

Town of Temple, NH
ZONING BOARD OF ADJUSTMENT

August 3, 2023

Marsh Application

ZBA Members Present:

Emily Sliviak, Deb Harling, Allan Pickman, James Stein, Lucas Tabolt, Richard Redding

Attorney's Present

Attorney Tom Hanna representing the Marsh's.

Attorney Driscoll representing the Select Board.

Attorney Dan Luker representing John & Connie Kieley

At 6:00 p.m. Harling introduced the members and asked if any members had to recuse themselves.

Sliviak stated she will recuse herself for the Marsh hearing based on knowing Attorney Tom Hanna from a previous ZBA case.

Harling stated before an application is accepted the board will have to make the determination on if it has jurisdiction to do so.

Pickman believes the board does have jurisdiction to proceed with a hearing. Stein believes there is no significant difference between the 2018 application and the new application. Tabolt believes there is more information that has been presented from a geology study and an opinion regarding property values. Redding finds the application is substantially similar.

Harling wanted to hear Attorney Tom Hanna's opinion on why he believes the ZBA has jurisdiction to continue the application and start a hearing.

Hanna referenced the 1980 Fisher Vs Dover case, stated that this case does not allow similar cases to be heard but there are a line of other cases that do allow a board to have jurisdiction. Hanna states that Judge Temple's order was for the Marshs to reapply for a special exception. The town gave a proposed order based on the court's decision, *the defendant shall bring the property into compliance by either removing the material that constitutes a junk yard and their noncommercial enterprise use or they must obtain land use approvals necessary within 30 days of the order, including but not limited to applying for a special exception. Site plan approval isn't possible without a granted special exception. There are steps to completing the court order.*

Hanna continued to explain why the board does have jurisdiction to proceed. Hanna stated "the town invited the applicant in the proposed order to reapply as a means of compliance".

Attorney Driscoll stated there are a lot of leaps being made. Driscoll stated a special exception for a noncommercial enterprise use for keeping with these items meant that the board would have to override a previous decision. He believes the 2018 application is the same as the new application and the board does not have the jurisdiction to move forward.

Attorney Luker believes the applications are no different and that Judge Temple made a thorough determination that the property is a junkyard under state law. He believes by accepting the application and moving forward with a special exception then the board would be going against the recent court decision and against the previous board's decision in 2018. The same use that was applied for in 2018 is being reapplied for again. Luker stated that this board does not have jurisdiction under the Fisher doctrine and if you take into account Judge Temple's order he was directing the applicant to apply for a junk yard and going through necessary steps. The application is not complete and is missing attachment 3 which gave written permission for the board to view the property with a planned site visit.

Luker also wanted to make the board aware that the Town of Wilton has submitted a letter with their opinion on the property and regional impact.

Harling asked about the appeal that was filed with Judge Temple's decision, without prejudice.

Driscoll said the Supreme Court found that the decision is not final because attorney fees awarded to the town has not been affirmed yet.

Harling asked the opinion of the board, who would like to move forward or seek counsel first.

Pickman would like to move forward so the application can move forward to the PB.

Redding is curious to see what counsel has to say but sees no difference in the new application.

Stein believes a more complete application is necessary or the application should be dismissed under Fisher VS. Dover.

Tabolt agrees with the Superior courts decision on defining the property as a junkyard and the application should be different. Tabolt found it odd that written permission was not given to the board in order to visit the site. Tabolt stated that if this moved forward then regional impact may be a possibility and he would like to seek counsel's opinion first.

Pickman commented that there is nothing that is preventing this board to move forward and simply make a condition that requires the applicant to go to the PB next and obtain a junk yard permit from the town.

Bibler a town resident, stated she believes the property is subject RSA 438 because it is in the Souhegan Water district/water shed. Harling said jurisdiction must be determined first before discussing the possibility of regional impact.

John Kieley wanted to discuss regional impact and Hanna asked the board to continue on the issue of jurisdiction only, no public comments should be allowed.

Stein made a motion to dismiss the application. Harling asked members to state reasons why: Stein stated the applications are the same. Redding repeated his original opinion.

Motion by Stein that the ZBA does not have jurisdiction on this application under the Fisher v Dover doctrine as it has been determined that this application is not significantly different than the 2018 application that was denied, and because of the appeal to the Supreme Court, which was withdrawn without prejudice and may be re-filed at a later time, second by Redding.

Pickman Nay, Tabolt Aye, Stein Aye, Harling Aye, Redding Aye

A vote was made in the affirmative that this board does not have jurisdiction.

Harling made a motion to approve the 7.14.23 minutes as amended, second by Tabolt.

OTHER BUSINESS:

Jim Medeiros is interested in becoming an alternate member for the ZBA. He spoke about his experience and interests in becoming a member. Harling made a motion to make Medeiros an alternate member for the ZBA for a 3-year term (recommendation to the SB), second by Sliviak.

Harling made a motion to adjourn, second by Pickman.

Minutes by Sliviak