

ZONING BOARD OF ADJUSTMENT	November 16, 2023 7:00 PM
TOWN OF HAMPTON FALLS	TOWN HALL

FINAL

Please note that meetings of the ZBA have been video recorded. Meeting Minutes are maintained on file at the Town Clerk's office, Town Hall, 1 Drinkwater Road, Hampton Falls, NH. Meeting Notices are posted on bulletin boards at the Town Hall, Library, Hampton Falls Post Office, and the Town website at: www.hamptonfalls.org for minutes, meeting agendas, videos, and more information.

A. CALL TO ORDER:

J. DeLeire, Chairman, called the meeting to order at 7:00 PM.

B. ROLL CALL:

3 MEMBERS and 4 ALTERNATES PRESENT: John DeLeire, Chairman; Mark Call, Member; James Manna, Member; Jamie Hasenfus, Alternate; Patti Young, Alternate; Weezie Vance, Alternate; Jude Augusta, Alternate.

1 ABSENT: Steve Bryant, Vice-Chairman;

STAFF: Mark Sikorski, Building Inspector; Rachel D. Webb, Assistant Administrator.

GUESTS: Attorney John Colliander, Linda and David Coe, and John Shaw

Chairman DeLeire stated that there were three (3) ZBA members and four (4) alternates present. The five (5) voting members for the meeting were: J. DeLeire, M. Call, J. Manna, J. Hasenfus, and J. Augusta. Chairman DeLeire clarified that the additional Alternates could participate in the discussion of the meeting up to, but not including, the vote.

C. PUBLIC HEARING:

1) Case # 23-11: Application from **David and Linda Coe**, for an Equitable Waiver of Dimensional Requirements to the terms of Zoning Ordinance Article III, Section 7.7.1 and asks that said terms be waived to permit a boundary encroachment at 1 Coburn Woods Road, in Zone AR: Agricultural Residential, at property located at **1 Coburn Woods Road, Map 4, Lot 73-7.**

2) Case # 23-12: Application from **John R. Shaw**, for an Equitable Waiver of Dimensional Requirements to the terms of Zoning Ordinance Article III, Section 7.7.1 and asks that said terms be waived to permit a boundary encroachment at 86 Exeter Road, in Zone AR: Agricultural Residential, at property located at **86 Exeter Road, Map 4, Lot 73-5.**

Attorney John Colliander, introduced himself as representing the applicants Linda and David Coe, and John Shaw for both Case #23-11 and also for Case #23-12, and asked if the two cases could be discussed as together, as they mirror each other, as abutters, and the Chair agreed. J. Colliander oriented the ZBA to the location on Route 88/Exeter Road, on the south side of the road within a subdivision known as Coburn Woods, that is also part of the Applecrest Orchard. He stated that there are two (2) solar arrays that have been constructed one on the Coe's property, and one on the Shaws' property. He stated that the Coe solar array extends into the fifty-foot (50') setback. He stated that the Shaw solar array also extends into the fifty-foot (50') setback, and inadvertently it crossed the Coe property line.

J. Colliander stated that his applicants are seeking Equitable Waivers for the solar array locations. For informational purposes, he continued that the plan is for the Shaws to give the

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Coes an Easement to allow their solar array to cross the property line. The Shaw array encroaches not only on the setback but also on the property line. J. Colliander stated that the solar arrays were constructed several months ago by Harmony Energy. He also stated that the boundary lines are difficult to determine because of the apple orchard and the trees. He said that the property owners contacted Applecrest about the location for installation of the solar arrays, because Applecrest maintains the orchard. He said that Applecrest preferred that any structures be located close together so that there would be minimal interference with the maintenance of the orchard for spraying, in addition it would minimize the number of trees that would need to be removed to accommodate the solar arrays. The applicants wanted to create an alternate source of energy while minimizing damage to the orchard. The solar arrays were constructed in such a way as to inadvertently violate the setbacks, and it was not until the Building Inspector called the violations to the owners' attentions that they became aware of the fifty-foot (50') setback problem. J. Colliander stated that the Equitable Waivers request that the solar arrays remain where they are.

J. Colliander went through the four (4) requirements for Equitable Waivers.

- a) The violation was not discovered until after the construction of the solar arrays. He stated that it is true that the solar arrays were constructed, and were not encroached intentionally. He stated that his clients' concerns were about lessening the intrusion into the orchard. The encroachment was not done intentionally, and was not noticed until after the solar arrays were built.
- b) The violation was not intentional. The focus was building structures that create alternative energy and not interfering with the operation of the orchard. He stated that the orchard transcends the boundary lines, and it was simply a mistake in where the solar arrays were located.

Chairman DeLeire read the requirement (b): *"That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority."*

Chairman DeLeire stated that he understands about the orchard, and that it may have been difficult to see the property lines, but wouldn't the agent who did the work, wouldn't they check to make sure that they are working on the correct property, and check the setback and that the work was done in conformance with the regulations for the building permit. Chairman DeLeire stated that it seems that there was a failure to inquire, and it seems that the owner's agent did not operate in good faith and measure or calculate the setbacks.

J. Colliander stated that he understands the points made by the Chairman. He continued that it is difficult to understand the property lines within their orchard location, and Chairman DeLeire disagreed saying that it is easy to find boundary lines, and they exist throughout the town; people have surveyors or engineers determine property boundaries, and there are pins and rods marking property lines, so that is a duty that has to be followed for this requirement (b).

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J. Augusta asked M. Sikorski what the process would be to start the process to determine the location of the boundaries in a dense wooded environment. M. Sikorski responded that the Building Permit states on it that the applicant must follow-the Building Code. He continued that Harmony Energy was the one who applied for the Building Permit for 1 Coburn Woods, and that he did not receive a permit for the other one. W. Vance asked if M. Sikorski had received the permits, would he have verified the boundaries, and M. Sikorski responded that he receives permits several ways either by mail, or email, or in person, and if in person then there can be a discussion to determine exactly what the applicant wants to do, and compare it with the zoning. M. Call asked how he received this permit, and M. Sikorski said that he received it by mail. J. Augusta asked if it is the applicant's responsibility to meet the setbacks, and M. Sikorski stated that in the Town Newsletter he always states that if people are not sure about property setbacks, to come and check with him. M. Call said that he has talked to a few solar companies, and a common statement is that the solar company will handle the permit process. He asked if Harmony signs the permit application, is Harmony or the property owner responsible to comply with the requirements?

M. Call asked why the permit for the second property was not applied for, as he stated that he was very concerned about why there would be a second array on a second property with no permit.

J. Colliander stated that the Coes and the Shaws hired Harmony Energy, and that Harmony is their agent, but the violation is not anything done intentionally. He agreed that Harmony had a duty to be sure that it conformed to zoning. M. Sikorski said that the permit for the Coes was issued. He said that the permit for the Shaws was dated in June, but had a current check dated the day after the violation was discovered (when the permit was delivered to his office). M. Sikorski said that this was not the first project in town that Harmony has done. There was another project on Brown Road where Harmony had first proposed a location of an array within the wetland setback, and then moved it to the correct location. M. Sikorski said that he agreed that the applicants present tonight are not responsible for what happened, and he wished that more people had knowledge about the property setbacks.

J. Colliander stated that the situation is that the solar arrays are built. He said that the orchard functions as a common area, and Applecrest desired as minimal intrusion as possible on the orchard.

Chairman DeLeire stated that perhaps the correct procedure would have been to request a Variance, from the outset, prior to construction. There was a consensus among several ZBA members that Harmony should be the ones defending themselves for their actions.

J. Colliander said that if his applicants are not successful tonight, and their alternative is to move the solar arrays, then that will impact the orchard, and will have to cut down some trees, then make the maintenance of the orchard more cumbersome having to go around two separate solar arrays farther apart, and he stated that that would not be acceptable.

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Chairman DeLeire stated that all of the alternatives may be unacceptable, but the ZBA needs to consider the four (4) requirements of the Equitable Waiver, and the “b” requirement is a tough one because of the applicants’ agent.

J. Colliander said that his applicants’ request meets the requirements of “a”, “c”, and “d” easily, as there is no harm to anyone, and the only two lots affected are the applicants’ lots, there are no abutters affected, there is no intrusion into wetlands, and there is no public interest that is in jeopardy. In terms of requirement “d”, the public benefit would be to grant the application, because not granting the application would create more of an intrusion.

M. Call stated that this is probably the third Equitable Waiver request this year, and there are four (4) specific criteria required to be met. He stated that he agreed with J. Colliander that “a”, “c”, and “d” are probably met, and that “b” is the tough criteria. He asked if there was a failure to inquire, was there ignorance of the ordinance, and why wasn’t the contractor here to represent themselves?

J. Augusta said that he had an issue with requirement “d” due to the public benefit, and he also stated that his opinion was that people should be responsible for their contractors. J. Colliander read part of the requirement “d”: “...that the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.”

J. Colliander said that he does not see any public benefit to require that the arrays be moved. He said that there would be a public detriment because three times as many trees would need to be taken down. J. Augusta said that that is an environmental argument, whereas he is looking at the legal argument of needing to comply with the ordinance. He said that this is skirting the laws after the fact, as opposed to asking before the development. J. Colliander defended his clients stating that no one is skirting anything, or they would not be before the ZBA.

P. Young read the Harmony paperwork that stated that they handle all permits etc. She stated that Harmony did not do their due diligence, and let’s not pretend that they did. She said that the company has been in business for 30+ years. J. Colliander said that he agreed, and that the property owners are trying to correct this. P. Young objected to the premise that it is ok to disregard the ordinance and come to the ZBA afterwards to seek an Equitable Waiver; she said that she had a problem with the “d” requirement. J. Colliander stated that he could not believe that the ZBA could agree that it is more in the interest of the public to: 1) move the arrays with 2) chop down three-times as many trees, and 3) make it very difficult for Applecrest to maintain the orchard. J. Augusta said that is not the public benefit, he said that P. Young was saying that the public benefit is compliance with the law. He said that there is a legal compliance argument that is being responded to with an environmental argument, and that is the problem with requirement “d”.

Chairman DeLeire stated that his opinion was that the problem was with requirement “b”

M. Call said that it is important the property owners comply with zoning ordinances, and that is the public benefit, that Hampton Falls residents know that the ZBA is looking out for the Town’s

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best interest when it comes to zoning. He echoed what P. Young said that the ZBA can not allow contractors to build structures without permits, without regard to setbacks, and cannot allow that as a board.

J. Colliander said that he did not think it would be a benefit to bring Harmony Energy in to the ZBA, and Chairman DeLeire agreed. He summarized the comments that Harmony built something they shouldn't have in the wrong place, without a permit, without doing their due diligence, and without doing their engineering/surveying. He said that he did not see how the ZBA could turn a blind eye to requirement "b", and he said that J. Colliander acknowledged that they cannot overcome "b". He said that perhaps Harmony may have to correct this.

J. Colliander asked if the ZBA would consider an application for a Variance favorably, and Chairman DeLeire stated that legal strategy is up to the applicant. He said that it is unusual to apply for a Variance after something has been built, and that the Variance criteria are not any easier. J. Colliander stated that he was trying to gauge the sentiment of the ZBA.

John Shaw, 86 Exeter Road, stated that of the two arrays that his is the most egregious because it encroaches and there was no building permit. He said that he had a contract, and he is not happy. He said that he takes responsibility for what happens on his property, and he is not hiding behind his contractor. He said that he is appalled that work was done on his property without a building permit.

J. Colliander requested to Withdraw his clients' applications, without a Finding, and then they would decide whether to come back with a request for a Variance.

MOTION: To Withdraw the application of Case #23-11 and Case # 23-12, without a Finding.

MOTION: J. DELEIRE

SECOND: J. AUGUSTA

UNANIMOUS

Chairman DeLeire closed the Public Hearing portion of the meeting.
There was a brief five-minute recess.

D. COMMUNICATIONS TO BOARD MEMBERS:

1) Case # 23-13: Motion for Rehearing from Justin Pasay/Al Fleury regarding Case # 23-08 3 Weare Road.

Chairman DeLeire asked all the voting ZBA members if they had the chance to read through the materials in the packet regarding the Motion for Rehearing from Attorney Justin Pasay regarding 3 Weare Road, and everyone responded in the affirmative.

Chairman DeLeire stated that if the ZBA denies the request, then the applicant has the option of going straight to Superior Court. He said that if the ZBA grants the request, and the ZBA denies the applicant, they can still go to Superior Court. So, the ZBA has to decide whether to grant the

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Motion for Rehearing. Chairman DeLeire said that when the Case #23-08 was before the ZBA and Alex Dittami was still on the ZBA (he has since resigned, due to moving out of state) that he made the most comprehensive Motion to Deny the Variance requested, that was very detailed, and covered a lot of bases, and he did a really good job, but the ZBA may have some question about whether his motion followed the five (5) criteria the way that they should have, and that they checked off every single box, even though it was comprehensive. Chairman DeLeire stated that if the ZBA allows the Motion for Rehearing then when they hear the case they will have to be absolutely completely clear as to the five (5) criteria and how the ZBA votes, so that if the case goes to court, that there is a record to stand by.

Chairman DeLeire stated that because A. Dittami is not on the ZBA anymore he will not be present to be able to clarify the points he made during his Motion for Denial. Chairman DeLeire stated in his opinion that he thought it would be safer for the ZBA to allow the Motion for Rehearing, to go over it again, and then their response to the Rehearing can be ironclad.

P. Young stated that it may be better to vote on each criteria separately, to answer and discuss each criteria separately. She said that years ago, the ZBA used to make their votes that way, and she thought it may be more thorough, and Chairman DeLeire agreed.

M. Call stated that he was not present for the original hearing of Case #23-08, and asked if there was a particular one of the criteria that was difficult, or was it more than one. Chairman DeLeire said that the way that the Motion for Rehearing was drafted it suggested that none of the criteria were met. He agrees with P. Young that each criteria should be discussed separately and voted on separately. He continued that as comprehensive as A. Dittami's Motion to Deny was, the question is whether it hit each of the five (5) criteria specifically.

J. Augusta said that he was in support of a rehearing.

M. Call said that he did not think it would hurt to have a rehearing, especially if the ZBA thinks that their original Motion to Deny may not be on as firm footing as it could.

MOTION: To grant the Motion for Rehearing Case # 23-13 regarding Case # 23-08 for 3 Weare Road.

MOTION: J. DELEIRE

SECOND: J. AUGUSTA

E. OTHER BUSINESS: There was no Other Business.

F. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES: 10/26/2023

MOTION: To approve the meeting minutes from 10/26/2023 as written.

MOTION: J. AUGUSTA

SECOND: J. DELEIRE

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G. ADJOURN:

MOTION: To adjourn the Zoning Board of Adjustment at PM.

MOTION: W. VANCE

SECOND: J. DELEIRE

UNANIMOUS

The next meeting of the Hampton Falls Zoning Board of Adjustment is scheduled for Thursday, December 14, 2023, at 7:00 PM at Hampton Falls Town Hall.

Zoning Board of Adjustment Minutes prepared by Rachel D. Webb, Assistant Administrator.