



TOWN OF MIDDLEBURY

Zoning Board of Appeals

MINUTES

ZONING BOARD OF APPEALS REGULA MEETING

Wednesday, August 5, 2020 – 7:30 p.m.

Shepardson Community Center Auditorium
Via Zoom Meeting #861 3971 4591

Present: Ken Long, Chairman
Joe Mancini
Candice Graziano
Brian Proulx
Tom Ford, Alternate

Also Present: Curt Bosco, ZEO
Rachel Primus, Recording Clerk
Attorney Stevens

Excused

Absent: Ray Caruso
Linda Herrmann, Alternate

Call to Order with the Pledge of Allegiance

The meeting was called to order by Ken Long at 7:33 P.M.

Seating with Regular Members

The regular members present were seated and Ken appointed Tom Ford a regular voting member in place of Ray Caruso.

Approval of July 1, 2020 Special Meeting Minutes and July 1, 2020 Regular Meeting Minutes

VOTED: Unanimously on a motion by Brian Proulx and seconded by Candice Graziano to **APPROVE** the July 1, 2020 special meeting minutes as presented.

VOTED: Unanimously on a motion by Brian Proulx and seconded by Joe Mancini to **APPROVE** the July 1, 2020 regular meeting minutes as presented.

Continued Public Hearing:

Application #3187 – John J Starr, 2 Sandy Beach Road – Appealing the Decision of the Zoning Enforcement Authority concerning buildings and use at 3 Sandy Beach Road.

Attorney William Stevens, representing the ZBA, noted that the applicants are represented by Attorney Kaufman, whom he has been dealing with, and he wanted to make sure they were here tonight representing themselves, without attorney presence. Mr. Starr, who is attending the meeting via Zoom, and Ms. McManus said they were fully representing themselves this evening. Mr. Long noted that the owner of Sandy Beach Club, Mr. Anderson, was unable to speak at the last meeting because of the time restraints, but he is present tonight, along with his attorney.

Attorney Mark Branse, representing Sandy Beach Club, gave the board some information on his background. He stated he will be presenting a power point presentation tonight. He noted that the board should've received the handout information already via email. He said there were land

use cases included in those that he will site in tonight's presentation. Attorney Branse started with the Sandy Beach Rebuttal. He explained that the board acts in a quasi-judicial role, hearing the facts and legal arguments as a court would. He said they have the ability to do anything Planning and Zoning could do in making a decision here. He said the appellants have given a lot of information, but he reminded them that the application can only cover the appeal that was filed. The three reasons are operation of a boat club and transient boat use; the installation of a boat ramp that was never permitted; and the decision to not regulate. Attorney Branse gave the definition of non-conforming. He explained that the lot conforms, as well as the building and structures. He said that what the uses were in 1959 are the same now, only they have intensified. He said that the violations that were brought up last month were irrelevant and should not have been heard. He said they were only told to discredit the Club. He said the statements were not true and he explained why. The temporary barrier installed was for erosion control. The Conservation committee recognized it in their minutes and approved it. Attorney Branse went on to explain the claim that a house was built on the property without proper permits was false. On June 26, 1996 the Andersons received a building permit to build a new home. They planned on demoing the original house once it was complete. The town then said they could not have 2 houses on the lot. It was an error, but not Mr. Anderson's. Instead, they rehabbed the original house. In regards to items being stored on the property. It is true, there are items stored on the property. A tractor, which belonged to Mr. Starr, as well as a pontoon boat, all with permission from Mr. Anderson. There are also additional boats. Attorney Branse noted that Mr. Starr's new pontoon boat was launched from the Clubs boat dock. DEEP does not establish where the littoral line is. That can only be done by Superior Court. Attorney Branse read the definition of a structure from the Middlebury Zoning Regulations. He noted they only regulate structures that are on the ground, not in the water. There are no setbacks in the regulations for docks. At the last meeting, the appellant did not give the full zoning regulation. There is a quote from Chairman Smith saying in the past 25 years the town has never regulated the water. In regards to the non-conforming use, the assessor doesn't show the boat ramp or dock. Some assessors look at totality, not itemized value, and they are allowed to do that. Attorney Branse read a letter from the Middlebury Assessor into the record which states all the information is correct and accurate, as he has assessed the property for the last 3 years. Assessor's records are not records of Zoning Compliance. Attorney Branse gave the definition of legal non-conforming use. Just because there were no docks for a few years doesn't mean they lost use. The aerial photos used at the last meeting were taken in the winter, as they always are. There are no leaves on the trees. The next topic Attorney Branse addressed was intensification vs expansion. The amount of increase of business that is done is not an expansion of use. It has nothing to do with zoning. It is undisputed there have always been boats and docks, it's not a new use or expansion, but intensification. The expansion of use into another season is not true. An extension of a non-conforming seasonal use is not an expansion of that use. More boats are more use, not an expansion. The boat launch has been improved with paving millings. You could always get a vehicle with a boat to the water, in the exact same location. The boat launch was used by Jack Starr for many years. The subject of rental vs owner boats was brought up, and Attorney Branse said that the zoning boards don't get involved with that issue. He noted that at the last meeting, the insurance policy that was shown to the board by the applicants is a workman's comp policy. He provided copies that show Sandy Beach Club does have the necessary insurance coverage. He also told the board that the Club does not sell fuel, repair boats, or shrink wrap boats. Attorney Branse said that he feels this board should uphold the Planning and Zoning decision. He said he had received recent items from the appellants and has reviewed them. He reviewed all the issues that have been brought up at the previous meeting. The appellants cited zoning regulations without giving the additional regulations cited within them. The assessment of the business is based on a gross assessment and they supplied a letter from the town assessor.

Overtime, the site and location of docks has expanded and the number of boats has increased. There is noise from the motor boats, boats are allowed on the lake. The appellants too own a boat. All owners on the lake have shared rights, then the littoral argument is mute. The applicants want the town to have jurisdiction on water use, there isn't currently. Brian Proulx asked about the season water system and the missing reports for DEEP. He asked if these reports were from the winter months. He asked what the definition of seasonal was in regards to a seasonal operation. Mr. Anderson said the definition is that the operation has to be shut down at some point, the water needs to be shut down. He said the water testing is a quarterly report, the labs are certified with the state. Candice Graziano asked for clarification regarding the repairs and fueling being done to boats. She asked that they are not denying it's happening, but it is being done by independent contractors. Mr. Anderson said they are allowing it, but there is no fueling being done. There is an independent contractor who schedules a day to be at the Club to offer his services of shrink wrapping. The Sandy Beach Club does not benefit from it. And he said there are no repairs being done, just boat detailing and shrink wrapping. The appellants have benefited from these services as well. Ken Long brought up the issue with the lockers in regards to being accessories. Attorney Branse said they are small lockers that you access on your own with a key.

Paul Anderson gave his closing statement. He mentioned this has been an ongoing issue the last 3 years and they are finding they are at a point where a final decision needs to be made. They need one decision, as to what happened on the property on October 15, 1959. Mr. Anderson said he is calling upon Mr. Finlay, who was a very active man back in the 1950's and documented all the activities that took place. Boating, swimming, picnicking, fishing, night swimming, events; all things he constantly promoted. He said he was honored to be the successor of the new "Inn Keepers". He has received a crash course in land use. He said he is confident the board's opinion will be the same as his.

Attorney Jim Strub, representing the Planning and Zoning Commission, stated both power point presentations got into a lot of detail. He noted that this board has received the information that the Planning and Zoning Commission looked at and they came up with findings based on the facts provided. He said it didn't matter which presentation was made, he feels the information provided is correct, as well as the previous decision made by Planning and Zoning. Attorney Strub explained that it is a legislative action to pass zoning regulations, and the town has chosen not to regulate the lake. There is no language in the current regulations that talk about the uses in water. He said the littoral rights are to be decided by a superior court. He said the non-conforming status of the property is a pre-existing non-conforming use as a swimming and boat club. He noted that membership has nothing to do with the use. He said that the Planning and Zoning Commission will be addressing the issue of shrink wrapping and boat detailing at their next meeting. He said these issues are not part of this appeal. Attorney Strub said there is no wetland violations on the property. He stated that the Conservation district advocating one property owner against another is outside their realm without involving the town. He explained that Mr. Bosco, the ZEO, has nothing to do with the decision brought before you. He recused himself from previous meetings. The Planning and Zoning Commission came to the decision on their own. He said they should give deference to the role the Planning and Zoning Commission made, not because they have to, but because they did the right research and measures. No board members had questions at this time.

At 9:10 PM there was a 5-minute recess.

Public Comment:

Garrett Moore, 389 White Deer Run Road wanted to address the issue of expansion. He explained that growing up during 1966 through 1970 he spent the summers at Sandy Beach. He swam, there were docks, row boats, canoes, lockers and food and beverages available. In 1993 he bought a house 2 lots down from the beach. He lived in that home from 1993-2000 and still

owns it today. He said during that time there was the same usage from the past, except the locker system changed and the boats became bigger. In 2000 he bought the property directly across the lake from the Club. He explained that he and his family have a big investment in the lake owning a total of 70 acres all together. He said they have seen an intensification of use, but no change. He felt this was typical. He said he didn't think as many people were swimming now, mostly fishing and boating. Mr. Moore said it still appears to be the same type of use. Ms. McManus handed the board packets. She said she has no new information to present, just statement and supporting information. She explained that Jack was away on business. She wanted to take the time to thank Mr. Moore for all he does for the lake. She wanted to discuss the recusal of Curt Bosco and that he is not only a sitting member of the Conservation Committee but also the ZEO. She said that they never requested Mr. Bosco to recuse himself. She said that after 2 ½ years after submitting their complaint, Mr. Bosco recused himself. She said they feel he was biased toward the Planning and Zoning Commission. She quoted comments made by Mr. Bosco. She said it is a jurisdictional decision by the Planning and Zoning Commission but the attorney at the last meeting said that DEEP has sole jurisdiction of the water use. She said they only issue permits for buoys, rafts and docks are regulated by the town. Ms. McManus said the Planning and Zoning's present position is that anyone can put any structure or any commercial use without having jurisdiction. She feels this has an adverse impact of health and safety. She noted they had submitted 3 certified zoning maps that show the lake is an R80 zone, therefore the town is exercising their authority of zoning the lake. She handed a copy of the map into the record. Attorney Branse said that he did receive the applicant's articles that were submitted last night and had time to review them. Ms. McManus said there is no evidence presented that there was swimming and boating club in 1959. Sandy Beach Lodge was open to the public in 1959. In 1960, it changed to Sandy Beach Club. Boats were owned by the lodge and rented out hourly, not owned privately. The boat launch did not exist in 1959. She then reviewed the taxation of the business. She noted there are structures that are not listed on the Vision card. She noted the structures that are income producing. Ms. McManus said she is hoping that the ZBA will rule that there has been expansion. They are selling access to the lake to private boat owners, both short and long term. She said the boat launch is a new use and was not present in 1959 because it was public. It is now different in character, nature and kind. There is a danger to swimmers, increase of traffic on the water, and increase of traffic on the roads. She said that Attorney Strub said the use was a boat and swim club in 1959, but she argues there was a change of use in the property. There is now dock slip rental to private boats with an increase of commercial rental real estate. She argued that they are using the structure of a wood dock on the water, and docks are tethered to the ground. They should conform to non-conforming regulations. There are no taxes being paid on the docks. Ms. McManus discussed that at the beginning of their complaint process the town put Mr. Anderson in touch with a zoning consultant in an effort to establish a zoning overlay. They wanted to be part of this process but were not.

VOTED: Unanimously on a motion by Candice Graziano and seconded by Tom Ford to **CLOSE** the public hearing at 10:03 PM

The board has 35 days to render a decision. They scheduled a special meeting for September 2, 2020 at 7:00 PM

Old Business

None

New Business

None

Correspondence

None

Adjournment

VOTED: Unanimously on a motion by Candice Graziano and seconded by Brian Proulx to **ADJOURN** the meeting at 10:05 P.M.

These minutes are submitted subject to approval.

Respectfully submitted,

Rachel Primus

Recording Clerk

ZBA Members

CC: Town Clerk, Barbara Whitaker, Z.E.O.