Zoning Board of Adjustment

Meeting Minutes March 27, 2023

These minutes were produced first by Office 365's voice-to-text transcription of an audio recording of the meeting. Then, ZBA software was used to drive Open AI's GPT 3.5 model to convert the transcription into grammatical sentences and paragraphs. Words actually spoken are enclosed in quotes.

Carney "It's time to call the ZBA to order at 7:01 pm before I go any further, I'm going to let Deb speak on the recording procedures."

DeFosse I tried out Microsoft 365 personally, with the intention of testing it out to see if I would recommend it to the town. I found that the program allowed me to dictate my meeting minutes quickly and efficiently. However, I did notice one potential issue with the program: when dictating, it is important to speak your name (even if it is just your last name) so that the recording can be properly attributed to each speaker.

Aside from this minor issue, I found the product to be highly effective. Although there were occasional instances where words were not transcribed correctly (such as "ZBA" being transcribed as something else), these were easily fixed in under an hour. Overall, I felt that the program was well worth the price.

As a result of my positive experience with Microsoft 365, I recommended it to the selectmen. They authorized me to purchase the product, and I believe it has been an excellent addition to our office's workflow.

Carney I'd like to add that I really liked the last time we voted on the minutes. It came out really well, but Mark spent a whole lot of time doing it. However, I think this one here will be a lot better and much superior. In fact, I think it'll actually cut down on Debbie's time, so I was totally in favor of doing this for a while, at least trying to get things going.

DeFosse I have trouble hearing certain things sometimes when doing my minutes, as you mentioned earlier. I believe it would be best to keep things as they are, but with the addition of microphones. By extending the microphones to both the speaker and the listeners, we can ensure clear communication and receipt of messages.

Overall, I think this solution would be effective in improving our communication during meetings.

Carney "Thank you for speaking on the recording of our minutes."

Carney "The members present tonight: myself Gary Carney chairman, Mark Florence vice chairman, Linda Marshall and Andrew hatch, who is absent tonight, and our administrator assistant Deb DeFosse."

Carney During the discussion, it was mentioned that the minutes of the March 13th meeting have not yet been approved. Deb still has some work left to do on them, and as a result, the approval will be postponed to the next meeting.

The election of the chairman was also included in the agenda, however, since Andrew was not in attendance, it was decided to wait until the next meeting to hold the election. This decision was made with the intention of allowing all members to participate in the process of electing a new chairman.

Furthermore, it was announced that the next meeting is scheduled for April 29th. Although the specific details of the meeting were not discussed at the time, it was confirmed that the next meeting will take place on this date.

Florence "April 26th will be our next meeting. I'm all set for that."

Florence Mr. Chair, I have some comments to preface the meeting. If I may, I would like to lead directly into our investigation on the motion.

The first note that I made to myself was asking the Chair if he might recall that at the end of the last meeting we were approached by a selectman. The selectman suggested that it may not be appropriate for the chair to make a motion.

Carney "That is correct."

Florence During that meeting, they offered us what I thought was good advice. They suggested we make the meetings more robust. Curious, I decided to investigate further. After reading Roberts' Rules of Order, I discovered that the chair does indeed have the power to motion, but it is not recommended for twelve member boards or more. For boards of three members or less, it is quite common.

Although the advice was well-intended and I didn't want to dismiss it, I believe that since we are not bound by Roberts' Rules of Order, we should make our own decision regarding this matter. In fact, we have our own rules of procedure which will dictate how we conduct our meetings and how we plan for future meetings. Ultimately, I leave it up to the group to decide whether or not to follow this advice.

Florence There is a strict time limit of 30 days for filing an appeal. It is important to note that the appeal before us was made in a timely manner, but upon reviewing the notice of decision from our last meeting, I realized that we had issued a condition subsequent requesting that errors and omissions in the permit application be fixed, regarding the construction of the second story. Although this condition was agreed upon at the meeting, it has not been fulfilled. As a board, we do not have enforcement powers, so we can only make note of this and move on.

Additionally, I came across RSA 677:3 while preparing for this meeting, which stated that motions raised in a motion for rehearing are considered final. This information provided some guidance for my thoughts.

It is important to be aware of these points as we move forward with the meeting.

Quote "A motion for rehearing ... shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable ... No ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless ... for good cause ..."

Florence "Meaning they can't make any additional arguments without leave of the court as it moves forward."

Florence Initially, I thought that it might be as simple as taking a vote on the standard for our review. However, I now believe that in this meeting, we need to answer two questions. The first question is whether the motion contains any new evidence or arguments to cause any consideration. The second question is if the board acted unlawfully or unreasonably at the original hearing.

I think it's what we have to look at tonight to satisfy ourselves whether we should grant or deny the motion for a hearing. However, the current situation doesn't make sense to me.

Carney "I agree with that."

Marshall "I agree."

Florence After some consideration, I expressed to myself that we should address two questions before deciding on whether to grant or deny the rehearing. I suggest that we discuss these questions tonight. To get the conversation started, I prepared notes on two topics: new evidence and the issue of whether we acted lawfully and reasonably.

Regarding new evidence, the motion for the rehearing claims that the second story of the proposed building is an inevitable consequence of the sloped roof. However, I wanted to challenge this argument as I have seen many structures with sloped roofs that have empty space below or exposed rafters. Therefore, I do not give much weight to this claim.

Furthermore, I divided my notes into two parts and discussed each separately. My aim was to provide information that could help us make an informed decision about the rehearing.

Carney It was just a simple question. It started as a simple question from me as I looked at something we hadn't seen before. We were given a more complete set of plans which showed the elevation. All we needed was a foundation plan to do our thing. I questioned it offhand, not that we had anything to do with it. However, it seemed to take off from that point.

Florence "Agreed."

Florence I would like to bring up a second point, which concerns the argument regarding what I call the "zombie claim." This claim pertains to the alternate definition of "unnecessary hardship," and it was not present in the original May 2nd, 2022 application. However, it was introduced in the June 30th, 2022 motion for rehearing, and subsequently dropped in the November 28th, 2022 re-application. Interestingly, it has resurfaced once again in the March 1st, 2023 motion for a rehearing.

It may be useful to recall that the alternate definition of unnecessary hardship is described in the state's official ZBA handbook. I'll take the liberty of reading it out here.

Quote "Alternatively the applicant can satisfy the unnecessary hardship requirement by establishing that because of the special conditions of the property there is no reasonable use that can be made of the property that would be permitted under the ordinance."

Florence And if you remember, we discussed this at length back in July. I guess it was in July last year that we were talking about this. We rejected the claim then, and what I propose in front of us now is that we reject it again. This is because the property is actually being used right now as the applicant's residence. The house is there as permitted by prior variances or LUO 402 nonconforming uses. I'll reach for the same section of the handbook.

In summary, we previously discussed this claim in July last year and rejected it. We should reject it again because the property is being currently used as the applicant's residence. The house is permitted by prior variances or LUO 402 nonconforming uses.

Quote "If there is any reasonable use, including an existing one, that is permitted under the ordinance this alternative is not available."

Florence I would like to reiterate my rejection of the claim of the alternative definition of unnecessary hardship. This is the second time I am stating this, as I do not see it as a viable option.

Moving on to the next point, let's discuss the stormwater management improvements mentioned in the motion. According to the original application, the proposal will only increase the impervious surface by 394 square feet. Additionally, the motion claims that the stormwater management improvements will have a positive impact on the environment of Highland Lake and the general public. These are facts that we have received from the motions.

It is important to consider these details when making any decisions regarding the proposal. While the impervious surface increase may seem small, the potential impact on the environment must be carefully considered. Likewise, the potential benefits of the stormwater management improvements must also be thoroughly examined.

Overall, we must carefully evaluate all aspects of the proposal before making any decisions. Only through thoughtful consideration can we ensure that our actions will have a positive impact on the community and environment.

Carney I remember it being talked about, you know. I wouldn't be able to go back at it verbatim, but I do recall.

Florence "This was certainly something we have discussed."

Marshall I noticed on this application that under the "background and description" section, it states that the existing driveway has no stormwater management system. This means that sediment is able to run down into Highland Lake. However, the proposal includes plans for stormwater management improvements which will reduce runoff and erosion. Unfortunately, I am not entirely sure how they plan to accomplish this.

I remember being there during the beginning stages of this project when the driveway was simply made of gravel. Despite the proposed changes, the driveway will still remain a gravel driveway.

Florence Right, so I am thinking, how can there be a net improvement over having a structure in place, when compared to not having it there at all? As you mentioned, the existing parking apron is categorized as impervious, but not all impervious surfaces are created equal. It's gravel and crushed stone, just like my own parking area, which is also classified as impervious, but it's not entirely impervious.

So, if a building is constructed over that area, it will actually be guaranteed to be 100% impervious, which means that it doesn't matter what happens in the stormwater management system. While it definitely helps once the structure has been made, I can't accept the claim that it handles stormwater better than just having a pervious surface. To my mind, having the surface that already exists is much better.

Carney Can you bring up pictures? There was one, not the elevations, that caught my attention. I thought they were going to add something down here which was supposed to be something for the runoff. The thing I am referring to is located here. They are going to work on drainage, but I thought there was going to be a horizontal one.

There was another picture that went all the way down to the water. In here, I thought they were going to put something similar. However, I am not entirely sure if my assumption is correct.

Florence "OK I don't see that."

Carney Maybe it was in one of the other ones, I don't know. I do remember that there was no more space to run off here. There was a walkway or something, and the walkway was going to be removed because they were going to take some square footage from it.

Florence I had some theoretical objections to the stormwater structure, as I didn't believe it could handle the stormwater better than without the structure. Additionally, the claim of net improvement didn't make sense to me.

Moving on to the alleged unlawful or unreasonable acts in the motion, there was an implication that the board acted unlawfully by not rendering a decision on the setback variances, as they were considered minor. However, based on my research reading Housing Appeals Board decisions, I believed we acted reasonably by holding a decision in abeyance for possible reconsideration, citing the Graham v. E Kingston case as a precedent. I also believed we did Caruso a favor by not rejecting the variances immediately, as either could possibly be acceptable in a different application.

Another issue was the characterization of the proposal as a two-story addition, with the claim in the motion that the second story was improperly used as a basis for the denial. However, I believed we acted reasonably by relying on the engineering drawing which clearly labeled it as a second story. I also believed that the proposal was accurately classified as a two-story addition and that calling it merely a garage would minimize its impact. We did not use the second story as a basis for denial, but rather to accurately characterize what was before us.

Overall, I believed the board acted reasonably and did not act improperly in making our decisions based on the information presented to us.

Carney That's exactly right. It started off just as a not an off the cuff. It started off as an innocuous question and it seemed to stumble from there. And when we were coming up with our decision, that did not enter into the fact. I would have made the same decision had it been just a one story with no space above. The decision would have been exactly the same, the same amount of water that's coming off the roof, the same amount of everything is happening. I suppose if I went out on a limb and I said and they said it was three stories, you would have got the same thing. Although going three stories would probably put it over the height of 35', that's beside the point. At no time was our decision about the stories.

Florence There is a new subject that the appeal relies heavily on the configuration of neighboring properties to justify the proposal on the public interest, spirit of the ordinance, and unnecessary

hardship prongs. However, I believe that we acted reasonably in rejecting these arguments. We did so on the grounds that the neighbors are free to redevelop their properties as they see fit, and that any advantage today could be a disadvantage tomorrow.

I remember saying it at the meeting, of course, that for such non-conforming lots, the owners are free to seek and be granted variances to further their development. As a result, we said to ourselves that the applicant has no control over the neighboring property's actions. They are going to act completely independently, and to rely on their layout, their configuration, and the distance of their setback of their houses, to help justify this proposal is not reasonable.

Marshall It seems that the abutters are in favor of the current situation. However, there may be some concern about whether they are considering the future. If they were to sell their properties, someone else may want to make changes that could significantly alter the situation.

Despite any potential uncertainties, it is worth noting that the abutters are currently satisfied with the status quo.

Florence I agree that the variance goes with the property, not with the owner. If the current owners sell their property tomorrow, the new owners could have completely different plans. Another point raised in the motion is our consideration of overcrowding and aesthetics as we try to judge the proposal on the public interest and spirit of the ordinance prongs.

I believe that we acted reasonably and lawfully by concluding that the building and permeable coverages unduly and to a marked degree conflict with LUO, which is one of the basic zoning objectives. We have stated this several times and provided the reasons for our decision fully in the minutes of the hearing and the notice of decision.

I also found a relevant case, Soukup v. Gilford, where the Housing Appeals Board concluded that the ZBA did not act unreasonably or unlawfully when it focused on the aesthetics of the neighborhood and the desire to avoid the appearance of overcrowding. This case helped me to figure that we were doing something reasonable because the Housing Board had already made similar decisions in other cases.

In summary, our decision was based on the zoning objectives and the public interest, and we acted reasonably and lawfully.

Florence In my final statement, I want to discuss the issue of uniqueness and the equal burden of the ordinance. In the original application submitted in November, there was a claim made that the property is unique due to its size and configuration, specifically because it is small, narrow, and closely nestled next to Highland Lake. However, there is contention on the determination of uniqueness, which was a main point of discussion.

To determine the meaning of unique, we consulted the dictionary and found that it means "different to all others." We also looked at another Housing Appeals Board case, DeSantis v. Salem, which supports this interpretation. What is unreasonable is the tortuous definition in the motion of "different to at least one."" It doesn't make sense to define unique as meaning "different to at least one."

In our original July notice of decision, we demonstrated that the applicants lot is identical in size and configuration to 64% of the lots closely nestled next to Highland Lake and 67% of the lots on the same street. We have plenty of documentation to back this up, including a table of the number of lots with their acreage and other details.

Another claim made by the applicants is that their property is burdened differently from the other lots in the area. We believe that the proper test for unnecessary hardship is: if the property is burdened by the zoning restriction in a manner that is distinct from other similarly situated property, then it may merit a variance.

We defined "similarly situated property" as the lots surrounding the shoreland of Highland Lake. This definition was reasonable, as the Carusos also characterize their lot as "closely nestled next to Highland Lake." Therefore, we think it's a decent characterization of the neighborhood.

One question we had to consider is whether the burden of the lot coverage requirements falls unfairly upon the Caruso's lot because of its small size. We found that its size is essentially identical to 64% of similarly situated lots. So, in the absence of special conditions, is it circular reasoning to grant the variance simply because the lot is small? We believe it is.

Finally, we spent a lot of time discussing whether the proposed variances are reasonable. We looked at the Harborside case and how they approved marquee signs of 25 square feet because they were "reasonable and not overly aggressive." We followed the same reasoning and concluded that the proposed addition to the Caruso's property is not reasonable, given its size and the variances required.

In summary, I reinforce my belief that we should deny the variances based on the evidence and reasoning presented.

Carney "I totally agree with that. I think we acted lawfully."

Marshall I agree as well. I feel that they have not done anything to change the paperwork. It still says the same thing as before.

It's frustrating to feel like no progress has been made. It would be nice to see them take action and make meaningful changes to the system. Until then, we're left dealing with the same old paperwork and bureaucracy. Hopefully, someone will step up and take the necessary steps to improve the situation.

Carney "Yes, OK I agree with that."

Carney "I think we are ready for a motion."

Florence "I think we are ready for a vote."

Florence "I move that the board deny the rehearing before us on the grounds that we have acted lawfully and reasonably."

Carney "I'll second."

Carney "All those in favor?"

All "Aye"

Carney "OK thank you. 3-0 vote to deny the rehearing. The meeting is adjourned at 7:40pm."