

9.24.86
G.P.

MINUTES - BOARD OF ADJUSTMENT
September 17, 1986 - Selectmen's Room

Members present: Steven Blanchard, Eddie Lamminen, Herbert Klein, Grayson Parker, Acting Chairman - Tom Mitchell (replacing Arlene Laurenitis), Recording Secretary- Gail Proctor.

Others present: Ron Bitten, Peter Ferrand.

Chairman Mitchell called the meeting to order at 7:30 P.M. He explained to the Board that the purpose of the meeting was to make a decision on the request for a rehearing by the Selectmen of the Town of Wilton on the Levesque Case (#12 - August 27, 1986).

Chairman Mitchell apologized to the Board for having to hold a second hearing on the request. The meeting held September 10, 1986 was determined to be not legal due to the lack of proper 24 hours prior posting of a public notice announcing the meeting. Ch. Mitchell noted that members of the Board have had copies of the Selectmen's request for a week.

Ch. Mitchell also apologized to the Board for having to schedule a second meeting on the request. Ch. Mitchell stated that he was not aware that public notice was needed when the Board's only purpose was to decide whether a meeting for a rehearing was to be granted or not.

Ch. Mitchell explained to the Board that the reasons for granting a rehearing include: 1. A technical error has been made on the part of the Board. 2. New evidence was submitted. 3. An illegal decision was made. Reading from page 17 of the ZBA Handbook, Ch. Mitchell informed the Board, "... it is doubtful that many of the use variances, where a restriction against the particular use of the land is waived are fundamentally legal." Ch. Mitchell continued that what the ZBA is discussing is a use variance, the use of the land. Ch. Mitchell stated that the property in question is zoned Residential-Agricultural. Ch. Mitchell reminded the Board that Mr. Levesque is asking to use the land as a commercial piece of land.

Ch. Mitchell explained that if an ordinance prohibits industrial or commercial uses in a residential neighborhood, it is hard to see how it could be allowed without violating the spirit and intent of the ordinance. Ch. Mitchell commented that the ZBA cannot change the ordinance. Ch. Mitchell concluded his remarks by asking the Board members to keep these points in mind.

H. Klein asked Ch. Mitchell to state for the record who would be sitting on the session. Ch. Mitchell stated that ZBA members S. Blanchard, H. Klein, E. Lamminen, G. Parker, and himself as Acting Chairman would be reviewing the case. Gail Proctor would be the Recording Secretary.

Eddie Lamminen stated that he was angry at Ch. Mitchell for not knowing the laws regarding the 24 hours posting notice in advance. E. Lamminen also criticized the press for reporting Selectmen Stein's comment that the previous meeting (referring to the 9/10/86 meeting) was "a sham". E. Lamminen also criticized the Board of Selectmen for taking the ZBA to court "for a restaurant that deep in his heart he voted rightly for a use that wouldn't hurt a single soul in the Town of Wilton . . ."

E. Lamminen stated that the Board took every single point item one at a time and looked at them. He explained that the Board should not have a rehearing because everything said in the application (Selectmen's request), including the new evidence was available at the night of the hearing and that it could not be presented. E. Lamminen emphasized that there was no new evidence in the application that was not available. E. Lamminen pointed out that no one from the Planning Board was at the original hearing to express the Planning Board's point of view. E. Lamminen commented that the ". . . law states you cannot try somebody twice for murder . . ." and he continued by stating that ". . . because you can always go back and dig up something you didn't have the first night. That is exactly what this Board (Selectmen) is doing now". E. Lamminen said he will vote exactly the same way. E. Lamminen also said that he "did not buy" Ch. Mitchell's apology for not knowing about the 24 hours posting notice regulation. E. Lamminen continued by stated that he depended on Ch. Mitchell to know about the posting. E. Lamminen informed the Board that he did not want to pay for a lawyer to fight the Selectmen and waste the Town's money.

Ch. Mitchell responded to E. Lamminen's comments by saying that we (ZBA) have to make a decision in public because of the Right-to-Know laws. Ch. Mitchell explained that the previous hearing (9/10/86) was null and void and that all the members had to do tonight was to give their reasons and vote on the rehearing request. E. Lamminen stated that he "realized it" but "nothing would be printed tonight unless the Selectmen say so and it's been happening and I'm just tired of it."

Steven Blanchard stated that he had been interviewed the other day and he exclaimed, "that this thing here is starting to become some sort of power struggle." He stated that Greg and David (Bohosiewicz and Stein) will not agree with certain members of this Board now or probably not ever." S. Blanchard added, "It's a damn shame it's going to come this way." S. Blanchard said it did not change the way he felt about the decision that night.

Ch. Mitchell asked if Mr. Blanchard would just give his reasons for his decision. S. Blanchard replied, "I think our reasons have been expressed enough times." Ch. Mitchell pointed out that "they are not on record". S. Blanchard responded by stating, "that if you go back to the first tape you would find that it would be on record."

Ch. Mitchell attempted to explain that because the first hearing to review the rehearing request was not legal and that it was necessary for the ZBA members to record their decisions again. S. Blanchard stated that the bottom line was whether any new evidence was presented tonight that was not available at the first hearing. S. Blanchard said there was nothing in there (rehearing request) that was new. Ch. Mitchell asked S. Blanchard about the legality of the change (referring to the spirit and intent of the ordinance). S. Blanchard responded by stating, "I feel that it is right and I feel that it is legal."

E. Lamminen addressed the legality issue by stating that in his heart he felt that the townspeople if given a chance to vote on the issue would vote more toward the commercial property. E. Lamminen continued by stating that the property was unique because of changing circumstances considering the situation around it (Levesque's Lot). E. Lamminen cited Intervale Water, Intervale Machinery, the Vet Office, as well as Noah's Ark, just up the road, and Blanchard's Junkyard. E. Lamminen pointed out that the majority of the uses are commercial or have been changed to commercial in recent years. E. Lamminen stated that it makes #5 correct (spirit and intent of the ordinance).

E. Lamminen stated that his personal feeling was that there was more commercial property in the area than residential. E. Lamminen stated that just because the Selectmen are taking the Board to court over it (rehearing request), he didn't think the Board should change its mind.

Ch. Mitchell reminded the Board that the only reason for the present hearing was to decide whether to grant a rehearing on the case. Ch. Mitchell pointed out that when he contacted the ZBA members by telephone to reschedule the hearing no one had mentioned to him that a 24 hours notice was needed for the public before a meeting to decide whether to schedule a rehearing was needed. Ch. Mitchell also commented that whatever was discussed before was "null and void" because the meeting was not made public. Ch. Mitchell explained to the Board that they must vote again and also give reasons for their decisions. Ch. Mitchell added that it was necessary to take minutes of the discussion and to record the reasons for the decision.

Ch. Mitchell asked E. Lamminen, "You made an assumption that the people would probably have voted for that area to be commercial but not industrial. How can you make an assumption that people would feel that way about the area?" E. Lamminen replied, "I did not make the assumption," he added, "That's the way I feel." E. Lamminen continued by pointing out that Planning Board member Hal Melcher told the Selectmen that the Planning Board was putting that zone in again as industrial. E. Lamminen said they (Planning Board) wanted the Town again to vote industrial which it already denied the industrial zone before. E. Lamminen further commented that after the fact of the ZBA's meeting that allowed Mr. Levesque to put in his restaurant, the Planning Board comes down to the Selectmen and says they want to put it in industrial again this year.

Ch. Mitchell pointed out that when an area is changed by putting in a restaurant, it is spot zoning. E. Lamminen replied that it would not be spot zoned because the spirit and intent of the ordinance would be upheld because of the special conditions that exist in the area, the five or six pieces of property that are commercial.

Herbert Klein addressed the group by stating how he would follow Ch. Mitchell's request to outline his reasons for his decision point by point according to the application. H. Klein asked Ch. Mitchell if the original Levesque hearing was posted and notified properly. Ch. Mitchell stated that it was. H. Klein continued by stating that

he felt that the "crux of the whole appeal" was that "somebody flubbed, that those parties with a position contrary to our decision weren't there." H. Klein pointed out that his position on the Board was at the behest of the majority of the Board of Selectmen who filed the appeal. H. Klein continued by commenting that he was not playing sides with the majority of the Zoning Board who were appointed by other than the two appealing Selectmen of the Board. H. Klein explained how he went over the request for a rehearing point by point. Point #1 of the request according to H. Klein, quotes Ouimette vs. Somersworth. H. Klein states that the Board brought up the exact point at the original hearing and also at the illegal second hearing. H. Klein indicated that he felt that the Board more than met the criteria as set up in that court case. H. Klein addressed Point #2 by stating that the Board went over the public interest ~~interest~~ aspect and the Board did mention the Master Plan. H. Klein added that no way would the granting of a variance to one restaurant in the midst of an industrial zoned area would in any shape or form tend to make a "commercial strip development". Referring to Point #3, H. Klein pointed out that the Residential Development is across Rte.101 from Mr. Levesque's property on the north side. H. Klein explained that when Rte. 101 was put in, Mr. Levesque's 4 acre parcel was "leftover". H. Klein pointed out that the lot is plainly unfit for agriculture. H. Klein continued by stating that any zone under 16-20 acres was wholly impractical for agriculture. H. Klein stated that it was a fact that only two residences could be mounted on that particular area with no chance of a decent set-back. H. Klein read the statement from the request which said, "... no attempt by the landowner to develop the property for residential use. . .", was made. H. Klein said that the statement was true and that Mr. Levesque had been farming the land to a limited extent over the years and the person who had been farming the property refused to come back. According to H. Klein, Mr. Levesque had tried to get other people to farm the property without success. Also according to H. Klein, Mr. Levesque did not say whether he had attempted to build houses there or to get a developer to use the two house sites.

H. Klein said that the Board faced up to every point of the "five criteria". H. Klein stated for the record the point of hardship would be that to grant a rehearing would cause more of a hardship to the applicant than not to grant a rehearing.

H. Klein pointed out that in his decision and in his opinion there is nothing which indicates that the ZBA is trying to rezone. H. Klein said that according to the ZBA Handbook, the Board cannot rezone. H. Klein felt that the Board kept within the structure of the law and the ZBA duties. H. Klein emphasized that the Board granted a variance and did not rezone any area.

Grayson Parker made a motion to vote on the issue.

Ch. Mitchell requested that first Grayson Parker add his comments and reasons to the discussion and subsequently, Ch. Mitchell wished to add his own comments.

G. Parker stated that he concurred with everything that had been said so far and anything that he could add would prolong the meeting and say the same thing.

E. Lamminen addressed POINT#1 by stating that he felt there would be no diminution of value to the surrounding properties. E. Lamminen's personal feeling was that the surrounding properties would not suffer. POINT #2 E. Lamminen stated that granting the variance would be in the public interest. E. Lamminen stated that a restaurant would definitely be in the public interest of the Town. E. Lamminen said the Town needs a restaurant. POINT #3 (unnecessary hardship), was addressed by E. Lamminen by stating that special conditions exist because of the changing circumstances of the property. In E. Lamminen's opinion, this made the property unique. POINT#4 (substantially justice)etc. E. Lamminen stated that it would be of benefit to the public to have a restaurant. POINT #5 (proposed use contrary to the spirit of the ordinance. E. Lamminen commented that, "it would be a tough one for anyone to meet", but he added that the spirit of the ordinance in this case would go back to the special conditions of the surrounding property.

Ch. Mitchell addressed the application from the Selectmen for a rehearing by stating that he believed that there was new evidence in the application. Regarding the hardship factor, Ch. Mitchell stated that he originally thought the hardship was met because the property was surrounded by properties of commercial variety. Ch. Mitchell pointed out that across from the highway (Rte.101), on the north side is a residential strip and in the back of the property was an industrial zone area. Ch. Mitchell stated that the property is surrounded by residential and industrial zones, not commercial. Ch. Mitchell said it did not meet the hardship criteria by being an island in a commercial zone. Ch. Mitchell pointed out that at the original hearing it was stated that the proposal was "in accordance with the Master Plan". Ch. Mitchell felt now that the point was subject to debate and open to interpretation. Ch. Mitchell stated that it put doubt in his mind about the proposed change. Ch. Mitchell continued by saying that the "legality of the whole issue bothered him and that he was concerned that the Board would be spot zoning." Ch. Mitchell explained that because the Town(at Town Meeting 1986) voted not to rezone the area industrial, it did not mean that the Town would want it commercially zoned. Ch. Mitchell stated that he would not make the assumption that the Town would want it commercial because the Town did not vote it industrial. Ch. Mitchell added that the property is Residential (Agricultural) and therefore, he was not voting on any issue that would change it. Ch. Mitchell continued by saying that not all five of the criteria were met and there was doubt in his mind of the legality of the decision. Ch. Mitchell said that he believed a rehearing should be held.

Ch. Mitchell then asked for a motion to a vote. Ch. Mitchell suggested that the motion be made in the affirmative. S. Blanchard questioned the purpose of placing the motion in the affirmative and asked why can't we say what we mean for a change. It was pointed out by G. Parker that it was standard protocol to have a motion in the affirmative.

Grayson Parker moved to accept the material for a hearing as proposed.

Eddie Lamminen seconded the motion.

Ch. Mitchell explained that the motion was for a rehearing, an affirmative vote meant that a rehearing would be held, a negative vote meant that no rehearing would be held.

The Board voted 4-1, not to grant the rehearing. Ch. Mitchell cast the affirmative vote.

E. Lamminen added that it was his personal feeling that he did not want the ZBA to hire a lawyer to fight the Selectmen.

Motion to adjourn the meeting by Steven Blanchard.

Motion seconded by Eddie Lamminen.

Meeting adjourned at 8:15 P.M.

Gail Proctor
Gail Proctor
Recording Secretary



BOARD OF ADJUSTMENT

TOWN OFFICES

WILTON

NEW HAMPSHIRE 03086

September 16, 1986

Selectmen - Town of Wilton, N.H.

Re: Request for a rehearing on the Levesque Case (#12), Request filed on
September 9, 1986.

Notice of Decision

The Wilton Board of Adjustment at its September 17, 1986 public hearing, voted 4-1 not to grant a rehearing on the Levesque Case (August 27, 1986) as requested by the Selectmen of the Town of Wilton.

The majority of the Board agreed that no "new evidence" was submitted in the request. The majority of the Board also agreed that the Board was not in "technical error" at the original hearing.

Gail Proctor

Gail Proctor
Recording Secre.

P 269 434 749
RECEIPT FOR CERTIFIED MAIL

U.S.G.P.O. 1985-480-794

Sent to	Selectmen Town of Wilton
Street and No.	Main St.
P.O. State and ZIP	Wilton, N.H. 03086
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Special Delivery	
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3800 June 1985