

TOWN OF ELIOT – BOARD OF APPEALS MEETING

February 21, 2013

ROLL CALL

Present: Chairman Edward Cieleuszko, Vice-Chairman Peter Billipp, Secretary Bill Hamilton and Associate Members Ellen Lemire and John Marshall.

Others Present: Code Enforcement Officer, Jim Marchese; James Covey, appellant; Jared Hichens, land owner.

CALL TO ORDER

Chairman Cieleuszko called the meeting to order at 7:00 PM.

MEETING AGENDA

The hearing was for an administrative appeal by James Covey, Rollinsford, NH of the decision of the Code Enforcement Officer for the denial of a permit for a food truck on Route 236, Eliot, Maine. The property is owned by Jared Hichens, Sr., 2088 State Road, Eliot, Maine, Map 87, Lot 9.

APPROVAL OF MINUTES

Because the appellant was not yet present at the meeting, the BOA decided to review the minutes. The minutes of the December 20, 2012 meeting were approved as amended.

DISCUSSION OF AGENDA FILING TIME

Chairman Cieleuszko stated that before the BOA could begin to hear the case, all the fees had to be paid. He stated that from what he understood from the Code Enforcement Officer, they had not been paid. He added that if they were not going to hear the case, it could be delayed for another month because there is a 60-day time period allotted for a decision to be made.

Mr. Hichens stated that Mr. Covey had told him he would be there for the meeting and that he had paid the fees.

Ms. Lemire stated that the filing fee had been paid, as noted by the Town Clerk on the application for the appeal. Chairman Cieleuszko stated that the amount was only \$25.00 and that there was a notification fee that had not been paid.

The CEO, Jim Marchese, stated that the appellant was notified on February 6, 2013 that the balance of \$148.76 was due prior to the hearing.

Chairman Cieleuszko stated that the BOA could put the hearing off for another month but that if they did not make a decision within 60 days, it would be assumed as denied. He stated, as an aside, that there were a lot of problems with the application.

Mr. Billipp asked Mr. Hichens if he expected Mr. Covey to be at the meeting. He replied that he had seen him that afternoon and that Mr. Covey said that he would be present. Mr. Billipp stated that perhaps Mr. Covey was running a few minutes late.

Chairman Cieleuszko stated that Mr. Covey still had to pay the fee. He stated that the CEO had accepted checks in the past and that the fee does not have to go through the Town office as long as the CEO gets the check before the hearing. Mr. Marchese affirmed that as correct. Chairman Cieleuszko clarified that Mr. Covey could pay at the meeting.

Mr. Billipp asked Mr. Hichens if he had a way to reach Mr. Covey by telephone to find out if he was on his way to the meeting. Mr. Hichens replied that he did not have a cell phone number for Mr. Covey. Mr. Marshall asked if it were possible that Mr. Covey was at the Board of Selectmen meeting in the next room by mistake. Mr. Hichens checked and did not locate him there.

Mr. Hichens stated that he noted that Chairman Cieleuszko had stated there were problems with the application. Chairman Cieleuszko stated that according to what had been presented to the BOA, the appeal was filed months late. He added that the BOA would not hear the case for that reason unless something came up to dissuade them from that standard opinion.

Mr. Hichens replied that the way he understood the situation, Mr. Covey had been going back and forth with the CEO trying to get an answer and that was why it was late. Chairman Cieleuszko stated that the appellant had 30 days from the denial of the permit to file an appeal. He stated that the permit was denied on November 1, 2012 and the appeal filed on January 28, 2013.

Mr. Hichens stated that from what he had been told, Mr. Covey was trying to get a complete denial from the CEO and had not received a regular denial and that that was why he was late filing. Chairman Cieleuszko stated that there was evidence as to when filings were made, but that no decision either way could be made until the fees had been paid.

Mr. Marshall stated that if the BOA were going to deny the application, paying the fee would not be worthwhile. Chairman Cieleuszko stated that the costs that the fees cover were already

incurred and that Mr. Covey was well aware of that fact because the procedures are explained very well by everybody in the Town offices.

Mr. Marshall stated that he wondered why the application was even entertained and started if it was obviously already late. He stated that that seemed rather insincere to him. Chairman Cielezsko stated that there is no way to refuse an application because it is late. Mr. Marshall stated that the Town office knows when the permit was denied and when the application for appeal was being made. He stated that the appellant could have been notified that the appeal was being filed too late to be considered.

The CEO stated that he did not have the right to deny someone the option of presenting their case before the BOA. He added that the issue of timeliness is the Board's decision to make, not his. Mr. Marshall stated that he could have advised the appellant. The CEO replied that he had advised the appellant several times that it was doubtful that his case would be heard because he had exceeded the 30-day limit. He added that the appellant proceeded with the application anyway. Mr. Marshall stated that he would have only been concerned if the appellant had not been advised.

Mr. Covey arrived at 7:15 PM, apologized for being late and paid the fees to the CEO.

PUBLIC HEARING CALL TO ORDER

Chairman Cielezsko called the public hearing to order at 7:20 PM. He stated that the meeting was streaming live on the internet.

Chairman Cielezsko introduced the BOA members to the appellant. He stated that the process would be as follows:

- Chairman Cielezsko will summarize the request.
- Voting members will be determined.
- The concerned parties will be the appellant, Mr. Hichens and the CEO.
- Jurisdiction, standing and timeliness of the appeal will be determined.
- The appellant will present his testimony.
- The Board will question the appellant.
- The Code Enforcement Officer will present his testimony.
- The Board will question the CEO.
- Other parties to the action, if present, will offer comments.
- Other interested parties in the general public will offer comments if they wish to do so.
- The appellant will have the last statement.
- The BOA will have the last questions.
- The hearing will be closed

- Findings of Fact will be determined.
- Options will be explored and a decision determined.

Chairman Cieleuszko stated that if the hearing were put off, it would be delayed to a date to be determined tonight and there would be no abutters notified.

Chairman Cieleuszko stated that the notice of the BOA decision would be sent to the appellant within seven days. He added that the appellant would have 45 days to appeal the decision. He stated that, in the event that the appellant does not meet the requirements for standing or timeliness in regard to the appeal, the result would be an automatic denial of the application.

Chairman Cieleuszko stated that the voting members will be Ms. Lemire, Mr. Hamilton, Mr. Billipp and Mr. Marshall, with Chairman Cieleuszko voting in the event of a tie vote. The interested parties were Mr. Covey and the CEO. He added that there were no abutters present.

JURISDICTION

Chairman Cieleuszko stated that the Board has jurisdiction under Section 45-49(a), Administrative Appeals to hear the case.

SUMMARY OF REQUEST

The application is for an administrative appeal by James Covey, Rollinsford, NH of the decision of the Code Enforcement Officer for the denial of a permit for a food truck on Route 236, Eliot, Maine on property owned by Jared Hichens, Sr., 2088 State Road, Eliot, Maine, Map 87, Lot 9.

APPELLANT STANDING

Chairman Cieleuszko asked Mr. Hichens if he approved the utilization of his land for the proposed use and Mr. Hichens replied in the affirmative. He then asked the CEO if it were a classic standing for Mr. Covey if the owner of the land authorized permission verbally at the meeting. The CEO stated that it was. Chairman Cieleuszko asked the CEO if he had anything in writing authorizing the use of the land and the CEO replied that he did not but that the oral statement was acceptable.

Chairman Cieleuszko asked for questions from the BOA regarding the timeliness of the appeal. Mr. Hamilton stated that it did not appear to be timely. He stated that one has to appeal any decision of the CEO or Planning Board to the BOA within 30 days.

Mr. Covey stated that he was not aware of the limit in the beginning but that when he did find out, he took care of it immediately.

Mr. Hamilton stated that the clock starts when the CEO makes his decision. He stated that Mr. Covey had received a notice from the CEO stating that the application was denied and from the point of that decision, the appellant had 30 days to appeal. He stated that the decision was made on November 1, 2012, and that the application for the appeal was submitted January 28, 2013.

Mr. Covey stated that he went to the Town Hall prior to January and was told by the CEO that he was too late. He found out that he could file the appeal anyway and that was the date he filed. He stated that he had spoken to Mr. Marchese in early December and the CEO said it was too late at that date to file the appeal. He stated that he checked around and was told he could file.

Mr. Hamilton asked Mr. Covey who had told him he could file the appeal. Mr. Hichens indicated it was Dan Blanchette.

Mr. Billipp stated that he had a real concern because in Section 45-50(a), Appeal Procedure, it states "In all cases, a person or party aggrieved by a decision of the code enforcement officer or by a decision of the planning board shall file his appeal within 30 days after a decision is made." He stated that the permit was denied on November 1, 2012 and a letter was written from the CEO to Mr. Covey on November 5, 2012. He added that, even if you used the November 5th date as the starting point, 30 days later would be December 5, 2012. The appeal application was not received until January 28, 2013, which was almost two months late.

Mr. Covey stated that in December, the CEO told him he was already past the 30-day limit. He added that he did not find out that he could still file an appeal until just before he filed the appeal. He stated that he had talked to some people who told him that he could file, so he did so right away. He stated that he had been at the Town Hall shortly after the time had run out and he was told he could not file. He stated that he could have filed the appeal at that time, but he was told that he could not file and that is why the issue lingered on. He stated that when he found out from Dan Blanchette that he could file, he did so.

Mr. Billipp stated that it was difficult to know who said what to whom. He stated that he felt personally that the BOA would have to rely on the wording of the ordinance when deciding whether or not the application was received in a timely manner.

Ms. Lemire stated that she agreed with Mr. Billipp. She added that it seemed to her from what Mr. Covey had told them that even the first time he came in to file an appeal he was already past the 30-day limit. She stated that once an appellant goes past the 30-day limit, he disqualifies himself on the issue of timeliness.

Mr. Covey stated that he had no idea that he only had 30 days to file an appeal. Ms. Lemire asked him if he had been told and he replied that he had not been. He stated that a letter had been sent to him and the information in the letter was the only information he had been given.

He added that he did not recall what was in the letter and did not know for sure whether the time limit was in the letter.

Mr. Hamilton noted that the letter of November 5, 2012 was sent to Mr. Hichens. Mr. Covey replied that a copy of the letter also came to his address.

Mr. Billipp pointed out that the bottom of the letter from the CEO states, "Any decision of the Code Enforcement Officer on the permit may then be appealed to the Board of Appeals within 30 days of this decision per Sec 45-50." Mr. Covey restated that he did not recall whether that statement was in the letter or not. Mr. Billipp stated that it was clearly in the letter and he thought it was quite clear that the 30 days had been exceeded.

Chairman Cieleuszko asked Mr. Covey who had told him that he could file an appeal. Mr. Covey stated that he had talked to Mr. Hichens. Mr. Hichens stated that Mr. Covey had told him he talked to Dan Blanchette. Mr. Covey stated that he talked to Mr. Blanchette. Mr. Hichens had spoken to Mr. Blanchette and relayed the information that he could still file the appeal.

Chairman Cieleuszko asked for clarification as to whether both Mr. Covey and Mr. Hichens had talked to Dan Blanchette. Mr. Hichens replied that he had talked to him on the phone and that Dan had said he could still file an appeal, even though it was late.

Chairman Cieleuszko asked Mr. Covey what reasoning was used in his thinking that he could file the appeal late. Mr. Covey replied that he was told that he could file, so he did file. He added that even when he came in to pay the filing fee, the clerk did not have a problem, even though Mr. Covey mentioned that he was late.

Chairman Cieleuszko clarified that there had been no reason given for a supposed extension and Mr. Covey stated that was correct.

Chairman Cieleuszko stated that if the BOA found that the appeal had not been filed within the proper time, they could make a motion to deny the appeal because of timeliness.

Mr. Marshall asked whether they needed to deny the appeal or could they just not accept it. Chairman Cieleuszko stated that they would deny the appeal.

Mr. Billipp stated that the ordinance does not specify what happens in the event an appeal is not filed after the 30-day limit. Ms. Lemire stated that that was because there is a limit of 30 days in which to file.

Chairman Cieleuszko stated that to deny the late appeal is by practice of the Board and of the State. He stated that it is not in the ordinance but it is in the MMA (Maine Municipal Association) and the Board of Appeals manual and it has been accepted through the courts as an established practice.

Mr. Marshall asked if an appellant could reapply in the future after a denial by starting a new process. He stated that it seemed to him from the information presented that the BOA could not hear the case because it was not a timely filing and that could be the end of the issue. He added that if they denied the appeal, rather than simply not hearing it, it might cast a black mark on any future of the case.

Mr. Billipp asked if there were a time limit for an appellant to wait before reapplying.

Mr. Covey stated that he did ask about filling out a new application after he found out that he was late and was informed that it would be a nuisance.

Chairman Cielezsko stated that it was established through the courts that a case cannot be reapplied for without substantial change to the application. Cases cannot be routinely resubmitted without substantial modification. He added that the BOA is really held by the standards of the court system and the appeal procedures. He stated that it is established that the BOA deny the untimely appeal.

Mr. Marshall stated that he was also concerned that people at the Town Hall, knowing the limitations, would give advice to go ahead and file late. Chairman Cielezsko stated that he did not think anybody gave Mr. Covey advice to file. Mr. Marshall stated that he thought they should have told Mr. Covey he was beyond the time limit and could not file the appeal.

Mr. Billipp stated that an appeal can still be filed, even if it is past the 30-day time limit. He added that it may not be a good idea but that nobody is going to say that it cannot be done.

Mr. Covey asked if somebody should have told him it was a bad idea to spend the money if the case was not going to be heard.

Mr. Marshall stated that the issue seemed terribly disingenuous.

Mr. Hamilton stated that he did not think it was up the Town Clerk to make a decision as to whether or not an appellant is qualified to make an appeal. He added that her job is to receive, date and distribute the application, not to make a judgment as to whether the appellant meets the timeliness issue or the standing issue. He stated that he did not think it was incumbent on the Town Clerk to make those decisions or to screen the applicants and he did not think it was disingenuous.

Chairman Cielezsko stated that according to the Board of Appeals manual, it is up to the Board to decide the timeliness, standing and jurisdiction in a public session. He added that it is not up to the Town Clerk or anyone else. He stated that questions should be answered truthfully and he believed they always were.

Mr. Marshall stated that he did admit that the time limit of 30 days to appeal was very clearly stated in the CEO's letter of November 5, 2012.

Mr. Billipp noted that the last sentence of the letter stated that, "The town clerk is responsible for receiving, dating and distributing appeals forms."

The public hearing was closed at 7:40 PM.

MOTION

Mr. Billipp made a motion to deny the appeal. Ms. Lemire seconded the motion.

DECISION

The motion was passed unanimously with Mr. Hamilton, Mr. Marshall, Mr. Billipp and Ms. Lemire voting in favor.

Chairman Cielezsko told Mr. Covey that his appeal had been denied and that he would receive a letter of notification.

Mr. Covey stated that it had cost him \$200 to find out that he could not be heard. He stated that he thought that someone at some point along the process should have told him his case would not be heard. He stated he was trying to find out why the process was not stopped and why the abutters were notified if the case could not be heard.

OTHER BUSINESS

Mr. Billipp stated that in the current case he thought that if the appellant was having discussions with Town officials, those officials should be at least telling the appellant that he needed to talk to either the CEO or the Chairman of the Board of Appeals to get information regarding the standing of an appeal. He stated that he hoped that advice was being given rather than simply taking an appellant's money and giving out the application form.

Mr. Hamilton pointed out that the letter of November 5, 2012 from the CEO to the appellant very clearly stated that there was a 30-day time limit.

Mr. Marshall stated that he agreed with both Mr. Hamilton and Mr. Billipp. Ms. Lemire concurred. Mr. Marshall stated that the appellant was late in filing, but he did not feel his money should have been accepted.

Mr. Billipp stated that he thought the appellant really should have been given the advice to talk to the Chairman of the BOA since the application was clearly late and the appellant still wanted to file an appeal.

Mr. Marshall stated that he wondered if an appellant should file an appeal through the CEO rather than the Town Clerk so that there is continuity and that the current situation does not recur.

The CEO stated that he strongly believed that it is the opinion of the BOA as a whole whether or not the appellant really had a heart attack and could not submit the appeal in a timely manner, whether or not the appellant's house really burned and he could not submit in a timely manner. He stated that the decision is not the call of any one individual to make. He added that he thought there were instances where an appellant could be late and the lateness could be justified.

Mr. Billipp stated that there did not seem to be any justification in Mr. Covey's situation. Ms. Lemire concurred.

Mr. Marshall stated that the 30-day limit seemed a little tight in that, if there is negotiation going on with the CEO and an appellant works in a job where getting time off is difficult, the 30 days would pass quickly.

Chairman Cielezsko stated that the 30-day limit has to be balanced because a lot of the BOA decisions are against a homeowner.

Mr. Marshall stated that he agreed with the time limitation in a situation when someone gets a permit and that permit has to be time-definite because the homeowner is waiting to begin work. He stated that in Mr. Covey's case, that situation did not exist. Mr. Marshall stated that he thought the process the BOA just went through was very dissatisfying. He stated that he thought the appellant was someone who wanted to be productive, feed his own family, not be on welfare, and to utilize existing property owned by a private citizen. He stated that the Town was happy to take his money and yet not grant the appeal in his favor. Mr. Marshall stated that he found the situation very disturbing.

Chairman Cielezsko asked the CEO if Mr. Covey had been told at some time after the letter of November 5, 2012 letter that he was "swimming upstream" and the CEO stated that Mr. Covey had been told several times.

Chairman Cielezsko stated that he would not condemn the Town on the merits of this case because it was a unique situation. He added that the BOA would have to see an established failure continue before jumping to conclusions and blaming the Town.

Ms. Lemire asked the CEO if he thought that Mr. Covey fully understood that the 30 days was a deadline. She added that she thought people misunderstand the deadline because she had heard it said on more than one occasion that an appellant can file even though they are over the 30-day limit. She stated that she didn't think people pick up on the subtle message that

they can file if they want to file but that does not mean they will get the result they want and that, most likely, they will not.

Chairman Cielezsko stated that if an appellant has any questions, the options are open to ask Barbara Thain or call Chairman Cielezsko and that they have often done so. He added that options are open for an appellant to get information from a lot of people. He stated that a lot of things failed in the case for Mr. Covey that would normally have been in place.

Ms. Lemire asked if a member of the BOA, if hired as an employee of the Town, would have to step down from the Board. Chairman Cielezsko stated that that would not preclude a member from being both. Mr. Billipp mentioned that Mr. Lytle is both a Town employee and a BOA member.

Mr. Marshall stated that the situation would be different if the person were a Selectman. Chairman Cielezsko stated it is against State law for a Selectman to be on the Board of Appeals. Mr. Marshall stated that he wondered if Selectmen could also be Town employees. Chairman Cielezsko replied that a Selectman could be a Town employee and also be on another board, but not on the BOA. State law states the limit is just the BOA but by common courtesy it applies to all boards.

ADJOURNMENT

The meeting was adjourned at 7:47 PM.

Respectfully Submitted,

Linda Keeffe
Recording Secretary

Approved by: _____

Ed Cielezsko, Chairman, Board of Appeals

Date Approved: _____