

TOWN OF ALLENSTOWN  
Zoning Board of Adjustments  
16 School Street  
Allenstown, New Hampshire 03275  
August 16, 2017

**Call to Order**

The Allenstown Zoning Board of Adjustments was called to order by Chair Eric Feustel at 6:37 pm.

Chair Feustel called for the Pledge of Allegiance.

**Roll Call**

Present on the Zoning Board of Adjustments: Eric Feustel, Chair; Jeff Gryval; Keith Klawes, alternate; Chad Pellisier; Roger Laflamme; and Dawna Baxter, alternate.

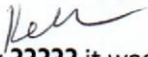
**Others Present**

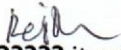
Dana Pendergast, Allenstown staff  
Sharon Somers, Counsel

At the suggestion of Chair Feustel, on motion of Mr. Gryval, duly seconded by Mr. Klawes, it was voted to change the order of items on the agenda.


Chair Feustel stated that the Board would first deal with the staff update and then approval of minutes. He added that item I. b. would not be considered at this meeting if the Board decides to re-hear the 4 NH Homes request for a Cluster Variance.

**Staff Update**

On motion of Mr. Gryval, duly seconded by  it was voted to approve Mr. Pellisier as the new vice chairman of the Board.

On motion of Mr. Gryval, duly seconded by  it was voted to approve Mr. Klawes as the new secretary of the Board.

**Approval of Minutes**

On motion of Mr. Gryval, duly seconded by  it was voted to approve the minutes of the April 12, 2017, meeting.

Chair Feustel asked that the meeting minutes of the September 28, 2016, be typed and submitted at the next meeting. He also asked that the December 14, 2016, meeting minutes be transcribed.



Chair Feustel stated that next Sharon Summers, Counsel for the Town, would address the Board regarding the 4NH Homes Cluster Variance (20170003 & 0004) because the Board members have to decide if they are going to re-hear the case. She will also explain why there is no public input.

Ms. Somers stated that she has sent around to everyone a huge package of materials. She said that the Board has two issues before it. The first is the applicant's request that the Board reconsider the earlier denial of the variance in April. The second is the applicant's appeal of the administrative decision that a variance is needed. She worked with Mr. Pendergast to compile a packet of the record for the basis of that decision. This includes correspondences from the applicant, relevant minutes of both the Zoning Board of Adjustments meetings and Planning Board meetings, and a memo from Mr. Pendergast to the Board explaining the decision and the rationale for it. That is the administrative appeal piece. In thinking about this and discussing it with the applicant's attorney, Mr. Pendergast, and other town officials, Ms. Somers said that it seems that the sensible way to attack both things is for the Board to first reconsider the earlier denied variance. If the Board decides to do that, a public meeting will be set up, probably in September, and the Board will come back here and start from scratch. The applicant will present its case supporting their request for a variance and the public will speak for or against it. If the Board decides to proceed with a re-hearing, the applicant will continue its administrative appeal because at this juncture, if a re-hearing is granted, it is premature to consider an administrative appeal. We would need to know a little bit more about what is going to happen with the re-hearing request. Ms. Somers spelled out a couple of different scenarios. If the Board tonight decides to grant the re-hearing request, another public hearing will be scheduled. If the Board grants a variance at that time, the administrative appeal becomes moot because the Board will have officially acted on the variance. On the other hand, if the Board decides tonight not to grant a hearing, a public hearing on the administrative appeal would begin immediately. The Board would decide whether or not the requirement to have a variance to begin with is a correct decision. The applicant would present its views on that and Mr. Pendergast's correspondences would essentially document his views. Then the Board would have to decide. The second scenario is that the re-hearing is granted, we come back in September, and the variance is still denied. At that point, the Board would take up the issue of the administrative appeal. That may proceed on to court in some fashion from there. No matter how you look at it though, the logical order of this is to try to determine in the first instance whether or not you want to re-hear the variance request. Reviewing the standards for this, if the Board thinks it may have made an error when it made a decision in April, it would be a reason to re-hear the request. One of the applicant's arguments, a procedural issue, is that there was not a quorum here due to the fact that some of the people abstained. There wasn't a full Board to actually vote on the issue. The Board can also consider whether or not it made a substantive error. If the Board decides to grant a re-hearing, it is not an admission that an error was made. It's just saying that in an effort to catch any mistakes you might have made, you want to start from scratch. The other basis, which Ms. Somers does not believe is part of the applicant's arguments, would be new evidence that wasn't otherwise available at the time of the hearing. To Chair Feustel's point a moment ago, typically, in any situation in which the ZBA is considering whether or not to re-hear a case that they have previously decided on, that is a decision that is just made amongst the Board members. The Board would take the arguments of the applicant, the minutes from the earlier proceeding, and any advice it is getting from Counsel or the Planner. Then, the Board members collectively would make the decision of whether or not it would be a good course of action to grant a re-hearing. Ms. Somers said that the general practice, and the one she recommends, is



to not have public input on this issue. It is solely the Board's decision, and there are a couple of reasons for that. One is that you don't want to dilute your decision making process by getting input from the public. Secondly, on a procedural level, there is no notice of a public hearing on this issue. Technically, this is supposed to be a decision of just the Board. Ms. Somers suggested that the Board simply take the minutes that were just approved for the April 12, 2017, decision, look at the hearing request and the arguments presented by the applicant, and then decide whether or not it would be appropriate to grant a re-hearing. She stated that she is not going to tell the Board what decision to make; it is her job to try to defend the Board the best that she can. If members have questions while talking about this, she would be happy to answer them. She said that she believes, after looking at the applicant's arguments, that if the Board decides to grant a re-hearing based on procedural issues, that is a defensible decision. The other would be the substantive issues. Finally, she advised that if the Board decides to grant a re-hearing, it really would be starting from scratch. She said it would be perfectly feasible for the Board to come back in a month's time and have the applicant present its case all over again, and have the public present their case, and come up with the exact same decision. Whatever is decided now isn't going to bind the Board going forward.

Chair Feustel stated just because we decide to have a re-hearing doesn't mean we have to change our decision.

Ms. Somers responded that is correct.

Chair Feustel asked if the applicant has the right to explain its reasons for the appeal.

Ms. Somers responded no. The reason is that the Board has read their materials and they are only authorized...the Board can only make a decision based on the arguments they have presented. If they start talking tonight and somehow inject some different elements of things they haven't previously done, then it just becomes messy and frankly, they don't need to. They have presented their arguments and the Board should be able to make its decision based on those written arguments.

Mr. Laflamme asked if anything significant has changed since the April denial.

Chair Feustel responded that would not matter to the Board, not until the re-hearing – if the Board decides to re-hear the application. That would not be part of it. They are looking for procedural and substantive issues.

Ms. Somers said the Board is just trying to decide, based on the mistakes they claim you made, if it is possible that it made a mistake and wants to start over again.

Mr. Gryval said that Chad, wasn't at the meeting that night. As the night went on there was not a full Board. One 'no' vote killed their request.

Chair Feustel said that when someone comes before this Board, they have a right to be heard by a full Board. They can waive that right, but they still need to have three affirmative votes. It is a majority of the Board, not a majority of the quorum.

Mr. Laflamme said that there were four members present. One voted for, one voted against, one abstained and one recused himself.

Chair Feustel said that as soon as there was one vote against and one abstention, his vote was moot, so he never voted. They needed three affirmative votes, so his vote wouldn't have mattered. They had a right to be heard by a full Board and they waived that right. In theory – actually in law – they lose the right to appeal if they agree to that. However, the Board has never had a case where someone abstained.

Ms. Somers said that she understands in principal what Chair Feustel is saying, that if an applicant waives the right to a full Board, they have made that decision. However, the facts in this case are slightly different because their argument is that, by virtue of the fact that functionally, only two members voted, they didn't give meaningful consent.

Chair Feustel said what if we had a full Board and three people recused themselves for one reason or another. He said that the member who abstained did not do so until after hearing the arguments. He asked if Mr. Gryval was the member who abstained.

Mr. Gryval responded, no you and Mr. Roy both abstained.

Chair Feustel said that he chose not to vote because it didn't matter.

Mr. Laflamme said if you had a conflict of interest, you should have said so at the beginning of the meeting.

Mr. Gryval said that from what he has heard, only two votes were cast; the applicant agreed to be heard by four and expected at least a quorum of the votes tallied; in his opinion, that did not happen. The request for a re-hearing should be granted on the basis of procedural issues.

On motion of Mr. Gryval, duly seconded by Mr. Laflamme, it was voted to grant the request for a re-hearing.

Chair Feustel said that Mr. Roy is no longer a resident of Allentown and no longer a member of the Board. He gave no indication at the beginning of the meeting that he was not going to vote.

Mr. Laflamme said that Mr. Roy did not have a conflict of interest; he just couldn't make a decision.

*Keth*  
????? said I don't know if this is the time to bring this up, the matter of the Chair recusing himself from voting.

Chair Feustel said I only vote to break a tie.

Mr. Laflamme said that his vote wouldn't have made any difference.



Chair Feustel said even if Mr. Roy had voted, it wouldn't have resulted in a tie and I wouldn't have voted.

Mr. Laflamme asked couldn't you have voted if you wanted to?

Chair Feustel said yes.

???????? said three votes were required and they wouldn't have had three affirmative votes, even if Chair Feustel had voted 'yes'.

*Keith*  
???????? said, even if the vote of the Chair is going to be used as a tie breaker, he could write his vote on a piece of paper before the rest of the Board votes. There is a right and a duty to vote.

Chair Feustel said ironically, he was inclined to vote 'yes' and that would have damned them. They would have no grounds to be here. By precedent, he only votes when there is a tie. That is not legally binding. We are not a committee of precedent; this is not a court.

Mr. Gryval said that he is hearing is that the Board members would like to see the chair vote if so inclined.

Chair Feustel said that he is not a coward.

*Keith*  
???????? said the Chair would be the last one to vote so as not to influence the other members. Is it legal for the Chair to vote on paper and hold it in case of a tie?

Ms. Somers said she would be happy to assist the Board on reworking or revising your procedures going forward. They can have a discussion about the pros and cons and how to best treat it. The Board does have a motion on the floor, so for clarity of the record, a decision should be made on that.

Chair Feustel stated that he will speak in favor of granting the re-hearing, just out of an abundance of caution. Based on the procedural issues, there is an issue there. What the Superior Court judge might decide doesn't matter to the Board if we decide to re-hear the application. That's a moot point as well. He said that the Board would do well to re-hear this.

A roll call vote was taken on the motion to re-hear the variance request of 4 NH Homes.

Jeff Gryval – yes; Keith Klawes – yes; Chad Pellisier – yes; Roger Laflamme – yes; Eric Feustel – yes. The vote was unanimous.

*Roger*      *Jeff*  
After discussing available dates, on motion of ???????? duly seconded by ????????? it was voted to hold the next meeting on September 5, 2017, at a location to be determined.

*Keith*      *Boyer*  
On motion of ????????, duly seconded by ????????, it was voted to continue the administrative appeal until the next meeting.

Chair Feustel stated that the abutters will get a notice via certified mail regarding the next meeting, and it will include the location.

Mr. Pellisier offered to check on the availability of a venue for the September 5<sup>th</sup> meeting.

Ms. Somers said that, not on September 5<sup>th</sup>, but on a regular meeting night she could meet with the Board to talk about procedural items – what Chair is or is not doing and the roll of abstentions from voting.

Chair Feustel asked if this could be precursor on September 5<sup>th</sup>.

*Keith*  
???????? asked if this discussion would be held in front of the public.

Ms. Somers said that concepts could be discussed and a separate meeting could be held to vote on suggested revisions; these would not be implemented for the September 5<sup>th</sup> meeting.

Chair Feustel said that he would like to avoid a separate meeting because of budget constraints.

Mr. Gryval said that he had a copy of the rules and procedures.

Mr. Pendergast stated that they have not been adopted by the Board.

*ERIC*  
???????? said that there is a difference between recusal and abstention.

Ms. Somers said that the Board should have a consultation with counsel in a non-meeting setting so as not to have concerns about Right to Know laws.

Chair Feustel asked if a meeting with counsel is needed. He explained the difference between recusal and abstention: recusal takes place at the beginning of a hearing because of a conflict of interest, while abstention occurs when a member can't make a decision.

Ms. Baxter will re-send a copy of the rules and regulations to all members.

Ms. Somers suggested meeting with counsel on September 5<sup>th</sup> at 6:30 pm, limiting the meeting to a half hour so that the public hearing could begin at 7:00 pm.

Chair Feustel said that he is concerned about the budget because \$7,000 has already been spent on this variance request. That equates to \$2 per capita.

Mr. Gryval asked for a listing of the members of the Board.

Mr. Pendergast said that Eric Feustel, Roger Laflamme, Bob Bergeron, Chad Pellisier and Jeff Gryval are full members. Keith Klawes and Dawna Baxter are alternates.

Chair Feustel said that since Bob Bergeron doesn't usually attend, he would ask the Board of Selectmen to replace him with either Dawna Baxter or Keith Klawes.

Dawna Baxter said that she would accept the full time position, if asked to serve.


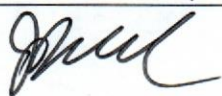
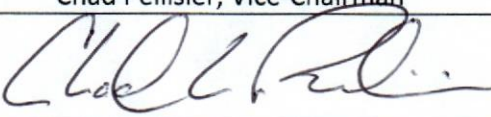
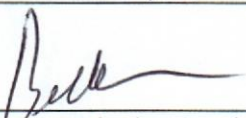
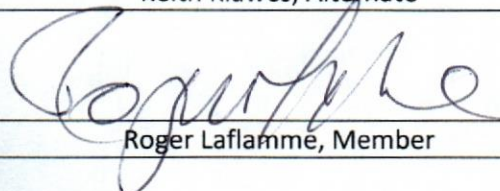
On motion of Mr. Gryval, duly seconded by <sup>Chad</sup>???????? it was voted to adjourn at 7:37 pm.



TOWN OF ALLENSTOWN  
ZONING BOARD OF ADJUSTMENTS  
PUBLIC MEETING MINUTES

August 16, 2017

**Signature Page**

Original Approval:	
	9/5/2017
Eric Feustel, Chairman	DATE
	9-5-17
Chad Pellisier, Vice-Chairman	DATE
	9/5/17
Jeff Gryval, Member	DATE
	9-5/17
Keith Klawes, Alternate	DATE
	9-5-17
Roger Laflamme, Member	DATE

