

TOWN OF BROOKFIELD, NEW HAMPSHIRE  
Office of the Zoning Board  
PO Box 800, Sanbornville, NH 03872  
October 22, 2009

**MEETING MINUTES**

**Attendance:**

Members: Present - Jay Badger, Dick Peckham, Tom Lavender (Chairman) and Richard Mauser. Absent - Paul Trembley

Alternates: Dulcie Lavender and Bill Nelson.

Selectmen's Representative: Ernie Brown

Reporter: Heather Terragni

Members of the Public: 20

**Call to Order:** Meeting called to order by Jennifer, ZBA Secretary at 7:00 PM, she called the roll. Paul Tremblay absent, Tom asked Bill Nelson to sit in for Paul.

Tom explained that all ZBA members including alternates are allowed to speak, only members are allowed to vote. Two items were before the board this evening; Motion for Rehearing requested by the Brookfield Planning Board regarding Zoning Board's decision on Craig Evan's appeal of Planning Board decision and Motion for Re-Hearing requested by Moose Mountain Recreation, LLC regarding Zoning Board's September 2, 2009 decision regarding Craig Evans appeal.

Based on the order that the appeals were received by the chairman the Planning Board motion for re-hearing was handled first.

**Motion for Rehearing requested by the Brookfield Planning Board regarding Zoning Board's decision on Craig Evans appeal of Planning Board decision:** The chairman reviewed Hooksett Conservation Commission vs. Hooksett ZBA court decision dealing with standing; it was found that the Conservation Commission did not have standing to ask for a rehearing from the ZBA. All members of the board had previously read the Hooksett decision. Brief discussion ensued amongst the board; the legal standing of the Hooksett finding was read. RSA 677:2 was referred to which specifies that the Board of Selectmen (BOS) or any party directly affected thereby can apply for a rehearing. The chairman explained that no governmental board except for the BOS can request a rehearing.

***MOTION:*** Jay Badger moved to not grant rehearing to Planning Board, seconded by Dick Peckham. Brief discussion ensued over wording of motion. No further discussion. Richard Mauser seconded motion. Dick Peckham withdraws his second. A vote was taken, all in favor. **MOTION CARRIED.**

**Motion for Re-Hearing requested by Moose Mountain Recreation, LLC regarding Zoning Board of Adjustment's September 2, 2009 decision regarding Craig Evans appeal:**

The chairman referred to September 23, 2009 motion for rehearing filed by Sessler Law Office, PLLC and read the initial paragraph of the request, the six items in support of the request were

handled one at a time. Each of the six requests from the September 23, 2009 motion for rehearing were read by the chairman before being reviewed by the board.

1. *The Zoning Board of Adjustment has no statutory authority to order the Brookfield Planning Board to take any action including but not limited to ordering the property owner to file a site plan and setting the dates for the submission and review. Even if the Zoning Board of Adjustment had the authority to order the Planning Board to review a specific site plan prepared by Moose Mountain Recreation, LLC, the dates and deadlines established in this order are unrealistic and unreasonable and therefore unlawful.*

The board reviewed dates and deadlines, the chairman explained that he feels if the dates and deadlines were in dispute this could have been brought to the board to discuss and possibly extended. Statutory authority discussed briefly. Dick explained the state RSA's and court decisions make it extremely clear that a rehearing of decision by ZBA should not be taken lightly and that the burden of proof lies with the person making the motion for rehearing and that granting of rehearing should be based on a procedural issue, new information or the ZBA was unlawful in their decision. He feels each of the six requests should be reviewed against the above facts to see if they meet the above criteria. Brief discussion continued regarding item #1.

***MOTION: Dick moved not to consider valid motion number one under rehearing request, seconded by Jay Badger. No further discussion. A vote was taken, all in favor. MOTION CARRIED.***

2. *The Zoning Board of Adjustment's decision is unlawful and is contrary to the plain language of the Zoning Ordinance which provides that 'in compliance with RSA 674:43, the town seeks to encourage innovative development and design through the use of site plan review process.' The proposal discussed by the Planning Board as submitted by Moose Mountain Recreation, LLC did not involve any development of the property nor did it involve any design of any buildings, improvements or amenities. The facts presented to the Board clearly establish that the applicant intended only to use the existing buildings, improvements and amenities which have historically been used for active recreational purposes on the property. Only one piece of property in town is zoned recreation. That property is owned by Moose Mountain Recreation, LLC. The historic use of this property is that it has only been used for recreational purposes. To now require site plan review where there is no development or design taking place is unreasonable, unlawful and discriminatory.*

Board discussions ensued over use of property and that the prior use was allowed through a variance and this variance expired 12 months after operations at Moose Mountain Ski Area ceased and use abandoned. The chairman explained the 1996 Zoning Ordinance (ZO) that is in effect now was put in place when nothing was operating at the mountain and feels they are bound by this ZO. Bill questioned property taxes, asking what the owners have been paying taxes on since operation ceased. After reviewing current tax card it was determined that the lifts are still being taxed as a feature. Change of use discussed with regards to abandonment, Richard is not convinced the property was abandoned and feels there is a difference between abandoned and dormant. If property is dormant no change of use has occurred.

***MOTION: Bill moved to grant rehearing based on #2, seconded by Richard. Brief discussion ensued over intent of this; Bill explained that based on number 2 he feels a rehearing should be issued. Language "innovative design" with reference to site plan review discussed along with "encourage" with reference to innovative design. The intent of this language discussed. Change of***

use discussed, reference made to restaurant being opened last year and plans to dig pond both as a change of use trigger. **A vote was taken, Yes: Bill and Richard, No: Tom, Jay, Dick. MOTION FAILS.**

- 3. The Zoning Board of Adjustment's decision is unlawful as it is contrary to the clear legislative intent of the Brookfield Zoning Ordinance. The legislative intent clearly establishes that site plan review of innovative development and design is only to be required for conditional uses such as inns, retail establishments, offices, conference centers and restaurants. The ordinance does not require site plan review for active recreational uses such as proposed for this property. The Zoning Board of Adjustment's decision clearly disregarded the ordinance's legislative intent and history.*

Relevance of # 3 discussed by the board, it was mentioned that history and past use are not to be looked at and that nowhere in the current ZO are conditional uses considered. It was explained that a PB Recreation Zone sub-committee is presently gathering data for the Planning Board to prepare a warrant article for March Town Meeting that will define the permitted uses in the recreation zone and if passed by the voters in March will allow for many uses in the recreation zone. Site Plan Review (SPR) and its purpose discussed and the fact that permitted uses still require SPR.

**MOTION: Dick moved not to consider item #3 because it is not relevant to the present zoning ordinance, seconded by Jay. No further discussion. A vote was taken, all in favor. MOTION CARRIED.**

- 4. The Zoning Board of Adjustment's decision is unlawful as it fails to recognize that the Zoning Ordinance makes a distinction between active recreational/primary uses and innovative development and design/conditional uses. It is only for the innovative development and design/conditional uses that the Zoning Ordinance requires site plan review.*

Brief discussion ensued; many felt items 2, 3 & 4 share same intent. Innovative design and the intent of the language was discussed again.

**MOTION: Dick moved that item #4 is not relevant and should not be considered, 2<sup>nd</sup> by Richard. A vote was taken, Yes: Dick, Tom, Jay & Richard, No: Bill, MOTION CARRIED.**

- 5. The Zoning Board of Adjustment's decision is unlawful as it was based in part on consideration of the provisions of Article IV B 3 of the Zoning Ordinance which provides for the discontinuance of non-conforming uses after abandonment. The use of the subject property is a lawful use and it is not a non-conforming use. Therefore the provisions of Article IV B 3 should not have been considered or discussed by the Board.*

The chairman read Article IV B 3 of the ZO; he explained that when the ZO was written nothing was going on at Moose Mountain and feels they are bound by current ZO. The Selectmen's Representative requested to speak, there was a brief discussion as to whether he is allowed to speak, the chairman allowed him to speak. The word encouraged and its intent were discussed again. Ernie explained the taxes have been paid as a ski slope; it is still a ski slope and has never been removed from this status. Expiration of variance and abandonment discussed again, there are mixed opinions regarding this issue. Abandonment vs. dormancy addressed again, Richard reiterated his opinion that it was never abandoned, it went dormant and he feels that is a big difference and offers some substance. Some feel that when the operation ceased, it was abandoned and one year after this the variance that allow the ski area to operate expires, the other opinion is that once the area was zoned recreation the issue of abandonment goes away. Authority of ZBA discussed, it was suggested the ZBA is bound by the "5" ZBA rules, it was decided that 5 rule reference applies to a variance and the issue before the board is an appeal so they are not bound by the five variance rules.

***MOTION: Dick moved pertaining to item #5, the ZBA did properly act in considering the variance in effect under which ski area operated was voided after one year of discontinued use as a ski area according to the present zoning ordinance, seconded by Tom. A vote was taken, Yes: Tom, Dick & Jay, No: Richard & Bill. MOTION CARRIED.***

6. *The Zoning Board of Adjustment's decision should be overturned because the property owner has the constitutional right to a hearing tribunal as free from prejudice, bias and pre-judgment of matters affecting his property right as is humanly possible. In this case the Zoning Board of Adjustment relied on advice of legal counsel who had all the appearances of prejudice, bias and pre-judgment in this matter. The Zoning Board of Adjustment's attorney had just been discharged as the Town attorney. Mr. Evans is one of the selectman who considered whether or not the attorney should be retained. Mr. Evans spoke publicly about his support for the attorney and of his desire to retain her as legal counsel for the Town. Further, when this issue arose, it is the understanding of Moose Mountain Recreation, LLC that the Zoning Board of Adjustment's legal counsel was also acting as the attorney for the Planning Board and the Board of Selectmen. The multi-representation of the parties to this dispute raises a serious appearance of a conflict of interest by the Boards attorney. Members of the Planning Board also spoke in favor of the attorney's replacement as Town Counsel. And of course it is a decision of the planning board which is now under review by the Zoning Board of Adjustment. All of these events took place while this matter was pending before the Board.*

The chairman explained that he does not feel all the facts listed in #6 are true. He explained that Ms. Slack resigned from the PB when asked to deal with this case. Discussion ensued as when Ms. Slack resigned from Planning Board, Jay referenced Planning Board minutes that discuss the resignation. The chairman explained that initial communications with Ms. Slack were with regards to procedural issues. Janet, Planning Board Chair explained that when she received notice of the appeal by Craig Evans she called Attorney Slack to discuss and explained that Attorney Slack accepted Evans filing to Superior Court on behalf of PB and that she had also made a comment that she needed to contact the chair of the ZBA. Janet explained she has email from this time frame and bills. She also explained that during a Planning Board meeting following the filing of the appeal several ZBA members questioned as to whether the ZBA had an attorney and they had stated no. Janet explained Attorney Slack had resigned as Planning Board Attorney only a few days before the public hearing which is why the Planning Board had requested an extension. July 27<sup>th</sup> Planning Board minutes contain reference to Attorney Slack's resignation. Comments were expressed by the board that issues raised in item #6 were offensive, unprofessional and lacked fact and are irrelevant.

***MOTION: Jay moved that item #6 has nothing to do with the re-hearing of this case, seconded by Dick. A vote was taken, all in favor. MOTION CARRIED.***

Robert Bourdeau asked to present an item #7 at this evenings meeting. After the board referred to RSA 677:22 and held brief discussions the board denied Mr. Bourdeau's request.

The chairman closed the meeting at 7:45 PM.

***MOTION: Dick moved the ZBA not grant rehearing of decision arrived at September 2, 2009 Public Hearing. No second.***

Several members of the public commented the meeting was closed and no further business could be heard.

**MOTION: Dick moved to reconsider closing of meeting, seconded by Tom. A vote was taken, Yes: Dick, Tom, Jay & Richard, No: Bill, MOTION CARRIED.**

Further comments were expressed from the public, Robert's Rules of Order were referenced. After further discussion by the board the previous two motions were deemed invalid.

The board scheduled a meeting for Thursday, October 28, 2009 at 7:00 PM. The meeting will be posted

Respectfully Submitted,

Jennifer Sonricker  
ZBA Secretary