

CITY OF DOVER

DOVER ZONING BOARD OF ADJUSTMENT - MINUTES

Meeting Type: Regular Meeting
Meeting Location: Council Chambers - 288 Central Avenue, Dover, NH 03820
Meeting Date: **Thursday, June 19, 2008**
Meeting Time: **7:00 pm**

1. ATTENDANCE

- Regular Members Present: Chair Masi Denison, Vice Chair Bill Colbath, Frank Landford, Jim Kelly
- Regular Members Absent: Sam Reid
- Alternate Members Present: Otis Perry, Chris Prior
- Staff Present: Tom Clark, Building Official, Rick Jones, Code Enforcement, Jennifer Bretz, Recording Secretary

Chair Masi Denison introduced the members of the Board.

2. APPROVAL OF PRIOR MINUTES OF MAY 15, 2008

Motion: Colbath made the motion to accept. Perry seconded. Vote: U/A

Colbath steps down for this case.

Denison, Kelley, Landford, Perry, and Prior will be voting.

3. NEW BUSINESS

- A. * Z 08-11 William Colbath, 129 Silver St., requests an Appeal from an Administrative Decision concerning Article X, Section 170-41.A, B & C and Article X, Section 170-42, in connection with the administration of a building permit (BP #08-26) at 55 Back River Rd, a/k/a Tax Map I, Lot 60, zoned R-12 to repair/renovate a fire damaged single family dwelling.

Denison stated for Colbath to present his case.

Clark asked if Denison read his memo.

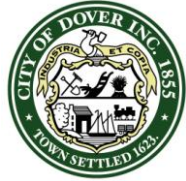
Denison stated she did read his memo but Colbath is allowed to present his case.

Perry motions to hear from City Attorney, Alan Krans. Kelly, Prior, and Denison in favor, Landford opposed. Vote: 4-1

City Attorney, Alan Krans, gave the ZBA the option of meeting in an Executive Session or Public Session.

The board chose the Public Session.

Krans stated the issue of standing is who has the right to bring an appeal of an administrative decision. The Zoning Board has the power to hear appeals of administrative decision regarding interpretations of a zoning ordinance. There are a couple of statutes involved in issue of standing. It has to do with the phrase "aggrieved person". Statutory Laws are laws that are passed by the legislature. Case Laws are cases that are decided by the NH Supreme Court. A combination of those defines an aggrieved person is an abutter or a person who is directly affected by the Administrative Official. The case law is clear that not every tax payer is directly affected. Your status as a citizen of the City of Dover or as a taxpayer does not qualify you as an aggrieved person. Aggrieved persons may not only seek an appeal of the ZBA, they may also go to court if



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they don't agree with the outcome of that appeal. Who can go to court? Who can appeal a Building Official? The answer is an aggrieved person directly affected greater than the average taxpayer.

Denison requested the statute number.

Krans stated RSA 677:4 and RSA 677:2. There are two cases. One involves Weeks Restaurant vs. The City of Dover; the other is Hooksett Conservation Commission vs. Hooksett ZBA. The additional RSA is RSA 676:5.

Kelley asked Atty. Krans for clarification of an abutter or not necessarily an abutter.

Atty. Krans stated that years ago it used to be an abutter. They've expanded that to include abutters and people that are directly affected. As he indicated, the case law also speaks to whether any taxpayer has standing. The answer would be no. The Weeks vs. City of Dover case, in 1979, had to do with Weeks Restaurant in the Weeks Traffic Circle. There was a Sambo's Restaurant, which was a competitor that wanted to come in to Dover, in that area. Weeks Restaurant was not a direct abutter but they wanted to have a say in whether Sambo's could come to Dover. The resolution to the case was that Weeks was even though they were not a direct abutter, they had standing because they had a direct impact in terms of traffic.

Denison asked if the applicant would like to express how he has standing if he is in fact an aggrieved party.

Colbath stated he is an aggrieved party being that he was present for the proceeding. He has an interest in the outcome of the case. The word aggrieved party is also equal to "a person having a substantial interest in the outcome of the case" is also used in that same case law. He stated that he currently has a right as a party to the proceeding to bring this appeal where there has been an error committed by the Board. It's his duty to correct that. He does have standing under a different case. He's using the case of Green vs. Shaw (1974) which states that any tax payer has the standing to appeal the illegal acts of a City Official. That gives him standing as a taxpayer. Colbath refers to a handout that was passed out. (In file)

Denison stated Colbath is stating the town has acted illegally. Colbath's argument is his interpretation of the permit. She asks Atty. Krans to come back up.

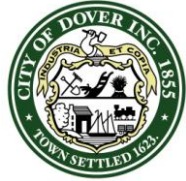
Denison asked Atty. Krans given that the applicant is not stating that they have standing as an aggrieved party in that they are directly affected by owning a property, but they have standing as a citizen and arguing that the city has acted illegally, what is his interpretation?

Krans states he's just been handed the case and needs to review it first.

Motion: Denison makes a motion for Atty. Schulte to speak. No one seconds.

Denison motions to recess at 7:25pm in order for Atty. Krans to read up on the cases.

Meeting is called back to order at 7:38pm.



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Atty. Krans stated he's had a chance to review Green vs. Shaw. It's a 1974 case. Richard Green is now the Executive Director of the Pease Development and John Shaw, who was the former Mayor of Rochester. The case involved an equity action. An equity action is when there is no statute or specific remedy. It was a writ of mandamus which is a type of legal action that seeks to have government officials do what they are supposed to do. Mr. Colbath is correct, in that particular case, an equity action allowed a group of taxpayers to go to court to seek redress against public officials. It had to do with whether or not they were spending funds illegally. An equity action is different than what the ZBA does. The ZBA is governed by statutes. Statute is something that is adopted by the NH Legislature. When there is a statute that pertains to legal issues, it's the statute that you go by. In Arnold Goldstein vs. Town of Bedford, Goldstein was challenging a decision by a zoning administrator regarding the merger of two nonconforming lots. Mr. Goldstein went before the ZBA and stated he was a Bedford resident who would like to see the zoning ordinance enforced. The decision goes on to say, "Since the plaintiff has proffered no evidence that he has an interest in this action beyond that of a concerned resident and taxpayer, he lacks standing to seek mandamus relief."

Discussion ensued regarding equity actions.

Colbath asked if he's allowed to speak. He does not understand how he does not have standing. RSA677:2 allows a town selectman to bring an appeal. He does not understand how he is not a party to the proceeding since he was a part of it.

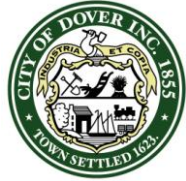
Denison asked Colbath if his argument was that because he was sitting on the board at the time of the proceeding, he's a party to the proceeding?

Colbath agrees. He doesn't think he has standing under Weeks vs. City of Dover. He doesn't consider himself aggrieved in that format.

Denison stated one argument the applicant has is he has a substantial interest in the outcome of the case. The next argument is he believes there is an error on the board and the board's decision, because he's a party to the proceeding by being on the board he can call that into question. He brought up the case of Green vs. Shaw but it was not applicable.

Colbath stated as a member of the board, he has a problem with it being eroded the way that it has been. That is why he has a substantial interest in the outcome of the appeal.

Perry stated a person who voted on the decision is now seeking to overturn that decision through the side. He's not convinced that Colbath has standing. He feels that a member of the board taking this action and appealing a decision of the board opens a can of worms that most courts would not like to see. If at any time a decision was made, a member of the board who was on the side that didn't prevail could then force a reconsideration of that decision by turning around and saying that they are now not acting as a member of the board but acting independently to reverse the decision. If Mr. Colbath had standing in this case, what has changed from the time that he sat on the board from the last vote? If he believes he is an aggrieved party, he should have recused himself from that decision.



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Prior stated that if you are on the opposing side, it does open an avenue that in which someone feels they were wronged and wants to rehear the decision, he agrees with Perry.

Kelley stated as the City Attorney indicated, the board works off of ordinances. That was the process followed.

Denison stated she agrees with Perry's points. She would not be uncomfortable if someone changes their mind and states the board made a mistake. If Colbath hadn't voted against it, than he can not use the system to get around his case. This particular method of coming before the board as an applicant, having been on the non prevailing side, makes her uncomfortable. While he doesn't have standing, she thinks he isn't in the wrong. As one of the members on the prevailing side, is significantly reconsidering her decision to vote on that side. In the first case, the board voted on a technicality, making sure everything was correct. In the second case, the board was informed that it was an enforcement against interpretation situation. They have an ordinance in the books that is poorly defined. It is a footnote that states any building built before this date can be converted into a duplex. She would like to see the Planning Board and City Council do something about the ordinance.

Motion: Kelley motions to not accept the application, Perry seconds.
Denison, Kelley, Perry and Prior are in favor.
Landford opposes, 4 -1 vote.

4. OTHER BOARD BUSINESS

Colbath takes his seat.

Discussion ensued regarding city e-mail.

Denison stated that in the May meeting, the board went over the Rules of Procedure. There were some changes that were recommended by the City Attorney. She read from an e-mail that Atty. Krans sent to Denison. The board has the option, but not the requirement, of submitting the proposed rule changes to the City Council. The reason why you would do that is it provides the public a chance to provide input through Citizens Forum. She proceeds to ask the board if they would like to submit their rule changes to City Council.

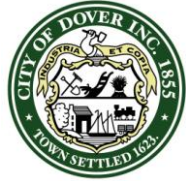
Perry asks if the board is submitting the rules for the City Councils approval or is it for their information?

Denison stated it's providing the public a chance to provide input through Citizens Forum.

Atty. Krans stated every other board seeks Council approval of their rules.

Denison asked if the Council votes on the changes.

Atty. Krans stated yes.



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Perry stated his understanding of why other City Councils vote on their ZBA changes is that the other ZBA's are established by their City Council. The Council is the controlling authority for those boards. Their function, their purpose and their legal status comes from the Council. Their Council has control over the rules and procedures. The ZBA is a statutory board. He doesn't think that their rules should be debated in front of the City Council.

Atty. Krans suggests having a Public Hearing at the ZBA.

Perry suggested having a Citizens Forum on the Agenda. It's an opportunity for citizens to have a chance to talk to the ZBA.

Clark stated the amendments to the rules are in the rules.

Denison stated its public notice not public discussion. Denison reads Section 8 from the proposed rules.

Clark reads Section 8 from the rules and procedures. He's asking how the Council is involved.

Denison stated they are not. It's a recommendation from Atty. Krans that the board consider doing it. There's not a requirement for it, it's only a suggestion.

Landford stated public input is fine if the board has one meeting for the public to go over their changes. He doesn't think the Council should approve their changes.

Krans stated he thinks the public should be involved.

Denison stated does the board have a public hearing or a public reading. The Board is required to have a public reading.

Landford stated we should give the citizens a chance to comment on the Board. Taxpayers and citizens getting a chance to speak on what the board is doing.

Perry stated a similar procedure is used in the Council for the passage of ordinances. It requires two public readings of the ordinance. The first public reading is a vote by the council to refer it to a public hearing. The public hearing constitutes the second reading. The Council may adopt it after the second reading or postpone it. If the board wanted to follow that procedure, on the agenda for the next meeting would be to adopt those procedures. At that point, it would be referred to a following meeting after a public discussion and then adopt it at a subsequent meeting for it. The Council has a formal public hearing, he agrees with having a public hearing.

Motion: Perry motions to have an initial reading, Landford seconded. Vote: U/A.

Discussion ensued on having a Citizens' Forum as a monthly item.

Denison stated she won't be attending the next meeting, Colbath will sit in.



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5. ADJOURN

Motion: Landford made the motion to adjourn at 8:16p.m. Colbath seconded. Vote: U/A

<u>List of Members</u>	<u>Term Expires</u>
Masi Denison-regular member	01-24-10
William Colbath-regular member	10-23-09
Frank Landford-regular member	04-10-08
Sam Reid-regular member	11-12-09
Jim Kelley-regular member	05-23-10
Otis Perry-alternate member	02-08-09
Chris Prior-alternate member	02-01-11