

**TOWN OF LOUDON
ZONING BOARD OF ADJUSTMENT
MINUTES OF JANUARY 22, 2015**

Chairman Dave Powelson called the meeting to order at 7:00 p.m.

ROLL CALL

The following members were present: Howard Pearl, Roy Merrill, Dave Powelson, Ned Lizotte, Earl Tuson, and alternates George Saunderson and Charlie Aznive.

ACCEPTANCE OF MINUTES

Regular Hearing – Ned Lizotte made a motion to adopt the minutes of December 29, 2014 as presented; seconded by Howard Pearl. All were in favor.

PUBLIC HEARINGS

Application #Z14-14, Inisfree Investments, LLC – Special Exception for bulk storage tanks, RR District, Map 11, Lot 12. Abutters Kenny Lynn & Ed Dempsey were present. Jeff Green represented the applicants. Mr. Green informed the Board that he spoke with his client who feels this is a permitted use of the zone. He said the Zoning Ordinance does not tie bulk storage to any particular use. He stated that they are asking for approval for six 6,000 gallon vertical tanks and one 15,000 horizontal tank. Earl Tuson asked if the application has not changed since it was submitted as he does not see any gallonage given on the application; he felt this information should be on the application. Dave Powelson stated that the plan attached to the application shows the tanks; he asked if the original plan is the location proposed. Mr. Green said they would probably have to be put there since that is how the application was submitted. He explained that he had proposed to the Planning Board that the tanks be moved, putting them over the 200' mark from the abutter. Mr. Powelson asked about the use for the heating and diesel fuel being stored. Mr. Green stated that any tanks over 500 gallons require special exceptions, and the use is not tied to the request. Howard Pearl referred to Section 204.6 of the Zoning Ordinance, in accordance with Section 701.3. He pointed out that #2 addresses the proposed use being injurious or detrimental, #4 addresses excessive demands on municipal services, and #6 addresses not having adverse effect on the environment. Earl Tuson read from notes on the plan that said the intention was storage of fuel for use onsite as well as distribution. He said the Board is being asked to approve the stated use which they cannot do as distribution is not permitted. Howard Pearl said the applicant might need to adjust their request. Mr. Green said the application does not include distribution. He noted that the amount is given on the plan but not the application, and the use is on the plan but not on the application. He said the reason he did that is because the application is not for a use but the size of tanks being increased over 500 gallons.

Ned Lizotte read from an email of November 12, 2014 from the Town's attorney with regard to handling this application. He said the special exception would be for use on the property which is excavation. Mr. Green noted that the attorney's reference to the gravel pit as a grandfathered non-conforming use is incorrect. He said gravel pits are permitted in the district. It was noted that they are permitted by special exception. Earl Tuson stated that this is not about the gravel pit but about tanks for the gravel pit. Howard Pearl said reasonable fuel storage is what they would use for equipment use. Ned Lizotte asked why they do not continue to have movable tankers onsite. He said he cannot say they are not setting up for something more down the road.

Roy Merrill said it has recently come to his attention that he is an abutter to this property, therefore he recused himself from this matter. George Saunderson was appointed as a voting member for this case.

Abutter Ed Dempsey said he would like not to see this at the edge of his property, noting that moving them from 150' to 200' does not make a big difference. It was noted that the application before the Planning Board was rejected as incomplete on December 18, 2014 as the applicant did not have the permitted use of distribution.

Howard Pearl said he understands the desire to save on bulk purchase but he has some serious concerns about the amount, particularly where it has been said to be for their own use. He noted there is an indication of distribution on the application. Earl Tuson said the plan reflects that the fuel would be for onsite use and distribution. He said bulk storage is to store and use, not distribute.

The chairman said the Board should go through the points of the application and see if all points are met. Pt. 1: Mrs. Dempsey spoke of her concern of 51,000 gallons in a residential area. Pt. 2: Mrs. Dempsey stated her concern about their property value being affected and the possibility of more truck traffic in the future. Pt. 3: Mr. Powelson said the applicant is stating this will comply with the rest of the Ordinance. There was no discussion. Pt. 4: The chairman noted that there was some discussion at a previous meeting regarding additional fire protection and truck traffic on the road. Howard Pearl asked if there is any plan for fire suppression. Mr. Green said there is not at this point; that would have to go on the State plan. Pt. 5: Howard Pearl said this raises concern as they are using it only onsite. He noted that previous testimony was that the applicant uses 2,000 gallons per week. Jeff Green stated it would be a tractor trailer load every other week. Mr. Pearl said he is not sure traffic volume would be an issue as there is already gravel traffic. Ned Lizotte said delivery trucks in addition to the gravel traffic could make a difference. Pt. 6: Howard Pearl asked Mr. Green if he knows if there is a difference in regulations that apply for bulk storage for use versus distribution. Mr. Green said there are no differences. Mr. Pearl asked if 1,000 gallons would have the same requirements as 51,000 gallons. Mr. Green said that was correct; he spoke about requirements for containment, etc.

Chairman Powelson said the Board has to decide if they have properly addressed the seven questions. He said he is not sure this really fits into point #3, special conditions. Howard Pearl again referred to Sections 204.6 and 701.3, saying he has concerns on point #2. He said he is having a problem getting by that one as this seems an excessive amount of fuel for use onsite. Ned Lizotte said he has concerns about the proposed location so close to a residence when they have the entire gravel pit. He said if bringing fuel in to a storage trailer has worked, why not just have a second trailer. Mr. Lizotte said he still feels something more is coming along. He said he has an issue with it so close to the Dempsey's property. Howard Pearl stated that the Board has to weigh the needs of the applicant but they also have to weigh the effect on the neighborhood. He said this is an excessive amount for the applicant's use. Ned Lizotte said when seeing the location in relationship to houses it is not ideal. He said by using trailers as they are currently doing the operation can be kept away from houses. He also said he doesn't feel they need bulk storage of that excessive amount for their current use. Mr. Green pointed out that trailers would not have the safety features, containment, etc. as compared to tanks for 51,000 gallons. He said they are asking for bulk storage. Ned Lizotte said he cannot get past where they are putting them. Earl Tuson noted that the Board can put conditions on an approval. Charlie Aznive stated that the bottom line is that it is detrimental to the neighborhood. Earl Tuson said the applicant is not constrained by the plan that was submitted unless conditions are placed. Howard Pearl explained that one challenge of the ZBA is that they are required to make discretionary decisions, such as being asked for 51,000 gallons for use onsite by the applicant but having a hard time getting to that.

Dave Powelson asked Mr. Green if his contention is still that this is for use in trucks. Mr. Green said that was correct, for onsite use. Earl Tuson noted that the application refers to two delivery trucks each day and one to two tractor trailer loads. He asked if this is meant to the site or from the site. Mr. Green said there are two delivery trucks now so two tractor trailers would be the only additional traffic. Howard Pearl asked if Mr. Green is asking the Board to either approve 51,000 gallons or deny the application. Mr. Green said he just needs an answer, either with conditions or a denial. There was discussion about how much fuel is in a trailer load and how many tanks would be

needed to satisfy the applicant's use. Dave Powelson asked how many types of fuel would be involved. Mr. Green said it would be on-road and off-road diesel. Earl Tuson stated that there would not be onsite use of heating oil. Howard Pearl asked if the intent is to go to the depot and bring back one tractor trailer of straight fuel, not mixed. Mr. Green said that was correct. Mr. Pearl said he was trying to come up with a way to allow a tractor trailer of two fuels for storage. He said two 6,000 gallon and one 15,000 gallon tanks would work. Dave Powelson said 51,000 gallons is the wrong number; the application could be denied on that and the applicant could come back with an application specific to onsite use. He said it seemed that Howard was inclined to approve some smaller amount. Mr. Pearl said he understands the pricing importance. There was brief discussion about what others have had for storage for onsite use. Howard Pearl stated that the most he had at his farm's peak was 8,000-9,000 gallons which was for a season.

The chairman closed the hearing to the public and opened it to the Board only. **Ned Lizotte made a motion to deny the application based on point #2, excessive storage capacity for current business needs; seconded by Earl Tuson.** Mr. Tuson said that it has been pointed out that there is no specific gallonage in the Zoning Ordinance. He said point #2 is that the proposed use is not to be detrimental, and the gallonage plays a big role in being injurious or detrimental. He said 51,000 gallons would be injurious or detrimental, noting it would be equivalent to 102 households of allowed storage. Howard Pearl noted this is a business, not households. Mr. Tuson addressed point #4 by saying that the fire department was here at an earlier meeting and expressed their concern. He said every structure adds to demands which are incremental to use. In addressing point #5, Mr. Tuson said he understands trucks of material. On point #6, Mr. Tuson said that DES has extensive regulations that the applicant would have to meet and those regulations are in place because uses could have a very large impact on the natural environment. On point #7, Mr. Tuson said monitoring never makes potential impacts go away, it only catches problems if lucky. He said the Board never got a good answer on their groundwater questions. He said the application, in two places, refers to delivery and distribution which are not permitted.

The points were reviewed as a Board.

#1: Howard Pearl said an argument could be made either way. Earl Tuson said for storage only, not for delivery and distribution. Mr. Pearl said he cannot see that they fail #1. George Saunderson said it technically might be allowed. Ned Lizotte said they do not meet #1 as they have it listed for storage and distribution, referring to note #10 on the plan. He said it lists heating and diesel fuel and he feels heating fuel would lean toward distribution. It was realized some members did not have the most recent plan that was submitted at the October meeting (a copy was not received for the file). Mr. Tuson pointed out that the newer plan has clear reference to distribution. Members reviewed that plan. It was agreed that the applicant does not meet point #1.

#2: All agreed that the applicant does not meet point #2.

#3: Earl Tuson stated that a special condition of the parcel would be the gravel pit. He said a gravel pit does not need heating oil. Others agreed.

#4: Howard Pearl said if fire suppression was included in the plans they have recognized what could occur. Earl Tuson said 51,000 gallons of heating and diesel fuel warrants more than just acknowledging. Four members agreed that #4 is not met; Howard Pearl disagreed.

#5: It was agreed the point was met.

#6: It was agreed the point was met.

#7: Dave Powelson said the answer for #6 will affect #7.

Earl Tuson moved to amend the motion to include points #1 and #4; seconded by Ned Lizotte. A roll vote was taken on the amendment to the motion: George Saunderson – yes; Howard Pearl – No; Dave Powelson – yes; Ned Lizotte – yes; Earl Tuson – yes. Yes – 4; No – 1 MOTION AMENDED.

The motion now reads 'to deny the application based on not meeting points #1, #2, and #4'. A roll vote was taken: Earl Tuson – yes; Ned Lizotte – yes; Dave Powelson – yes; Howard Pearl – no; George Saunderson – yes. Yes – 4; No – 1. DENIED

Roy Merrill returned to the table.

Application #Z14-17, Bonnie Martin – Appeal from an Administrative Decision, Map 35, Lot 5. The applicant and her attorney, Rob Dietel, were present. Mr. Dietel read from the cease and desist that was issued by the code enforcement officer. He said he is asking for the cease and desist to be vacated. Mr. Dietel said he has looked at the code enforcement file and found no indication of her living in her garage. He explained that the applicant owns a five acre parcel in the AFP district and has a single family home and a garage on the property. Attorney Dietel stated that the applicant filed for a building permit in 2012 to renovate the second floor of her garage with the plan to use it for recreational purposes. He said the applicant was the only person living there at the time and she wanted a recreational area. He went on to say that Bob Fiske approved the building permit. Mr. Dietel stated that Ms. Martin's son and two grandchildren now live in the home with her. He explained that on November 4, 2014 Ms. Martin reported a neighbor for tapping her trees. She had asked the neighbor to remove the taps and that did not happen so she called the police department. Mr. Dietel noted that the neighbor is not here nor is Bob Fiske. He asked that the Board vacate the order so his client can use the area as planned for family recreation.

Dave Powelson asked to confirm that the claim is that she is not living in the apartment. Ms. Martin said that was correct. She said she called the police so the problem is with the neighbor and then a month later this happened. Attorney Dietel said there may be the perception on an apartment but she clearly lives in the house with her son and grandchildren. Ms. Martin stated that there is no kitchen and no bedroom in the garage. Howard Pearl wondered why they are asking to vacate the order, noting that the cease and desist is a moot point if she is not living there. Charlie Aznive said Bob Fiske feels it is being used as an apartment. The attorney said it needs to be more than the word of a neighbor. He said there was never a site visit nor phone calls made to Ms. Martin. He said the order threatens fines, etc. but she is not living there. He said there is nothing in the record that proves she is; this is a cease and desist based on no facts. Mr. Dietel said it seems a very reasonable request to be able to use the area as initially proposed. Ms. Martin said she met with Mr. Fiske and told him she was not sure why she was there as she did not have an apartment. She said she would have liked him to visit before issuing the cease and desist.

Roy Merrill said a site walk would prove one way or another. Mr. Dietel said the code enforcement officer has the right to do a site visit but did not. Ned Lizotte said a site visit would give clarity to the situation. Howard Pearl said it would show their due diligence. The attorney said the burden before us is that there is no evidence to contradict Ms. Martin's statement and there is no one here tonight to speak about the matter. He said the Board could vacate the order, giving direction to the code enforcement officer, and the code enforcement officer could do a site visit. Ms. Martin said she is the only one paying at this point. Ned Lizotte said seeing the property would end the confusion. Roy Merrill said the Board is being asked to take an applicant's word against Bob Fiske's but the Board's first obligation is to the Town's employee. Earl Tuson said it would be nice if the code enforcement officer was sitting here right now.

Attorney Dietel said this is an issue between neighbors, noting that the record has no support for someone living in the garage. He said the easiest solution is to vacate the order, the code enforcement officer look at it, and reissue the cease and desist if he finds a problem. Charlie Aznive said there would be a record if the Board went to look at the situation. The attorney said there is no other evidence in the record. He said zoning allows the chairman to have an applicant make a statement under oath. Roy Merrill said he would not vote to vacate the decision without seeing the structure. Dave Powelson stated that the applicant has the option to write a letter that she would comply with the terms of the building permit. He said the property assessment card has a reference to a possible apartment. Donna informed the Board that Assessor Chris Murdough said she would be glad to go out to the property as well; she will need to know exactly what is there for the files. Howard Pearl said they could pass a resolution to vacate the order with the condition that Bob Fiske does an

inspection and comes back with a recommendation; that would put the onus on him. He said no onsite inspection appears to have been done.

Attorney Dietel said if Chief Fiske has a position on this they are entitled to have him here so this can be resolved and he made the decision not to be here tonight. Mr. Dietel noted that this was a properly noticed meeting. Chairman Powelson stated that the office received a memo from Bob Fiske earlier today. He read the memo (original is in the file) and then it was handed around for the Board members to review. Mr. Dietel said it is perplexing that Mr. Fiske refers to it being an apartment as that is not what the plans were submitted as and there have been no changes from the plan. He said they do not have a problem with anyone going there and he spoke about single family units being allowed. Roy Merrill asked where it says that apartments are allowed. Mr. Dietel said the district permits residences, including accessory uses, the garage is an accessory, and allowing a bedroom is customary to the use. He said none of that really matters though as Ms. Martin is not using it as an apartment. Mr. Dietel said the most efficient resolution is as suggested by Howard Pearl, to vacate the order with the condition that Chief Fiske do an inspection. If he finds additional grounds beyond a neighbor's complaint he could reinstate the order or Ms. Martin could apply for a modified building permit to meet the findings.

Charlie Aznive said a site visit should be done, including Bob Fiske. Roy Merrill said he does not feel the Board should touch this unless they go for a site visit. Dave Powelson said he agrees that the Board must do their due diligence to determine what is there since they have the word of the code enforcement officer and a resident and her attorney. Attorney Dietel said it suggests some sort of bad faith by Chief Fiske by not picking up the phone and talking with Ms. Martin. He said he appreciates the Board's perspective but there is no evidence, only an unsubstantiated report, and no other facts. Howard Pearl said he felt it would be in the best interest of the applicant for the Board to go to the site if it is felt that something was not right in the way the code enforcement officer handled the matter. Attorney Dietel said he is not calling out Chief Fiske; he knows that Mr. Fiske was put in a tough spot by a disgruntled neighbor. He said he would be more comfortable if there was just something more in the evidence. Mr. Pearl said that is a very valid concern. Charlie Aznive said the fast way to settle this is for the ZBA to do a site visit, asking Bob Fiske to attend, and have all parties involved.

There was lengthy discussion of a site visit. Attorney Dietel said he is trying to avoid further costs to his client and would once again ask that the Board vacate the order and that Chief Fiske do an inspection. This would eliminate the need for him to be at a site visit, as well as not have the ZBA as supervisory code enforcement. Ned Lizotte explained to Mr. Dietel that he does not have to go on the site walk. He said the Board does not want to vote to vacate the order, they want to address the situation, and a town officer has asked them to look at it. Earl Tuson said when the ZBA hears an appeal they are supposed to listen to two sides. He said the letter is Bob Fiske's side; the evidence should not be hearsay. Attorney Dietel asked that the matter be continued to the next meeting to allow them to reach out to Chief Fiske regarding him doing a site visit. After brief discussion, **Howard Pearl made a motion to grant the applicant's request to continue this hearing to next month's meeting and allow the applicant to attempt to resolve with the code enforcement officer; seconded by Ned Lizotte. Roy Merrill was opposed; the other members were in agreement with the motion.** The next meeting is scheduled for February 26, 2015 at 7:00 p.m. in the Community Building; there will be no further notification.

ADJOURNMENT

Roy Merrill made a motion to adjourn the meeting at 9:00 p.m.; seconded by Howard Pearl. All were in favor.

Submitted by,
Donna White
Administrative Assistant