

TOWN OF TEMPLE, NEW HAMPSHIRE

ZONING BOARD OF ADJUSTMENT

February 2, 2006

FINAL MINUTES OF PUBLIC MEETING

ZONING BOARD: Chairperson John Pierce; members Nate Chamberlin, Honey Hastings, and Don Kraemer; alternate member Tim Winship.

John called the meeting to order at 7:30 p.m. and appointed Tim Winship to be a voting member since regular member Pete Caswell was absent.

Case 2/2/2006 BARNHISEL

D. Rae Barnhisel has filed a Third Party Appeal of Administrative Decision to appeal the decision of the Board of Selectmen to grant a building permit for an addition to the Town Hall at Map 7, Lot 6, Senator Tobey Highway, in the Historic District.

Member Honey Hastings recused herself because she is counsel for Friends of Temple Town Hall and would be making a presentation to the board. John Pierce was asked by the applicant to disqualify himself because his wife, Susan, is a member of the Friends of Temple Town Hall. He said that it was important to him that the deliberations and decisions of the ZBA be held in the highest regard. So while he didn't see any compelling legal reason to disqualify himself, for the sake of propriety and community harmony, he chose to disqualify himself and turned the proceedings over to Vice Chairperson Don Kraemer.

The recording secretary acknowledged receipt from the applicant of five copies of the Appeal From Administrative Decision and attachments, three sets of mailing labels for 11 abutters and other parties, and a personal check in the amount of \$100. She also pointed out that the applicant neglected to legally notice the Town of Temple, the owner of Temple Town Hall.

Debra Harling, representing the Town of Temple, stated that although the town did not receive legal notice, she would concede that they had constructive knowledge of the case.

Don pointed out that there were only three members on the board. He asked the applicant if she wanted to go ahead with her case with a small board. She said that she did.

Don read the Appeal From Administrative Decision and letter dated 1/12/06 from Rae Barnhisel.

The applicant handed out a document titled Timelines (exhibit 1) which documented her letters to Boards, building permits, etc. She then addressed the issue of standing and stated that any resident of Temple would have standing because the Town Hall is a town-owned building. She stated that as a Planning Board member the power that has been granted to her as a member has been bypassed by the Select Board, and for that reason she felt she has standing to appeal that decision.

The applicant asked if the board wanted to make a decision on timelines and/or standing. Don said that The board had spoken with Town Counsel and had been advised that, although those two issues were applicable, because of NH case law, specifically, *McGrath v. City of Manchester*, zoning regulations don't apply to a town in performance of its governmental functions. In other words, he continued, the town didn't need a building permit. He also stated that the Zoning Board cannot issue a Cease and Desist Order, as requested by the applicant. She argued that case law was secondary to statutory law. The applicant argued that the town applied for a building permit on November 22nd and issued it illegally on November 23rd. She stated that the relief she was seeking was that the decision to issue the building permit be reversed, because it was issued without the usual waiting period, and without

consulting the Historic District Commission or the Planning Board. She also stated that Town Counsel, Attorney Drescher, had advised the Select Board to issue the building permit and that is why she objected to the ZBA consulting the same attorney.

Ms. Harling stated that the Town of Temple Board of Selectmen has engaged the legal services of attorney Byron Bedard, with the firm of Cook and Molan, so Attorney Drescher is no longer advising the Select Board on this issue.

The applicant read parts of her Notice of Appeal, dated January 12, 2006, pages 1 – 5, which included Facts of the Appeal, Alleged Errors, Procedural Violations, and Relief Sought.

Ms. Harling read a letter from the Board of Selectmen which stated, in part, that the appeal was not timely filed, as construction has been ongoing since November 2005; that the applicant does not have standing to file the appeal because she is not an abutter to the property under appeal and is not aggrieved; and that while the applicant is a member of the Planning Board, said Board is not making this appeal and has not authorized the applicant to represent them in this appeal. The letter further stated that the BOS acknowledge that the Zoning Board of Adjustment is entitled, pursuant to RSA 674:33, to interpret the Zoning Ordinance of the Town of Temple. The BOS contend that the Town of Temple, as a political subdivision of the State of NH, is exempt from zoning under any land use ordinance in the performance of its governmental functions (*McGrath v. City of Manchester* 113 N.H. 355;307 A.2d 830; 1973), and also contend that the ZBA is not entitled to interpret State Statutes.

Ms. Barnhisel presented a document dated February 2, 2006 (exhibit 2) and argued standing by quoting Article VI, section 4 of the Temple Zoning Ordinance and RSA 676:5 and 676:15. While arguing this, she discussed the Historic District Ordinance. The Board asked if this was part of the Zoning Ordinance. Ms. Barnhisel said it had not yet been included..

Mary Nutting – 114 Mansfield Road – brought the document that showed that the Historic District Ordinance was passed in 1980.

The applicant presented a document dated January 31, 2006 (exhibit 3), and read from paragraph 3 on page 3, arguing that the Town Hall is a place of assembly, rather than a governmental use of property. She also referred to RSA 674:54 on page 16 of the packet.

Vince Mamone – Fish Road – asked why we wouldn't want the Town Hall to conform to building codes. He said that if you don't have a building permit, how are you going to get the signatures that show that the different people have inspected the building? He said that he was concerned about the lack of process and that doing what's expedient hurts the town. Process is as important as the end result, he continued, and he added that he is in favor of the renovation project.

Honey Hastings – representing Friends of Temple Town Hall – argued that case law is not secondary to statutory law as the applicant had stated. She also explained the *McGrath v. City of Manchester* decision and said that it is the law in NH, it's not a matter of whether we like the law or not or whether

it should be different, it is the law. Ms. Hastings argued further from a document entitled Memorandum of Law, which was part of a packet presented to the board and which also included a copy of the above-mentioned court case, a proposed Motion to Dismiss and a proposed Decision Notice.

Ms. Harling stated that the building permit was issued pursuant to RSA 155:4A to insure compliance

with the life safety codes under the state building code.

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Temple Building Inspector William Wildes said that the State fire codes are usually enforced by him. He said the building permit application that he saw was signed by Tim Fiske, the Road Agent. As the code enforcement officer, he said he has never seen the plans for the addition. He hasn't reviewed it for Life Safety Code 101, State adopted NFPA 70, the electrical code, the oil furnace code, the energy code, nothing.

Ms. Harling provided a fax from Richard Monahan Jr., Project Architect, which stated that the addition to the Temple Town Hall has been designed to conform with the current State codes. These include: The 2000 International Building Code, The 2000 NFPA 101 Life Safety Code and the 2000 International Energy Code.

Ben Tirey – General Miller Highway – stated that the information from the architect is pretty standard today in that the architect takes the full responsibility for making sure that all codes are met.

Ms. Nutting asked if there was a problem with the oil tank in the Town Hall. Dick Benotti answered that the location for the tank has been changed so that it will be is a safer location.

At 9 p.m. the board closed the public hearing in order to deliberate.

There was discussion of *McGrath v. City of Manchester*. Nate said that he felt the board didn't have the jurisdiction to make a decision because towns are exempt from local zoning laws. Tim said that we had pretty much hit a wall as far as evidence goes, so he felt that following the advice of Town Counsel seemed like the best thing to do. Don also felt it best to follow the advice of Town Counsel and dismiss because the ZBA didn't have the jurisdiction to make a decision.

MOTION: Nate/Tim To dismiss without prejudice because the ZBA does not have the jurisdiction to grant the relief requested on page 5 of the appeal. Under NH law, zoning/planning ordinances do not apply to a town in performance of its governmental functions. See *McGrath v. City of Manchester*, 113 N.H. 355.(1973). All were in favor.

OLD BUSINESS

John and Honey rejoined the board.

Minutes – January 5, 2002

MOTION: Don/Nate to approve 1/5/06 minutes. Four in favor/Tim abstained.

MOTION: Don/Nate to adjourn. All in favor. Meeting adjourned at 9:25 p.m.

Diane Nilsson, Recording Secretary