

Atkinson Conservation Commission Minutes
Monday, June 10, 2019
Atkinson Town Hall

Approved July 1, 2019

Members Present:

Paul Wainwright, Chair
Denise Legault, Vice Chair
Jeff Nenart
Dennis Krause
Dan Kimball
Scott Kukshel
Tim Dziechowski, Alternate (voting)

Others Present:

1) Call to order, attendance

Chair Wainwright called the meeting to order at 7:30 PM on Monday, June 10, 2019, and declared that notice of this special meeting had been posted in two places more than 24 hours previously. Chair Wainwright reviewed the attendance list and declared that a quorum was present.

2) Administrative Appeal under RSA 676:5 concerning the Page Farm perimeter buffer

Vice Chair Legault made a motion to go into non-public session under RSA 91-A:3 II (I) for consideration of legal advice provided by legal counsel. Member Krause seconded the motion. All members of the Conservation Commission present voted in favor. Vote: 7/0/0.

The meeting entered non-public session at 7:32 PM.

Chair Wainwright and Vice Chair Legault reviewed the meeting they had with attorney Victor Manougian on Wednesday, June 5. Victor is with the McLane Middleton law firm, and his practice is limited to zoning. His specialty is ZBA appeals.

As discussed in our June 3 meeting, attorney Manougian has reviewed the letter from attorney Bosen that claims our appeal to the ZBA is not allowed because the Rural Residential Cluster is an Innovative Land Use. Attorney Manougian again stated that attorney Bosen's claim is incorrect because the exemption from appeal that is discussed in paragraph III of RSA 676:5 only applies to zoning that was adopted pursuant to RSA 674:21, which was not the case with the Rural Residential Subdivision zoning. In short, a zoning ordinance is not adopted pursuant to anything unless it says so. And furthermore, even if this ordinance were adopted pursuant to RSA 674:21, the exemption would only apply to powers specifically delegated to the Planning Board in the language of the

ordinance. An example in our case would be the granting of Conditional Use Permits – see, for example, ordinance 640:2 on page Z-65 of the March 2017 zoning book.

Also, in attorney Manougian’s opinion, ZBA Chair Glenn Saba should not need to recuse himself because of his previous statements that he feels the buffer issue should have been heard by the ZBA. He was simply doing his job. It is perfectly appropriate for members of one board or commission to attend meetings of other boards to voice their opinions and be informed. Furthermore, our 2015 Master Plan calls for us to work together.

Attorney Manougian again advised us that we have a strong argument that the zoning interpretation in this case concerning the perimeter landscape buffer should have been made by the ZBA, not the Planning Board. “Administrative Gloss” does not apply in this case since there is no ambiguity in the language of the zoning ordinance. The phrase “wherever possible, natural vegetation should be retained” is a zoning interpretation, not an ambiguity. And while “original intent” is useful in understanding an ordinance, it is not “controlling”. In other words, in this case, Atkinson today is a very different place from the early 1980s when the perimeter landscape buffer ordinance was written. Although its original intent was to shield populated neighborhoods from one another, the language in the ordinance does not specifically say that, so the Planning Board and ZBA are free to look at the ordinance in light of the 2019 reality that open space and wildlife habitat are equally deserving of protection from residential intrusion. Our 2015 Master Plan also supports the importance of protecting wildlife habitat.

Bottom line: the Planning Board has made a zoning interpretation that should have been made by the ZBA. This is especially true here since the applicant originally appeared before the ZBA for a variance to do essentially what has now been approved by the Planning Board (see the February ZBA minutes), and when the direction of that hearing seemed to be going against the applicant, they asked for a continuance and subsequently managed to convince the Planning Board that a variance was not needed after all.

Attorney Manougian’s summary of the situation is: you can’t ignore an ordinance just to make a project feasible.

Member Nenart made a motion to end non-public session and return to public session. Vice Chair Legault seconded the motion. The motion carried unanimously, 7/0/0

There were no decisions made in non-public session, and there was no motion to seal the minutes of the above non-public session.

Chair Wainwright reported on the discussions he has had with State Senator Chuck Morse concerning the inadvertent and unintended delay that our appeal would cause the million gallon water tank. Senator Morse reported that it is not feasible at this time to seek intervention by the Governor, so, as things currently stand, it appears that continuing our appeal would cause a lengthy delay in this important regional water project.

The Commission members discussed the relative importance of our appeal compared with the regional water project.

Member Nenart made a motion to withdraw our administrative appeal to the ZBA under RSA 676:5 because of the unintended and potentially lengthy delay it would cause to the construction of the million-gallon water tank. Vice Chair Legault seconded the motion. The motion carried 4/3/0.

Our letter of withdrawal is attached to these minutes.

3) Adjournment:

Chair Wainwright asked if there was any additional business that needed to be discussed, and, hearing none, asked for a motion to adjourn.

Vice Chair Legault made a motion to adjourn, and Member Krause seconded it. The motion carried unanimously, 7/0/0.

The meeting adjourned at 7:55 PM.

Attachments:

- Letter of withdrawal

TOWN OF ATKINSON CONSERVATION COMMISSION
21 Academy Avenue
Atkinson, New Hampshire 03811

Withdrawal of Appeal

June 11, 2019

Atkinson Zoning Board of Adjustment
21 Academy Avenue
Atkinson, NH 03811

Re: Administrative appeal under RSA 676:5 of zoning ordinance 600:11 interpretation contained in the decision of the Planning Board dated April 17, 2019 granting relief from the perimeter buffer requirements to the applicant Midland Investments, LLC

Dear Chairman and Zoning Board of Adjustment Members –

In consideration of the unintended and possibly lengthy delay in the Hampstead Area Water Company's construction of the million gallon water tank that would be caused by our appeal, the Atkinson Conservation Commission, in a special session on June 10, 2019, voted 4/3/0 to respectfully request withdrawal of our administrative appeal, referenced above, which was scheduled for a hearing at your June 12, 2019 meeting.

This request in no way diminishes our strong belief that our appeal has merit, and we would welcome opportunities in the future to address such issues without feeling the need to use the appeals process.

Sincerely,



Paul Wainwright, Chair
Atkinson Conservation Commission

Copy to :

Sue Killam, Atkinson Planning Board Chair
Sue Coppeta, Atkinson Planning and Zoning Administrator
David Cressman, Atkinson Town Administrator
Julie LaBranche, Rockingham Planning Commission
Victor Manougian, Esq.