector touched on a few of the issues raised by Attorney Callen. Regarding the abandonment issue she explained that yes the site was abandoned but the use never changed. Additions are being added like tubing but times have changed in the ski market, she views this as an additional service to the skiing market. Regarding traffic increases, Attorney Spector explained that traffic alone is not enough to require site plan review, regarding special event this is an issue for another time. She concludes that there is sufficient evidence to support the Planning Board decision.

The Board had no questions of Attorney Spector. Attorney Callen addressed the points raised by Attorney Spector. Regarding jurisdiction he feels she is wrong, the motion specifically mentions ZO. Regarding un-timeliness he finds this point false explaining that the vote in April was a similar, less explicit vote, in June the PB did not refuse the new motion, they voted so the new motion stands and he feels the appeal is timely. He reiterated facts he raised earlier; the previous owner defaulted on the mortgage so the property was clearly not being used as a ski area and there was no continuous attempt at such. He ended stating he feels this case is properly before the ZBA. Attorney Spector

responds; in the case of Fisher vs. Dover the ZBA took the second vote and then the Supreme Court determined the Board had no authority to take this vote.

Attorney Sessler introduced himself as representing Moose Mountain Recreation, LLC and Bob Bourdeau. He stated his client joins in the PB position; regarding timeliness he feels this is untimely. Attorney Sessler presented six exhibits to the board and explained the purpose of these exhibits.

- Exhibit A - Minutes of 4/27/09 PB meeting: Attorney Sessler feels this vote should have triggered appeal.
- Exhibit B – May 21, 2009 Granite State News article: Details Bob Bourdeau describing plans for Moose Mountain Recreation.
- Exhibit D – Minutes May 12, 2009 Selectmen’s Meeting, indicates Mr. Evans awareness of PB decision regarding site plan review.
- Exhibit E – Agenda June 8, 2008 PB Meeting: No mention of Moose Mountain Recreation
- Exhibit C – Town of Brookfield Zoning and Land Use Ordinance 1993 & 1994, the portion regarding the recreation zone. Attorney Sessler asked the ZBA to do the following when interpreting the Ordinance:
 - a. Read own ordinance very carefully
 - b. Read 1993 & 1994 ordinance regarding recreation district
 - c. Look at the history of the current ordinance

Attorney Sessler read the permitted uses from the current ordinance and reminded the board that the only property in the recreation zone is his client’s property and the ordinance provides no definition of active recreation. He further explains that the ordinance has nothing on how to deal with impact and the only mention of site plan in the provision is the last sentence. The provision does not require site plan, it mentions it. Brief discussion on what innovative design and development entails; he feels his client’s plans to not fit this criteria. Further time was spent on the 1993 ordinance in which permitted and unpermitted uses were broken out. He concludes stating active recreation would not trigger site plan; there are no plans for a new building, what was there before is being used. Regarding abandonment he feels this is not applicable, this only deals with non-conforming uses or buildings. He concludes stating if expansions are done his client understands site plan review would be necessary. There were no questions for Attorney Sessler.

Mr. Bourdeau addressed the Board; he explained that if the board continues to hear this case he wants to clarify a few inaccuracies. He explained Attorney Callen took years of history and documentation and only presented the negative items. Regarding the SNO.E report discussed by Attorney Callen, Mr. Bourdeau explained this report was ordered because the Town wanted a ski area and corrected what was early reported and stated the report concluded the Mountain is not viable as a full blown ski area; he explained he is not proposing a full blown ski area he is proposing a tubing/snowboard park. He explained that nothing he is doing is innovative; he is just making necessary repairs. Regarding parking he feels there is no issue here, there is adequate parking. On the topic of lights and snowmaking; the equipment, including lights on the poles are still in place. He briefly touched on the issue of abandonment explaining that horseback riding and snowmobiling have been going on for the past 18 years. He further explained that the town has a history of showing support for the ski area. Regarding site plan review Mr. Bourdeau explained that if at the first PB meeting when he explained his plans for Moose Mountain Recreation the PB would have required site plan review he would have done it, now that he has begun, explaining he opened the restaurant last year is not the time to now demand site plan review. Regarding mortgage default he explained that the default occurred 2 years ago, not 18.

Bill Nelson, member, asked for clarification regarding 1st PB meeting in which tubing and snowboarding was mentioned but at 2nd presentation weddings were discussed. Mr. Bourdeau explained that he feels weddings are consistent with the property and area what occurs at other area ski areas.

Attorney Callen had a few comments regarding Sessler's presentation. Regarding June 8, 2009 PB agenda, he stated they are not appealing Moose Mountain and there is no requirement they be notified. Regarding earlier ZO, he feels the ZO was amended and this is all that stands. Regarding innovative design he feels site plan review is how and where innovative is determined. Attorney Callen concluded stating it is the ZBA's job to interpret the ZO and encouraged them to continue this meeting for deliberations and to confer with their attorney regarding legal arguments raised.

Meeting open to public comments.

John Capristo asked as a taxpayer what this lawsuit will cost him. He further added he has a problem with a Selectmen, who was hired by the people doing this and feels everyone should have known that at some point the Mountain would be opened again.

Mary MacKillop has concerns over the cost and feels that Mr. Bourdeau can also sue the town, what will this cost? She explained the Planning Board could require site plan review and waive all of them. She finished stating Mr. Bourdeau was led to believe he could begin and that the town zoned this property recreation.

Ed Nason spoke as an abutter and citizen. He explained he is interested in preserving the history of the town; the ski area has existed since 1969. When the ZO changed to include the recreation zone it was always referred to as the Moose Mountain Ski Area. He further explained that it is designed as a ski area and provides adequate parking. He ended stating even with all the great things proposed her feels we will never get to the capacity that the Mountain once saw. He will do everything to see this continue.

Janet Murfey spoke as PB chair, regarding Attorney Callen's reference to the PB acting foolishly she feels careful thought was given and the PB acted appropriately.

Geary Ciccaronne feels that we should act in the best interest of the town and put our own self interest aside.

Brad Williamson asked if site plan review will be required of our new playground that we are fundraising for. Morally speaking this should require site plan review.

No further public comments.

Public Hearing closed 8:55 PM

After brief discussion regarding Attorney and Board member schedules a decision was made to hold deliberations on July 27th at 7:00 PM.

MOTION: Dick Peckham made a motion to continue meeting until July 27th at 7:00 PM in order to deliberate and come to a conclusion on case, seconded by Bill Nelson. A vote was taken, all in favor. Motion carries.

Meeting continued 9:00 PM.

Respectfully Submitted,

Jennifer Sonricker
ZBA Secretary