Approved

Town of Stoddard

Zoning Board of Adjustment

Minutes of Meeting 09/16/2021

The Chairperson called the meeting to order at 7:30pm

Pledge of Allegiance

Roll Call Members present: Chairperson Herb Healy, Vice Chair Franz Haase, Doug Summerton, Milosh Bukovcan sitting in for Bud Record

Members present on Zoom: Jason Kovarik

Members excused: Bud Record

Others present: Compliance officer Harry Power, Applicant Antoinetta Capriglione (Toni), Sarah Shawver, Realtor

New Business

Hearing: Antoinetta Capriglione appeal of Administrative Decision

* A Motion was made by Franz and second by Doug, to move the Hearing to the first item on the agenda, the motion passed. The Chairperson explained to the Applicant and audience, that three or more votes by the Board constitute a decision and there are five members in attendance.

The posted Notice was read to the audience. This Hearing is held by a request by Antoinetta Capriglione for a Variance concerning Article III, Section 5 of the Stoddard Community Planning Ordinance. The Applicant proposes to change the seasonal classification of her property. The Applicant also requests an Appeal from an Administrative Decision relating to the interpretation and enforcement of the provisions of the Community Planning Ordinance concerning the seasonal classification of the property. The property is located at 82 Fernwood Rd, Tax Map 120, Lot 029, in Stoddard, NH.

* Herb stated the Board will hear the Appeal from an Administrative Decision before the application for the Variance. Roll call was called (see above). The Chair referenced RSA 675:5:2A &B, the letter from the Compliance Officer, timing of the application and scheduled hearing, to show the applicant has standing and is the aggrieved party for the Appeal to an Administrative Decision. Board members agreed there is legal standing for the Appeal.
* The Chair spoke to the Board and Audience regarding how an Appeal from an Administrative Decision is reviewed at a ZBA Hearing. He stated our ZBA infrequently handles Appeals so he reviewed RSA 674, section 3: II and referred to a court decision regarding the de-novo standing of the ZBA in Appeal cases, (meaning it is deciding the issues from the new or starting over). Per legal advice, the ZBA should take the words of the Ordinance as they are written and make common sense meanings of them, and determine the intent of the Ordinance to harmonize the regulations (Article III, Section 5) with provisions of the Ordinance.
* The Chair asked for any petitions from other Boards. There were none. The Chair continued by explaining the process of the Hearing and how a decision will be made. He invited the Applicant to speak.
* Toni spoke stating she has owned the home for 35 years and has tried to put together evidence from the building of the home through that time. She has supplied Approval for Construction of the septic system, Septic system design plan by Lisa Davidson, from 1985, and the report of an inspection done by Septic Pro with photographs of that system done August of 2021. She explained the Approval for Construction is in the name of Art & Reba Nassau, who were the persons that designed Fernwood Development and built the home. She also brought a packet with her (Content List, from Joan Zelasny, Selectman of Stoddard, referencing a Certificate of Occupancy for Toni’s, a copy of NHDES Code of Administrative Rules ENV-Wq-1004.24 to show her home complies to their requirements for full time occupancy, a letter from NHDES Supervisor of Design Review, Subsurface Land Resources and Management, Water Division dated 8/9/21 stating review of the data base shows the Approval for Construction was for a year round use and a letter of support that the property should not be classified as seasonal from abutter Greg Pollock).
* She then mentioned Article III Section 5 of the Stoddard Community Ordinance, Conversion of Seasonal Dwellings. She feels the intent of Section 5 is if you are going to stay more than 270 days in a dwelling, you must have a working septic to protect the environment. The Ordinance does not state that a year- round home requires a 270-day occupancy or otherwise converts to Seasonal. Further, there is no environmental or Town benefit to be served by such an interpretation. It would better benefit the town and the environment to assure that an inadequate septic system is not used. She encourages the ZBA to request the Planning Board to revise the Ordinances to clarify their intent. Herb said State regulations allow Towns to have stricter requirements than the State and doesn’t form a basis for the ZBA to make a determination based on the Town Compliance Officer as he is following Town & State regulations.
* Harry was invited to speak on the rational for his decision. He stated that upon his observation of the recent occupancy of the property and the wording of Article III, Section 5 of the CPO, he considers the property to be seasonal, and he needs an Approval for Operation for conversion (classification) to a year-round property. Herb asked “What is the appeal actually for”. He read from Harry’s letter “your property on 82 Fernwood Road is in a seasonal classification without the approval for operation from NHDES.” He also read the Appeal which reads “is a seasonal classification” leaving out the word *in*. Herb continued, he looked at the plain language in the letter and Appeal, interpreting that the lack of an Approval for Operation caused the residence to become seasonal. Harry feels this property has not been occupied for a period of time which is his reason for making it a seasonal property and needing an Approval for Operation from NHDES. After discussion with Toni and Harry, Herb clarified the appeal is about her property being classified as Seasonal as she hadn’t lived there for at least two hundred and seventy days during the recent past. Toni stated she is concerned that her home is classified as a Seasonal Home, being consistent with the discussion held at the Selectmen’s meeting on 8/30/21.
* Herb asked if other Board members had questions. Franz asked Harry if he interprets the Ordinance to mean occupancy of 270 days or more per year equal a year-round classification and is the 270 days the minimum or maximum amount of time? Harry says 270 days equal a year-round occupancy. Franz states it was built in 1986 and was lived in for many years. The owner decided to spend time in a different area for a period of time does that make it suddenly seasonal? Harry stated it is a balancing act sometimes. He has to weigh the facts of time spent at the property with the Letter of Approval for Operation from NHDES. Franz wanted it on record that he is speaking loudly so Harry can hear him and not because he is anyway agitated. Jason asked “if my house is on the market, and I’m out of my house for five months, does that make my home seasonal”? Toni spoke saying her home was not occupied in October, 2019, when she left to go to Florida for the winter, planning to return in June 2020. Because of COVID, she was unable to come back until June 2021 when she planned to sell the home. Herb stated, Harry made his decision as Town Compliance Officer and is helping us understand his interpretation of the Ordinance.
* Doug speculated, a house is for sale, on the market for a year or more unoccupied, does that make it seasonal at that point? Harry answered, if you only come up summers and your permanent address is out of state, your property would be classified seasonal. Herb addressed Toni, you do not agree with Harry that your house is seasonal? Herb asked Toni if she feels Article III Section 5 seeks to define that a seasonal dwelling is one occupied less than 270 days a year? Toni said she feels it implies (1) if you have a seasonal dwelling then you have no obligation to comply with state approved septic system to protect the environment; (2) then if you live in that dwelling greater than 270 days it now become a year-round dwelling and (3) you need to comply with a state approved septic system. The converse is if you have a year-round home with a septic system and you choose to live in it fewer than those 270 days that it becomes a seasonal classification and that makes no sense in that it doesn’t affect the environment. Herb asked, and Toni agreed, whether the 270 days is a trigger point, if you had a seasonal home, at that point you couldn’t live in it without an approved septic system.
* Herb asked Toni, “Do you think it’s reasonable to assume that Section 5 Article 3 is to mean a dwelling is seasonal because the owner has changed their address with the town?” Toni answered “it is not reasonable.” Herb addressed Toni, you have owned house since 1986 and are the original occupant. The lot is part of a subdivision in Fernwood. They were all built for year-round usage and nothing in writing states it was to be used as anything else. The house has not been expanded since its original building, and the sewage load was designed for the design of the building. We have the approval for construction and the NHDES has stated it is unable to give an Approval for Operation as letters are given only on new systems. Toni asked is it possible that the town has lost it’s copy of the letter when the lot numbers were changed? Herb, it’s unknown if the letter was even issued and hard to know if it was lost. Herb spoke with DES yesterday and they said letters were sent during 1985 -1986.
* Toni states the report from her Septic Inspection shows the system is in good shape. She has a letter from DES saying the system design is for a year-round home according to the number of bedrooms. In the past she has lived at the home greater than 270 days at a time and it was considered a year-round home. Jason asked Toni if it was her intention that her home be a seasonal home? Toni replied no. Toni stated she has explained her situation to her Home Owners Association. And they are aware of this issue. Herb read the letter from her abutter Greg Pollock standing by Ms. Capriglione’s stance that her property is not seasonal. (Map 120 -lot 30, 32, 33).
* The Chair asked if there were any further questions for Toni or Harry. Franz asked Toni, do you meet all 5 of the DES criteria for year-round, she stated yes.
* Jason moved to close hearing, Doug 2nd motion. All voted in favor to close the hearing.
* Herb spoke stating Article III Section 5 does not define the term seasonal nor seasonal dwelling. He looked at the asterisk that comes after year-round and defines year-round. It does not define seasonal. To him the common sense meaning of Seasonal would mean not designed or intended for year-round use. He feels the language is meant to be a trigger, in that if you have a seasonal property and then convert to living in it more than 270 days you need an approved septic system. Article III Section 3B of the CPO (General Dwelling Requirements) doesn’t differentiate between seasonal or year-round. It states you must have a septic system that conforms to the septic load specified by NHWS & PCD. Section 5 does not comport to section 3B. unless you figure section 5 as a trigger. In my mind it is not logical that a septic system changes if the owner no longer lives there. He doesn’t believe that that was the intent of the ordinance.
* Milosh asked where the 270-day figure comes from. Franz Googled and found it’s a standard number the State uses for a 9-month period. Milosh asked if Seasonal is used for tax purposes. Herb added there is no definition of Seasonal in the Stoddard CPO. Milosh stated the letter from land management Division, dated 8/9/21, states that the construction of the septic system was clearly for a year-round dwelling. Herb stated since Seasonal is not defined in the CPO we should use the common sense meaning of it. Jason commented, that Toni had extenuating circumstances with COVID, which affected the entire country, where she has not been in the house for almost the last two years and that should be taken into consideration. Franz agrees with Jason, but stated he found there is nothing in the CPO that requires you to spend any amount of time in your home that changes its classification. Jason agrees. He feels that the house was built 35 yrs. ago following all the specifications as a year-round home and meeting all the proper regulations. It doesn’t make sense that if house sits vacant, that it gets classified as a seasonal property. Jason went on, saying even recreational communities have to adhere to all the elements of building in the CPO. This house has all these things in place. Improperly filed paperwork is different from the house being built for year-round use.
* Herb spoke: given that the CPO does not define seasonal dwelling, the building wasn’t designed or built with that intent, the owner has a letter from the Selectmen stating it is approved for occupancy, the owner has proof the septic design met the specification of NHDES and also meets septic system requirements for general dwelling in Article III Section3B of our CPO regardless of occupancy usage and the house was used for year round living until the change of address; these are his primary reasons for favoring the appeal. Further, proof has been presented that the septic system is currently in good operating condition and while that is important it is not fundamental to understanding the intent of the CPO.
* The Chair asked for a motion to vote. Franz made a motion to move to vote, Doug second the motion, all voted to vote. Herb stated the vote on the Appeal should be either a vote in favor or to deny: A Roll Call vote was taken: Jason voted in favor, Doug voted favor, Milosh voted in favor, Franz voted in favor, Herb voted in favor. The vote was unanimous in favor of the Appeal. Herb announced the Appeal is approved.
* Jason, announced to the applicant to be aware that the Town Selectmen can call for a re-hearing.
* Toni stated this hearing should send a message to the Planning Board. She believes the intent of the ordinance was to save the environment but was not clear in its definition of seasonal. Herb explained, in doing the Compliance Officers job, Harry has to stick by the written words and not their intent.
* Sarah asked about the status of the Variance application. Herb clarified the question of the Variance is mute.

Correspondence/Reports

* Errors in the Budget will be reported to the Town Administrator for correction.

Meeting Minutes

July 15, 2021 Minute corrections: Correct Hearing time to 7:30 pm, Under Old Business: Correct first sentence starting Secretary’s. in paragraph Hearing & Voting: correct first sentence, delete perfect, insert: was noted some Boards do vote on individual criteria. Correct 6th sentence. Next bullet same section first sentence corrected, 3rd bullet in same section: 2nd sentence corrected. 4th bullet same section: added sentence at end of paragraph. A motion was made by Doug to accept the changes, second by Jason, all were in favor of the changes.

August 19, 2021 Minute corrections: 5th sentence, insert the word septic load *capability*. 6th sentence: revised and corrected. Doug made a motion to accept the corrections, Milosh second the motion, all agreed.

Old Business

* Discussion on adding a new section to the ZBA procedures entitled Deliberations and Voting and saving Variance worksheets as part of the file. Do we need to vote on the Variance as submitted? Herb will research on how to word the Decision letter. Further discussion was tabled until October
* Discussion on Variance training reference materials.

Public comment

* There were no comments or non-agenda items presented.
* Harry was asked if anything is coming to the ZBA. He replied a lot is going on regarding building.

Adjournment: Franz made a motion to adjourn. The motion was second by Doug. The Meeting adjourned at 9:55 pm.

Respectfully submitted

Kathleen Ellis

Secretary to the ZBA