

The Law Office of Scott E. Hogan

P.O. Box 57

Lyndeborough, New Hampshire 03082

Phone: 603-969-1183

hoganlaw@comcast.net

AUG 13 2021

MM

MOTION FOR REHEARING PURSUANT TO RSA 677:2

TO: Rochester Zoning Board of Adjustment (Zoning Board, Board, or ZBA)

FROM: David Waleryszak
232 Milton Rd.
Rochester, NH 03867

BY: Scott E. Hogan, Esq.

RE: ZBA Decision of July 14, 2021, Denying Appeal of Administrative Decision
(Case Z-21-05) relating to property at 107 Betts Rd., Rochester, NH

DATE: August 13, 2021

INTRODUCTION

Mr. Waleryszak is the owner of residential property directly abutting the property in question, and is directly affected by the uses of it.

He respectfully requests that the Board grant this Motion, and allow another hearing on this matter, for the reasons stated below.

STANDARD OF REVIEW/ ZBA JURISDICTION

RSA 677:2 states,

“Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, **may grant such rehearing if in its opinion good reason therefor is stated in the motion...**” (Emphasis added).

On the purpose of Motions for Rehearing, the New Hampshire Supreme Court has stated,

“By requiring an aggrieved party to first file a motion for rehearing from an adverse zoning board decision before allowing an appeal to the superior court, RSA 677:2 is designed to give the ZBA an opportunity to correct any errors it may have made.”

McDonald V. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171, 175 (2005). (Emphasis added).

THE BOARD SHOULD GRANT THIS MOTION FOR REHEARING

Whether or not the Board ultimately changes its decision on the subject Appeal of Administrative Decision, it should grant rehearing of the application for the following reasons, based on fatal procedural errors, and that the evidence before the Board supports granting the Appeal.

Precluding the Appellant's Own Testimony

The Board conducted a public hearing on April 14, 2021 on Mr. Waleryszak's Appeal of Administrative Decision. *That Hearing was continued at the request of the City, after consultation with counsel for Mr. Canfield, Attorney Hilson.* Thereafter, Mr. Waleryszak requested his own continuance, so that he could gather relevant evidence and communicate with his abutting property owner directly. (It should be noted that Counsel for Mr. Waleryszak's neighbor, Attorney Chris Hilson agreed that Mr. Waleryszak did not make the request to continue the first hearing. That was communicated to the City Planning Director by email of 5-12-21 when Mr. Waleryszak made his request to continue).

When the public hearing was continued on July 14th, *the Board precluded Mr. Waleryszak from continuing his testimony in support of his own Appeal.*

That position obviously has no basis in the law or common sense, and is fatal procedural error. *Mr. Waleryszak, an abutting property owner who is subject to daily nuisance impacts from the subject property has clear legal standing to present his Appeal to this Board, and this Board is obligated to hear his testimony, as well as the abutter and members of the public throughout the course of the public hearing process. RSA 676:7.I.*

The Board's decision to preclude the Appellant from submitting testimony and evidence during the continued public hearing process would be the first issue presented for judicial review, which would result in a time-consuming and expensive remand back to this Board simply to allow such required participation.

For this reason alone the Board must grant this Motion for Rehearing.

The “Evidence”

The Record is clear that the evidence before the Board (at the time it precluded the Appellant from continuing his testimony and responding to the information presented by the abutter’s counsel) supports granting the Appeal of Administrative Decision.

IT SHOULD BE FIRST NOTED that in the letter submitted by Attorney Chris Hilson on behalf of Tom and Sandra Canfield dated June 4, 2021, Attorney Hilson acknowledges to the Board that:

“...MR. CANFIELD USES A SCREENING PLANT THAT IS ADMITTEDLY VERY NOISY, AND CAN BE HEARD FROM A MILE AWAY.” Hilson letter, p.3. (Emphasis added).

Despite that admission, Attorney Hilson goes on to state, “...*Complainant’s bald complaints concerning the noise of Mr. Canfield’s operations cannot be sustained.*” (Emphasis added).

Attorney Hilson then references and attaches Affidavits from “direct abutters” and “neighbors” who state that the “very noisy” operations, which “can be heard from a mile away” are not “bothersome”. Several of the Affiants at the same time testify to their past business relationships with Mr. Canfield, including business arrangements with and permissions from Mr. Canfield involving the use of the Canfield property itself.

In his Appeal and in the testimony that he was allowed to give before he was precluded from participating in the continued public hearing on his own Appeal, *Mr. Waleryszak established that the uses of the subject property have changed and increased, and present an unreasonable daily interference with the use, enjoyment, value and marketability of his properties.*

As to the “evidence” before the Board at the time it made its decision, *Attorney Hilson’s letter confirms that there are no City Records to support the position that the current uses are grandfathered in any way. In fact, Attorney Hilson’s letter actually confirms the lack of evidence/records to support that position, and confirms the numerous changes in uses over the relevant time period.*

CONCLUSION

For all of the reasons stated above, there is “good cause shown” for the Board to grant this Motion for Rehearing, so that all parties can have an opportunity to properly review and comment on the issues raised in this Motion, and in the underlying Appeal.

By his attorney,
THE LAW OFFICE OF SCOTT E. HOGAN

/Scott E. Hogan, Esq./

Scott E. Hogan, Esq.

P.O. Box 57
Lyndeborough, NH 03082
603-969-1183
hoganlaw@comcast.net
NH Bar ID#: 10542