



OLD VALUES - NEW HORIZONS

## COMMUNITY DEVELOPMENT

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**Approved Minutes Zoning Board of Adjustment  
January 12, 2016  
7:30pm @ Community Development Department**

Mike Scholz	Chairman	Present	Mike Mazalewski	Alternate	Present
Heath Partington	Vice Chair	Present	Kevin Hughes	Alternate	Excused
Mark Samsel	Secretary	Present	Jim Tierney	Alternate	Excused
Pam Skinner	Member	Present	Jay Yennaco	Alternate	Excused
Bruce Breton	Member	Present			

**Staff:**

Laura Scott, Director Community Development  
Dick Gregory, ZBA Code Enforcement Administrator  
Suzanne Whiteford, Minute Taker

**Meeting called to order at 7:30 by Chairman Scholz**

Ms. Scott sat in for Mr. Gregory, ZBA Administrator  
Case #50-2015 read into the record by Mr. Samsel

**Case #50-2015 Appeal of Administrative Decision.**

Mr. James Thoele, 125 Lowell Road, is appealing the December 2, 2015 decision of Mr. Dick Gregory, Code Enforcement Administrator, to allow 120 Lowell Road (24-F-3000), owned by the Landry Noyles Trust, to operate as a legal existing non-conforming business/use in the Residence A/Rural Zoning Districts.

**Motion by Mr. Breton to waive the reading of the abutter list.**

**Second by Ms. Skinner**

**Vote 5-0-0**

**Motion carries**

**James Thoele, 125 Lowell Road**

Mr. Thoele read his application to Appeal Administrative Decision, labelled 'Item 1' contained in Case #50-2015 packet and contained in the file on record.

Betty Dunn asked to delay the case until the Landry's attorney can arrive.  
Due to the inclement weather the Landry's attorney is delayed

**Motion by Mr. Samsel to continue Case #50-2015 after Case #51-2015 to allow time for the Landry family attorney to arrive due to the inclement weather.**

**Second Mr. Breton**

**4-1-0 Mr. Partington opposed**

**Motion carries**

Case #51-2015, abutter list, and letter of authorization read into the record by Mr. Samsel

**Lot 3-A-6 51-2015**

**Applicant** – Edward N. Hebert Assoc., Inc.

**Owner** – John Spinney

**Location** – 63 Morrison Road

**Zone** – Rural and Wetland & Watershed Protection District (WWPD)

Variance relief from the following section of the Town of Windham Zoning Ordinance and Land Use Regulations is requested to construct a new deck & porch.

**Section 601.3** to allow a 275 sq. Ft. Portion of a deck & porch to be constructed in the WWPD where structures are not allowed.

**Section 601.4.8** to allow the installation of the foundation for the deck & porch without a special permit from the Planning Board.

**Shane Gendron, Edward N. Hebert Assoc., Inc.**

Exhibit A 2 pages, Vision ID: 5170 for 63 Morrison Rd.

Exhibit B (1 and 2) original plans pages 1-4, for Morrison Hill Estates.

Mr. Gendron described photos contained in the packet.

Chairman Scholz asked if the porch was a 4 season porch.

Mr. Gendron does not know if the intended use of the porch is 4 season.

Mr. Gendron reviewed the five variance criteria.

Case opened to the public, no public comment

**Motion by Mr. Samsel to go into deliberation**

**Second by Mr. Breton**

**Vote 5-0-0**

**Motion carries**

Mr. Samsel commented that the five variance criteria are met and he has no issues with the request.

Mr. Partington reviewed the five variance criteria.

Chairman Scholz agrees the five variance criteria are satisfied.

**Motion by Mr. Samsel to grant variances as requested**

**Second by Mr. Breton**

**Vote 5-0-0**

**Motion carries**

Case #50-2015 resumed at 8:02pm

**Mr. James Thoele, 125 Lowell Road**

Reviewed information contained in following documents, contained within Case #50-2015 packet and contained in the file on record:

- Item #2
- Item #3
- Item #4
- Item #5
- Item #6
- Item #7
- Item #8
- Item #9
- Item #10
- Item #11
- Item #12
- Item #13
- Item #14
- Item #15
- Item #16
- Item #17
- Item #18
- Item #19
- Item #20

Mr. Thoele gave a video presentation.

Mr. Samsel asked Mr. Thoele if he is here for letter addressed to Jeff Noyles, Landry & Noyles Automotive and Motorcycle Service LLC from Dick Gregory, ABA/Code Enforcement Administrator dated January 22, 2015. Mr. Thoele indicated he is here to specifically address that letter Mr. Samsel noted.

Mr. Samsel asked Mr. Thoele when he learned about the sign permit and the additional lights. Mr. Thoele learned of those things when he inspected the file.

Mr. Partington asked if anything is in writing to verify the conversation Mr. Thoele reported to have had with Mr. Dick Gregory in June, 2015.

Mr. Thoele does not have anything in writing to verify the conversation between himself and Mr. Gregory in June, 2015.

Chairman Scholz asked Mr. Thoele what the nature of his discussion was with Mr. Gregory in June, 2015

Mr. Thoele told Chairman Scholz that he (Mr. Thoele) complained about the motorcycle shop turning into an automotive shop.

Chairman Scholz is concerned about the timeliness of the application.

Chairman Scholz is concerned that the time for Mr. Thoele to come forward and speak his opinions was when the items were publicly noticed.

Mr. Thoele expressed his concern that there are two brand new lifts that have produced more business and traffic. Mr. Thoele explained that at the time of the town's inspection only one lift was in place.

Chairman Scholz believes the ability to appeal that decision or permit was within 30 days of the notice. Chairman Scholz is struggling with the timeliness of Mr. Thoele's appeal because all those things that were permitted are now being appealed. The ZBA has to weigh their jurisdiction over this appeal with regards to timeliness of the request.

Mr. Thoele commented that he is appealing Mr. Gregory's administrative decision to allow it to operate it as a business at all.

Mr. Thoele states that when he was told the business was legal he took that at Mr. Gregory's word. It wasn't until Mr. Thoele came into the town office and physically examined the files for himself that he learned the business was not legal.

Mr. Dick Gregory, ZBA/Code Enforcement Administrator

Mr. Gregory commented that the appeal is untimely based on the rules for an appeal specifies 30 days are given for an appeal. Mr. Gregory reviewed the case consistence with '*Grandfathering*': *The Law of Non-Conforming Uses & Vested Rights. 2015 Municipal Law Lecture Series Lecture 1.*

Mr. Gregory explained that the garage was built in 1946 and started building cars. Sometime between 1946 and today it was a gas station. When Mr. Gregory inspected the property there were two automotive lifts in the ground.

Chairman Scholz asked Mr. Gregory about the discussion he had with the applicant in June 2015 Mr. Gregory recalled that most of the conversation between himself and Mr. Thoele was about Mr. Thoele's fence.

Mr. Partington isn't clear if automobile repairs were ongoing or had been abandoned for some time and was an expanded use of motorcycle repair.

Mr. Gregory did not make any determination if the automobile repair had ever stopped. During Mr. Gregory's inspection he noticed there was a vintage (1960's) and a new lift sitting in the space.

Mr. Partington asked where the focus on motor vehicles originated. Mr. Partington does not fully understand where the focus on the term 'motor vehicles'. Mr. Partington believes that it seems that Mr. Gregory took the word 'motorcycle' and made it 'motor vehicles.'

Mr. Gregory looked at it as a gas station which repaired automobiles. Mr. Gregory agrees that there was nothing that specifically said motor vehicles were allowed on the site.

Mr. Partington commented that the business was dissolved in 1991. There is very little info between 1983 and 2010, essentially no information. Mr. Partington asked how do we know what happened during the time period between 1983 and 2010.

Mr. Gregory determine what happened between 1983 and 2010 based on talking to people and gathering information.

Mr. Breton commented that nowhere is automotive repair listed. Mr. Breton referred to a historical directory hanging on the wall in the room. Mr. Breton commented there is a large amount of time where there is no documentation in the file.

Chairman Scholz asked the ZBA for input regarding jurisdiction; specifically does the ZBA have jurisdiction?

Mr. Samsel commented there are 21 letters in support of the garage in the file. Mr. Samsel read RSA 677:2 read into the record. Mr. Samsel commented that 1/22/2015 was the date of the appeal decision.

Chairman Scholz agrees with Mr. Samsel.

Ms. Scott commented that RSA 676:5 11A is the correct RSA, Mr. Samsel read the wrong RSA. Mr. Samsel acknowledged he read the incorrect RSA.

Mr. Partington is in agreement with Chairman Scholz and Mr. Samsel. Mr. Partington commented there is a 30-day appeal period in the Ordinance and ZBA bylaws. The sign permit clearly states the intention for automotive repair. The time to appeal was during the 30-day appeal period when the permits were noticed; 4/30/15, 5/14/15, and 2/5/15 were the dates of the permits. The administrative decision could have been appealed within the 30-day appeal period after one of the permit dates listed. Mr. Partington, based on the Ordinance, ZBA bylaws, and dates of the permits, the ZBA is not within jurisdiction.

Chairman Scholz continues to address the issue of jurisdiction due to the elapsed time period.

Chairman Scholz commented that all the permits are publicly posted in two places.

Ms. Scott commented that permit hearings are posted in the department and the newspaper.

Mr. Partington and Mr. Samsel agree that they are open to public comment regarding the timeliness, only, of the appeal.

Scott Bar, 129

Abutter

Property value dropped by \$46k. the only change has been the business

When was the permit filed and when was the sign put up

If the permit was issued and sign placed 30 days later, we would not have had an opportunity to appeal.

Asked for clarification regarding abutter notification when there is a significant change to the property.

The permits were granted improperly based on the continuance of a business.

Laura Scott, Director Community Development

all permits issued are posted weekly in the department and the newspaper. No abutter notifications are sent out for building permits. There is no way for the town to know when signs are placed after a permit is issued.

Mr. Partington commented that the process isn't necessarily fair. Would have to be looking for it to know it was coming.

Chairman commented that the community can decide to petition for a change to the ordinance. We have statutory requirements. The original permit was issued on 4/30/15

Tom Case commented the ZBA is basing their decision on when the permit was issued. The applicant is appealing a decision of the Code Enforcement Administrator. The June conversation between the applicant and Mr. Gregory was not put in writing. The appeal has to be based on a letter.

Mr. Partington commented that on 1/22/15 a letter was issued to the homeowner.

Mr. Case commented that an appeal has to be based on the Code Enforcement administrator's written (not spoken) decision.

Mr. Partington asked Mr. Case what is the time limit for appealing the Code Enforcement Administrator's decision.

Mr. Case commented the timeline starts when it is brought to the attention of the code enforcement Administrator. An applicant could wait a year to act on an issued permit. The 30-day appeal period starts when the applicant receives a written response (to the applicant's initial letter) from Mr. Gregory.

Mr. Samsel stated that he specifically asked Mr. Thoele earlier in the hearing what letter he was referring to and Mr. Thoele responded the letter dated 1/22/15 from Mr. Gregory.

Mr. Breton commented that the item #13 on Mr. Gregory's response, the second line from the bottom, he makes a determination that everything was in line. Mr. Breton referred to Exhibit 4 letter. 12/2/2015 Mr. Gregory sent a letter that the office made the determination that everything is allowed.

Mr. Partington commented that Mr. Gregory made the decision on 1/22/15 and sent a letter on 12/2/2015.

Mr. Breton, assume looking at all the evidence, Mr. Thoele read everything, the last correspondence was 12/2/2015 and Mr. Thoele made a decision to appeal. Mr. Thoele is not appealing the permits, appealing the whole item.

Jennifer Zink, 39 N. Lowell Rd.

- 50-year resident.
- The applicant had ample time since January to place an appeal.
- The 30 days should stand.
- The Landry's have been there forever.

Jason Breley

- Attorney representing Jeff and Susie Noyles
- Permits issued for the business 3/2015, 5/2015, 4/2015

- Letter 1/22/2015 determining a pre-existing use
- Reviewed Rules of Procedure 904, and asked why we are here?

Chairman Scholz commented there is no reasonable expectation that an abutter will know something is going to happen without notification. There is no time line associated with the decision. Mr. Gregory's January decision referenced is not significant for developing a time line because it was not posted publicly and could not had reasonably been known by someone.

Mr. Breton commented that on 11/27/15 Mr. Thoele writes the town and it answered two weeks later. Mr. Thoele is not questioning the permits. Mr. Thoele is questioning the nonconformity of the business.

Mr. Samsel commented that the discussion about the permits are items that could have been appealed. The correspondence from Mr. Gregory dated 1/22/2015 is a determination letter in response to the letter from Mr. Dingum. The determination letter only went to the Landry's; it was not publicly sent out.

Jim Tierney commented the advertisement was for this evening's appeal was for an appeal of administrative decision. The letter itself, on face value, is appealable. Whenever a code official is asked to make a decision on something it is appealable and gets it due process. There is no definition for automobile or motor vehicle in the RSA. The choices are to leave the town's decision as it stands, or modify it. The ZBA can't change the past, change the permits, or add to the zoning ordinance. The ZBA can only consider the request which is: How did Mr. Gregory come to his decision and was the decision correct?

Betty Dunn made the following comments:

- Letter dated 12/2/2015 says see attached determination letter which was dated 1/22/2015.
- It is placed in the file and people can come and look at it at any time.
- Could someone else or should someone else have known?
- The abutters should have known the appeal period has expired and the ZBA does not have jurisdiction based on the 30-day appeal period.

Mr. Thoele commented that the ZBA did not vote on this decision and read Rules of Procedure chapter 8 paragraph 5. Mr. Thoele commented that had he been notified in writing he would have attending the hearing; referring to the January 22, 2015 letter.

**Motion by Mr. Samsel to go into deliberation regarding timeliness of the application ONLY  
Second by Mr. Partington**

**Vote 5-0-0**

**Motion carries**

Mr. Samsel believes this is a tougher decision the ZBA has to make from time to time. Before testimony can be considered, the ZBA has to determine if this is an appealable letter. There was a request from an abutter. Mr. Gregory's determination letter is when the clock starts. Based on those facts, Mr. Samsel does not believe the ZBA has jurisdiction.

Mr. Partington commented that the rules are what they are. The letter from Mr. Gregory date 1/22/2015 is not reasonable, no one could have seen that. Mr. Partington will base his decision on the date of the permits and the verbal conversation between Mr. Thoele and Mr. Gregory.

Mr. Breton commented that last January it was determined that an automotive business could be there. 11/27/2015, two letters are sent to the town that the business is growing and getting bigger and bigger. Mr. Thoele goes through the files and appeals the expansion of a nonconforming business. Mr. Breton does not believe Mr. Gregory's decision is correct. Mr. Thoele is appealing the business being conducted on the property and it is being appealed within the past 30 days.

Mr. Partington commented that there is no evidence that anything has changed since January 22, 2015.

Mr. Breton believes he is within his rights to appeal, there have been 3 letters within the last 30 days.

Chairman Scholz commented there were signed permits issued and anyone could have gone and looked at the file. It is clear, based on the permits, a reasonable person would have found Mr. Gregory's letter of decision and could have appealed at that time. Chairman Scholz does not believe the ZBA has jurisdiction.

Ms. Skinner agrees with Chairman Scholz.

Mr. Breton suggested to table this discussion and continue after town attorney has had time to review the documents.

Chairman Scholz agrees with Mr. Breton. Chairman Scholz wants to make the right decision.

Mr. Samsel commented the business has been there as long as she has lived in town.

Ms. Skinner commented the business has been there as long as she has lived in town.

**Motion by Mr. Partington to deny Case #50-2015 for the Appeal of Administrative Decision of Mr. Dick Gregory, Code Enforcement Administrator, to allow 120 Lowell Road (24-F-3000), owned by the Landry Noyles Trust, to operate as a legal existing non-conforming business/use in the Residence A/Rural Zoning Districts as it is untimely and out of the ZBA jurisdiction. The 30 day appeal period has run out based on the original decision letter was issued 1/22/15, and related permits issued on 2/5/2015, 4/30/2015, and 5/14/2015.**

**Second by Mr. Samsel**

Discussion on the motion:

Mr. Breton disagrees with Mr. Samsel. Mr. Thoele is appealing the nonconformity of the expanded use. Mr. Thoele sent a letter to Mr. Gregory in November. Mr. Gregory responded to the letter in December. Mr. Thoele is not appealing the permits, he is appealing that the use has expanded. Item #12 states what is going on and the business is not in conformance; that is what Mr. Thoele is saying in the letter. Mr. Thoele is saying the business has expanded more than it is allowed to.

Mr. Breton stressed that Mr. Thoele does not have an issue with the permits, he is saying the current business has been expanded and that is what he is appealing. What was allowed there has expanded and he is appealing the expansion. Where do the homeowners have remedy if it grows and grows in front of them?

Mr. Mazalewski commented there may be other forms of remedy, this is not a dead end.

Chairman Scholz agrees with Mr. Mazalewski as there may be other forms of remedy.

**Vote 4-1-0 Mr. Breton opposed.  
Motion carries**

**10:03pm brief recess**

Meeting resumed at 10:19pm

**Case #41-2015 Application of Brian and Pamela McCarthy Request for Rehearing on the decision made by, Lot No. 22-L-202, located at 11 Prescott Road, Windham, NH**

Mr. Gregory clarified that Mr. David M. Groff is the person requesting the rehearing.

Application for Rehearing Facts:

1. no technical error, no new information
2. no technical error, no new information
3. no technical error, no new information
4. no facts supporting the statement, no technical error, no new information
5. no technical error, no new information
6. no technical error, no new information
7. no technical error, no new information
8. no technical error, no new information
9. no technical error, no new information
10. no technical error, no new information
11. no technical error, no new information Mr. Partington commented this may be an attempt to introduce new information in this packet which cannot be accepted as it was reasonably available at the time of the hearing.
12. no technical error, no new information
13. no technical error, no new information
14. no technical error, no new information
15. no technical error, no new information
16. no technical error, no new information

**A motion was made by Mr. Breton to deny the request for a rehearing for Case #41-2015, as the ZBA determined there were no technical errors made and no new information that was not available at the original hearing.**

**Second by Mr. Samsel**

**Vote 5-0-0**

**Motion carries**

**Motion by Mr. Samsel to adjourn**  
**Second by Partington**  
**Vote 5-0-0**  
**Meeting adjourned at 10:43pm**

Minutes revised by Dick Gregory, ZBA/ Code Enforcement Administrator