

**Kingston Zoning Board of Adjustment
August 13, 2015
Public Hearing**

Minutes

The Chairman called the meeting to order at 7:00 PM, declaring a quorum present; there were no challenges to the validity of the meeting.

Members Present:

Ellie Alessio, Chair
Peter Coffin
Ellen Faulconer, alternate

Ben Romano
John Whittier

Ms. Alessio announced that Ms. Faulconer will be a voting member this evening.

Board Business:

MM&S to approve the 7/09/15 minutes as presented. (Motion by Mr. Coffin, second by Ms. Alessio) **Motion carries 3-0-2** with Mr. Whittier and Mr. Romano abstaining.

Ms. Alessio reviewed the upcoming calendar including a conflict with her schedule. The Board agreed that the public hearing in September would be scheduled on Sept. 17th instead of Sept. 10th.

**John D. Lancaster
45 Route 125
Kingston, NH 03848
R4 Lot 3**

Ms. Alessio explained that this was a hearing to determine whether to grant a re-hearing as requested by Mr. Lancaster's attorney, Anna Barbara Hantz. She stated that if the Board granted this request, an application would need to be received by noon on Wednesday with appropriate fees and abutter labels. She added that while this was the Board's usual procedure, they were working on formalizing the process. There was a discussion regarding procedures for re-hearings and associated fees. Ms. Alessio noted that the Board members had received the original request dated July 9, 2015 and another one dated August 11, 2015. She invited Attorney Hantz to review the request.

Attorney Hantz said that she would be brief as the items were already in the record and not every town allows input at this stage. Attorney Hantz reviewed those items regarding the owner's activities on the site as the salvage business that he participates in. She stated that these activities were on-going at the time of the last site plan approval; a site plan triggered from a tenant's outside storage of granite. She stated there were site walks at the time (2007) including additional review. She said the containers were there at that time and they were stacked; she said it was recognized that these materials "come and go" and that

is what has been happening. She said the site plan requirement imposed by the Selectmen is erroneous as this is what was happening at the last site plan review and nothing has changed since then.

She said the building permit requirement, after review of the ordinance that indicates that a building permit is required for a permanent structure affixed to the ground; she said these materials come and go and as she has suggested, there may be “code” issues that are ripe for discussion such as electrical permits but it is not a building permit requirement. She said that for that reason, the decision by the Selectmen to require a site plan submission and a building permit application are off the mark. She said they are asking the ZBA to interpret the ordinance which applies a building permit requirement to buildings not to materials and also to review the site plan requirement against what was on-going when the site plan was approved in 2007. Attorney Hantz continued that because of those reasons the Selectmen’s decision was in error adding that if granted a re-hearing they would address those issues with documents from the record and in greater detail.

Ms. Alessio reviewed actions taken in June; there was a Notice of Violation issued by the Selectmen; someone had called in an emergency thinking there was a fire and emergency personnel responded and saw the structure that had not had a site plan review nor had received any building permits. The Notice of Violation was appealed by Mr. Lancaster and his attorney. The ZBA upheld the BoS decision; this request is an appeal of the ZBA’s decision.

Ms. Alessio asked if there were any comments in support of the petition. Richard Johnson said that this had been going on for a while and stated that “we all have had issues with the Selectmen and stuff”; he said if the site plan was in place and the stuff had been there, he doesn’t see what the issue is with the Board of Selectmen deciding they don’t like it now; he continued to speak of his displeasure of actions from the Board of Selectmen and the Town.

Ms. Alessio asked for comments in opposition. There were none.

Board discussion: Mr. Coffin referenced the letter sent on August 11th specifically addressing the number of containers and that the number of containers was not the deciding factor in the ZBA’s decision; the factor that they ruled on was whether the structure there was in fact a structure so he doesn’t think that the number of containers is not “new” information that had been pertinent to the Board’s decision. He continued by noting that Atty. Hantz stated that the containers come and go; he asked if there was any indication that since they were stacked in 2007 that those four containers have come and gone; he asked if they have left the site during that time and been replaced. Atty. Hantz said that regarding those particular ones, she was not sure specifically if they have been swapped out; she does know that storage containers have been sold. She continued that a lot of these materials, for example, the sky lights in the roof section that are there are not the only ones that Mr. Lancaster has but those are the ones that are positioned so that the buyer can see what they do; they are a display of very large things. Atty. Hantz continued that containers have been sold, skylights have been sold, pieces of roof structure have been

sold, but she could not confirm whether these particular ones had been swapped out. Mr. Coffin replied that earlier she had said that this particular structure has been in place since at least 2007. She stated that she knew that containers had been stacked since 2007, she can't say whether they were the same containers or not. Mr. Coffin said that when the site plan was conducted were the overhead doors now on the containers attached and the roofing attached. Attorney Hantz replied that she did not know but an invoice shows a portion of a roof placed in 2007. Mr. Coffin said that the invoice refers to rigging of large rooftop and skylights on to an existing roof openings. Atty. Hantz stated that Mr. Lancaster has a potential buyer for all of the components on the site and they could go and then the question is that more components could come back which presents a challenge for this type of business. Mr. Coffin said that what had previously been discussed was that if this was just a display of building materials then nothing inside can be used as, per Atty. Hantz's definition, it wasn't a structure and never had a building permit and therefore never had an occupancy permit. Atty. Hantz said there was never an occupancy permit; Mr. Coffin asked if the building had ever been occupied. Atty. Hantz said there had never been an occupancy permit requirement imposed. Mr. Coffin asked what the reason was for the generator and the lights and the electricity and hydraulic lifts within the structure; his assumption was so people could work inside the structure. Atty. Hantz said that was incorrect. Mr. Coffin asked why those items were there, then. She said the hydraulic lift was not in the structure; she said that these items, on a construction site, for example – containers get stacked, roof pieces are put on, sometimes generators are brought in for lights and electrical permit may be associated with that; she continued that there is no code that applies to the stacked containers; creating a sheltered space for the materials inside does not turn it into a building as defined by the ordinance. Mr. Coffin said the Town uses the International Building Code which is as State code and that says that a building is any structure, that which is built or constructed, that is used or intended for supporting or sheltering any use for occupancy. Atty. Hantz said that is not what the ordinance says. Mr. Coffin said the Town references that State code and abides by it. Atty. Hantz said the ordinance has to give a citizen fair notice of requirements by spelling it out; she said there are other installations in Town without building permits. Mr. Coffin said the Town usually does enforcement based on notification. Atty. Hantz said the ordinance has a definition of what constitutes a building sufficient to trigger a building permit requirement. Mr. Coffin returned to his original question as to the reason for having heat, light and electricity if it is not occupied. Atty. Hantz answered that it is so people can view the "stuff" that is in there. Mr. Coffin asked that she confirm that there has never been anyone working in the structure; she answered that there have been people moving things in and out; items have been stored in there; a cement truck has been parked in there. Atty. Hantz said that if this is the type of evidence the Board would like, it can be presented at a re-hearing as she is not here in an evidentiary manner.

Mr. Whittier stated that the decision the Board made was based on a difference of opinion between Mr. Lancaster and the BoS as to what constitutes a structure; the ZBA decided it was a structure and Mr. Lancaster disagrees. He continued that he was looking at the Precision Crane rental bill that was recently submitted to the ZBA for \$1360 and questioned payment of that kind to have something brought to site and then only have to pay the same amount to have them sold and removed as something that is taken in and out.

Atty. Hantz said that was what happened. Mr. Whittier questioned spending that type of money on something with the potential to only be there a day; it seems that it would be expected to be there awhile. Atty. Hantz said it is protecting the inventory which was a very good point as sitting the skylights on the ground would not be good for them and would not be a good display for them; Mr. Lancaster has sold numerous skylights because they can be seen in an application that shows that light shines through and therefore someone can get the idea of what it would be like to put those skylights in a building; to see the utility of them; if the skylights are just stacked on the ground, you don't get that same display. Ms. Alessio suggested this was a display in a showroom as a permanent structure. Mr. Whittier continued that he also spent \$1700 to stack the containers in the first place. Atty. Hantz stated that a crane is required to pick up a container to put it on a truck. Mr. Whittier maintained that this is intended to be a structure but trying to be questionable to bypass the ordinance; he continued that the Board voted that it was a structure and has not received any information to change that position.

Ms. Faulconer stated that she reviewed the submitted paperwork and the assertions of error in the applicant's July 9th letter and then reviewed the articles as referenced. She spoke to the suggestion that the Board misunderstanding the approved site plan and based on the information heard this evening she stated that if the Planning Board or Mr. Lancaster's intent was to have the storage area used as display, the site plan would have noted the area as "display" not storage. Ms. Faulconer continued that without any documentation that specifically includes the use to invite people in to see a display area for the business that she does not believe an error was made regarding the site plan interpretation. She said that with the applicant's assertion that these are simply storage containers, you have to not look at just the "title" of the structure but the actual activity. She said the next point regarding doors, roof and electricity requiring a building permit; a structure is defined as anything that requires permanent location on or in the ground; she said that anything requiring a crane to move it is considered permanent until it is then moved as anything can technically be moved. She said in the Town's Preamble Ordinance, a building and a structure is the same thing and can be used interchangeably throughout the ordinance and Article 301.2 says that building permits are required for exterior alterations of existing buildings, which also means structures, so the point of item "b" is inaccurate. She clarified that a shed is considered a permanent structure and she could someone come in and move her shed but she needed a building permit for it. She did not find an Board error in point b. Ms. Faulconer said point c did not appear to be a reasonable or accurate comment to imply that code compliance did not need a submitted permit as the Inspectors are unlikely to determine code compliance without some type of application and paperwork for them to review that explains what the structure is and whether is in compliance. She said that point "d" asserts that under site plan review regulations a full site plan review is not required and then list a partial requirement, but not the entire set of requirements. Ms. Faulconer noted that there are six items, not only the four listed and additionally there is a requirement that there needs to have a conceptual consultation with the Planning Board at which time the determination is made that a site plan review is not required and it requires submission of appropriately required paperwork; point "d" is inaccurate and therefore not an error for the Board.

Ms. Faulconer also referenced the re-hearing requests that include that should the re-hearing be granted the additional information will be presented at that time; it was her understanding that to grant the re-hearing request, the new information needed to be provided at the time of the request; she said it did not appear that new information was presented just a re-stating of the original application and discussions per the minutes and the file.

Ms. Faulconer referred to the letter dated August 11, 2015 and the applicant's assertion that "The Selectmen's demand for site plan and building permit approval is not warranted". She reviewed the ordinances that had been referenced in the application and if the determination is that this use is a structure than the Board of Selectmen have complied with Article 301.2 requiring that each request for a permit shall be accompanied by such information as the Board of Selectmen may require and in 904.1 and 904.3 it specifically states that the Planning Board reviews non-residential site plans and no building permit shall be issued until approval of the site plan by the Planning Board is granted. She says the Ordinances and Regulations actually support the Board of Selectmen who is following those that have been adopted by the Town; she did not feel there was an error. After reviewing the submitted documents, which had some errors and omissions, and the Articles referenced in those documents, she did not find there was information supporting an error with the Board's decision.

Mr. Coffin said that the only thing "new" introduced is a re-iteration of the fact that the structure has been there since 2007 which actually was a bone of contention during the original hearing; he believes that the evidence supports it being considered a permanent structure. Atty. Hantz re-iterated that the site plan notes acknowledges that there would be storage of materials as long as it was kept out of the setback and it anticipated that the materials would come and go as that is the nature of the business. Atty. Hantz re-iterated previous comments of activity on the site in 2007. Mr. Coffin said that the Board did not address the applicant's assertion regarding a warrantless search just the structure issue. Atty. Hantz stated that she needed to include this to keep it in the court record; if the issues were not raised she would lose it at the court level.

Mr. Coffin stated that he agreed with the analysis given by Ms. Faulconer adding that, as previously stated by him, that he has built these structures and does know that there is a code for using shipping containers as a building; it is quite difficult and the hardest part is the roof; the fact that adding skylights and a roof with sliding doors makes this a structure; there is a code and they are referred to as structures. Atty. Hantz referenced other Towns requirements and the interpretation of Kingston's ordinances as not requiring a permit.

Mr. Romano said that the original reason that came in front of the Board is that the applicant wanted relief against the Selectmen for requesting them to come to the Planning Board for site plan review and getting a building permit; he understands the applicant's point but this is the mechanism that the Town has to bring a proposal for a site plan. Ms. Alessio said the ZBA was being asked to consider that there is other information that was not taken into consideration that may or may not have changed the Board's mind from the original decision. Attorney Hantz stated that this is the step they have to take to get a

judicial review so they have to request a re-hearing adding that she doesn't expect there to be a re-hearing. Mr. Romano re-iterated that this is the mechanism the Town has to get people in compliance; if an applicant has to go before the Planning Board, it helps them to make sure that everything they have on the property is on the site plan at the time they get the approval because if it is different, then they are in jeopardy. He stated that if the storage containers were stacked, that should have been on the site plan as this would not have happened. Atty. Hantz reviewed previous comments regarding the activity and review of the property. Mr. Romano said he can only by the facts in the site plan; and if he sees items shown on a site plan, then that is what he expects he will be seeing. Atty. Hantz said that the plan shows an area to store granite but it doesn't show every piece of granite and where it would be; for Lancaster construction they drew an area outside of the setback and identified activity in the area. Mr. Romano said that the applicant should have a site plan review to include the activity not shown on the plan and if approved then the Selectmen will have nothing to say about the activity. Mr. Romano said the activity was not shown on the site plan. There was continued discussion with Mr. Romano and Atty. Hantz about activities shown on the plan. Ms. Alessio stated that the Attorney was getting into additional comments. Atty. Hantz continued explaining the details of the previous review; discussion regarding items such as determination of change of use and other review requirements continued. Mr. Coffin said it was important to remember that the big picture was that the Inspectors have the interest of people's health and safety in mind; Atty. Hantz agreed. Mr. Coffin continued that he would think that Mr. Lancaster would want to guarantee the safety of his workers and others by having the structure/container reviewed.

MM&S for the request for the re-hearing to be denied based on no new evidence being submitted and no error being made in the Zoning Board of Adjustment's decision. (Motion made by Mr. Coffin, second by Mr. Romano) **PUNA**

Ms. Alessio asked if there was additional business for the Board. She noted that for the September 17th hearing there were currently two applications.

The Chair declared the meeting adjourned at 7:43 PM.

Respectfully submitted,

Ellen Faulconer
Recording Secretary