

Zoning Board of Adjustment
December 20, 2021
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Chairman Frank Mai called the meeting to order at 4:17 PM

Members Present: Frank Mai – Chairman, Barbara Hanson, Thomas Jackson and Joyce McGee – Secretary.

Absent: Richard Mallion and Chuck Lockhart

Public Present: Richard Harris Sr. and Attny. Jody Hodgdon

Chairman Mai read the following Public Hearing Notice:

Public Hearing(s):

Appeal from an Administrative Decision

#2021-008: Owner/Applicant – Harris Sr., Richard & Nancy of the Harris Family Trust – 439 Lancaster Road, Tax Map 217 Lot 006: who is/are requesting an Appeal from an Administrative Decision on an After-the-Fact Permit Penalty of \$500.00 pursuant to Article XI – Enforcement Authority in the Whitefield Development Code which is authorized under RSA 676:17.

Chairman Mai asked Mr. Harris to speak on why he was appealing. Mr. Harris introduced Attny. Jody Hodgdon who would be representing him in this appeal. Mr. Harris stated that he could tell the Board his thoughts on it but Attny. Hodgdon is going to from a more legal perspective and what their position is on the matter.

Attny. Hodgdon handed out a set of exhibits (see attached). He stated that Mr. Harris was appealing the after-the-fact penalty for the conex boxes being on site prior to the Development Permit. He pointed to the exhibit that showed the Development Permit Application with a date of 5/25/21, this application showed what he was applying for, then after several continuance hearings it wasn't until the 26th of July it was approved, he then got a \$500.00 subsequent fine later in that month.

Whitefield's Code is impermissibly and unconstitutionally vague. In 2019 Working Stiff Partners, LLC v. City of Portsmouth, Supreme Court of NH No. 2018-0491, annualized the vagueness in the court findings. Attny. Hodgdon read the following from the Court Case: (See yellow highlight areas)

Barbara Hanson asked if it was approved by the Planning Board then why was an after-the-fact penalty imposed? It was stated the conex boxes were physically on site before the permit was actually approved.

Mr. Harris stated that he is a dealer for stock and trade, he is renting them. The Planning Board brought up the idea that they were no longer stock and trade. Barbara Hanson, were they rented prior to

approval? Mr. Harris, it's the same as a mobile home, they get taxed. Thomas Jackson wondered what the clause the town was using.

Attny. Hodgdon read the definition of a Structure and Temporary Structure from the Code (see attached). None of these include conex boxes, is a conex box considered a construction trailer? The application indicates construction shall not occur until application is approved, there is no definition of Construction but it defines Start of Construction (see attached). So having read this my position is still unclear, is a conex box a structure or not. The Code talks about whether temporary, permanent, or when construction begins.

Attny. Hodgdon referred to an exhibit from the Selectmen's minutes of October 25, 2021 where it talks about, "if it is on his property and he is renting it out and he owns it, it becomes a structure. If you take it to someone else's property, it is not a structure". He doesn't know where it comes from as it's not in the Code.

He also referred to the December 7, 2021 Planning Board minutes having a new definition to include portable storage units, obviously if it was clear there wouldn't be a need for it. When you read the Code, it is vague and the fine should be waived.

Thomas Jackson spoke that the information given was clear and precise, he is in agreement with Attorney Hodgdon. He is confused why it got this far.

Chairman Mai, agreed with the Supreme Court decision from the onset. Mr. Harris buys, sells, rents and leases, that is what he does. If I put myself in his shoes, I wouldn't have come before the Planning Board either. Yes, the surest why is to come and ask if you need a permit. Clearly the Planning Board was not knowing what they were dealing with, you re-enforce it as a Code but it is not clear enough, the Planning Board should have not taken it this far. Mr. Harris has a history of coming into the Board with Development Applications, my opinion is no penalty fee.

Thomas Jackson, if boxes need a permit, then you should have penalties on cats and dogs!

Chairman Mai, the new definition of portable storage containers, if voted in needs clear language. When is a permit needed? Barbara Hanson agreed, it needs to be defined for the purpose of how long will it be on your property? Chairman Mai, we went from no fees to more fees, it's well intended by the Planning Board but pushing the envelope.

A motion was made by Thomas Jackson to approve the application as complete, seconded by Barbara Hanson. All in favor, motion carries. APPROVED

Barbara Hanson wondered if waived where does it go from here? Answer: Whether \$500.00 or not, case is over. If the decision is that Mr. Harris would have to pay the penalty then he would pay it or go to Superior Court.

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Mr. Harris, the ambiguous language is still there. Barbara Hanson, the Planning Board needs to make the adjustment to the Code. Thomas Jackson, clarifying what is in the Code, ridiculous to have to pay a permit fee.

Attny. Hodgdon, the court language is on interpreting zoning ordinances, it must be in terms sufficiently clear, definite, and certain, so that an average [person] after reading it will understand when [one] is violating its provisions as stated in the court determination. They need to understand the code and when a permit is needed.

Chairman Mai, stated that when he sells a property and is asked if a permit is needed, he suggests to call the Town Office.

Mr. Harris, what is being proposed is ridiculous, it's ambiguous, no other town requires a permit. If you rent it and have a contract it's not yours, it doesn't belong to you. This is saying if you don't get a permit then you could get an after-the-fact permit fee of \$500.00.

Chairman Mai was confused on why it took so many meeting to come to a decision.

No further discussion

A motion was made by Thomas Jackson to waive the \$500.00 penalty toward Mr. Harris based on the evidence provided and the Supreme Court decision, seconded by Barbara Hanson. All in favor, motion carries. PENALTY WAIVED

The Board agreed if you are unsure if a permit is needed, ask!

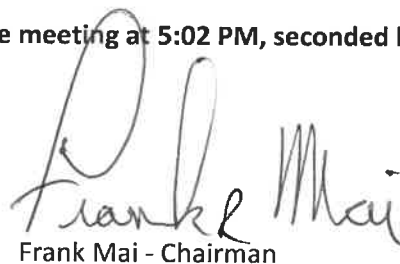
Other Business:

Minutes: A motion was made by Thomas Jackson to approve the minutes of October 18, 2021 as written, seconded by Barbara Hanson. All in favor, motion carries. APPROVED

A motion was made by Barbara Hanson to adjourn the meeting at 5:02 PM, seconded by Frank Mai. All in favor, meeting adjourned.

Respectfully submitted by:


Joyce A. McGee – Secretary


Frank Mai - Chairman