**Zoning Board of Adjustment**

**27 School Street**

**HILLSBOROUGH, NH**

**JANUARY 14, 2019**

**DATE APPROVED**: 05/13/19

**TIME:** 7:00 p.m. – 8:11 p.m.

**CHAIRPERSON:** David Rogers

**VICE CHAIRPERSON:** Roger Racette

**MEMBERS:** Russell Galpin Dana Brien and Nancy Torres

**PLANNING DIRECTOR:** Robyn Payson

**ALTERNATES:** Larry Baker and John Segedy

**ABSENT:** Larry Baker

**Present:** Dana Brien, Nancy Torres, Roger Racette, Russ Galpin, John Segedy, Robyn Payson, David Rogers

Also Present: Stephen Bennett, Kay L. Bennett, Kelly Dowd, Claudia Larkin, Jim Larkin

 **CALL TO ORDER:**

Vice Chairman Racette called the meeting to order at 7:00 p.m. He stated the meeting is for a Motion for Rehearing –Appeal of Administrative Decision in the Historic District. Vice Chairman Racette also stated Chairman Rogers recused himself for this meeting.

Mr. Segedy made a motion to amend the agenda to remove the words “Public Hearing” as this meeting is not a hearing, the motion was seconded by Mrs. Brien. The motion passed unanimously.

Vice Chairman Racette stated that there will be no testimony tonight; this is a discussion amongst the Board to make a decision to determine if the Board acted unreasonably or unlawfully during the hearing of November 19, 2018.

**MEEETING MINUTES**

November 19, 2018

Mrs. Torres made a motion to accept the minutes as presented, seconded by Mr. Galpin. Motion passed unanimously.

**Motion for Rehearing**

**Appeal of Administrative Decision**

**Kay & Stephen Bennett**

**1 North Road (Map 8, Lot 63)**

**Submitted by Daniel & Barbara Joyce Hingston**

The Motion for Rehearing is being filed on behalf of Daniel Hingston and Barbara Joyce Hingston, individually, and by Barbara Joyce Hingston, Trustee of the Barbara J. Hingston Revocable Trust by their Attorneys Preti Flaherty Beliveau & Pachios.

Mr. Galpin asked to address the Board prior to the discussion. He stated that he has served on the Board for many years and has had multiple training classes through the years. He stated there are four reasons to grant a re-hearing. The first reason is if we did not properly handle it. He continued to state that as far as he knows the hearing was noticed properly and the hearing was conducted according to all the rules and regulations set forth. The second reason is if false information or misleading information was given to the Board. Mr. Galpin does not believe this took place. The third reason is if new pertinent information became available since the hearing. Mr. Galpin does not believe new information was provided. The fourth reason is if the final decision was contrary to any State or local rules and regulations or laws. The Town of Hillsborough has no regulation on this type of construction and there are no state laws that this Board has violated. Mr. Galpin further stated that the Historic District Commission denied the applicant because there were no provisions for screening in the application. When the HDC requested a new application with screening provisions, the applicant did not comply. Mr. Galpin stated the ZBA has authority to add conditions with approvals, which was done with the screening. He further stated that unless a Board member has information to change his mind, he is in favor of denying the request for a rehearing.

Dana Brien asked for the statute regarding the option of stepping into the role of the HDC. John Segedy answered it was from case law. Robyn Payson said the case was Woolette vs Town of Kingston. Roger Racette noted the Board had the option to remand to the HDC or to step into the shoes of the HDC. John Segedy noted that they also could have made a determination that the HDC was correct and there was no need to remand.

Vice Chairman Racette proceeded to review the points in the Motion for Rehearing:

The Hingstons respectfully request that the ZBA:

1. Rehear the Bennetts’ application so that it may make findings with respect to the criteria set forth in Section 147-3(D) of the Historic District Rules.

John Segedy said that: They are right – we didn't deal with that. Roger Racette agreed. Russ Galpin said that since the ZBA took over we didn't have to follow HDC rules. Nancy Torres said we did discuss the HDC criteria although not necessarily stating each one.

 After discussing at length, the Board felt that while they did not mention each criterion individually, they did thoroughly discuss all the criteria before making a determination.

1. Rehear the Bennetts’ application so that additional evidence can be taken as to whether the Bennetts’ solar array is accessory to their single-family residence AND
2. Determine whether the selling of electricity to the grid, a commercial use, is appropriate in the Historic District.

The Board felt B & C should not be considered as the Motion for Rehearing is to determine if any errors were made by the Board in their decision making process. They also stated these topics were discussed at the hearing and no new information has been brought forward. It was also stated that electricity is not being sold, it is being stored for later use. This is not a commercial use.

1. Rehear the Bennetts’ application because of the above-described procedural errors by the ZBA.

The Board did not request written reports. However, two selectmen were present one being a fireman. Also, present was an expert from Revision Energy. The Planning Board was aware of what was going on and did not protest. The Board also felt that though it is the HDC’s responsibility to obtain these reports, it is not the ZBA’s.

The other alleged procedural error listed is: After closing the public hearing the ZBA improperly solicited and allowed additional testimony from the Bennetts and their representatives without allowing any input from abutters or the general public.

Vice Chairman Racette stated he followed normal procedures which is to announce when public portion is over and recess. During deliberations, if a Board member has questions, they make ask. The hearing was closed and did not take any more input and then voted. The Board did not re-open public hearing for rebuttals.

John Segedy said that by allowing one side to speak to the issue of screening after recessing the hearing but not the other side is a potential due process violation.

Another alleged mistake is the ZBA’s only “finding” as set forth in its Notice of Decision dated November 22, 2018, was to quote the language of RSA 672:1, III-a. Quoting a statute is not a finding as to any of the “considerations” set forth in Section 147-3(D) The failure to make findings makes it impossible for the Hingstons or other interested parties to determine the basis for the ZBA’s decision and would make it impossible for a court reviewing the ZBA’s decision to determine whether the ZBA’s decision was unreasonable or unlawful.

The Board felt the Notice of Decision was written correctly and referring to an RSA was not inappropriate.

Mrs. Brien while reading the approved minutes found a typo and asked for a motion to readdress the minutes of November 19, 2018, Mr. Vice Chairman seconded the motion and it was passed unanimously. The typo was on page 1 second to the last sentence “planning” should be “planting”. Mrs. Brien made a motion to change “planning” to “planting”, Mr. Segedy seconded the motion. Motion passed unanimously.

# Vice Chairman Racette asked the Board if there were any other items to discuss.

# Robyn Payson said because an out of context statement made by Dana Brien was cited in the Request for Rehearing under “ZBA Standard Of Review/Applicability Of Historic District Regulations”, it should be addressed for the record. The statement is as follows:

#  “… one member of the ZBA even stated that the idea of historic appropriateness "needs to go out the window. "

Mrs. Brien did not mean Historic District “appropriateness needs to go out the window”. The totality of the statement was that the ZBA could not clearly apply aesthetic standards to a use that did not exist in 1979. She said she found the restriction of property use of harvesting energy uncomfortable and compared it to white houses in the district not being necessarily “historically accurate”.

She went on to say that taking people’s property rights away to harvest energy because the structure does not meet 18th century standards were a problem. She said “If this was any use other than an alternative energy source there would have been much more attention paid to aesthetics.” (See complete statement attached.)

 Mrs. Torres made a motion to deny a rehearing, seconded by Mr. Galpin. After some discussion with Mr. Segedy and his concerns of addressing criteria, feedback from Departments & Boards and allowing due process of hearing both sides when public portion is re-opened, Mr. Galpin stated these concerns have not been mentioned by Mr. Segedy before and made a motion to move the question. The motion to deny the rehearing was passed by roll call vote with Mr. Segedy voting No, Mr. Galpin- Yes, Mr. Vice Chairman -Yes, Mrs. Torres – Yes, Mrs. Brien – Yes.

Having no further business, the meeting was adjourned at 8:11 by motion of Mrs. Brien, seconded by Mrs. Torres.

Respectfully Submitted,

Dianne Rutherford

Administration/Land Use Secretary