

**APPROVED**  
**TOWN OF PELHAM**  
**PLANNING BOARD MEETING**  
**December 7, 2015**

The Chairman Peter McNamara called the meeting to order at approximately 7:00pm.

The Secretary Paul Dadak called roll:

PRESENT: Peter McNamara, Roger Montbleau, Paul Dadak, Paddy Culbert, Jason Croteau, Joseph Passamonte, Alternate Tim Doherty, Alternate Mike Sherman, Selectmen Representative William McDevitt, Planning Director Jeff Gowan

ABSENT: Alternate Robert Molloy

**OLD BUSINESS**

**PB Case #2015-00016**

**Map 22 Lot 8-130**

**52 WINDHAM ROAD, LLC - 52 Windham Road - Special Use Permit and Site Plan Review for proposed mixed use development consisting of a 1500SF retail building and 15 townhouse condominium units in the Mixed Use Overlay District**

Mr. David Jordan of MHF Design Consultants and Mr. Brian McGowan the project proponent came forward for discussion.

Mr. McNamara informed that the Board would recess for five to ten minutes to consult with Counsel before proceeding with the hearing. It was not considered to be a 'non-public' session under New Hampshire Law, since the Board would be consulting with Counsel.

The Board recessed, and left the room at approximately 7:09pm. The Board returned and continued the meeting at approximately 7:32pm.

Mr. McNamara stated the Board had received legal advice and at this point the decision was whether to proceed forward on the matter leaving the Administrative Decision in place, or whether that decision will be appealed. He asked the Board what they would like to do.

Mr. Culbert felt the Administrative Decision was correct, and wanted to make a motion to leave it in place.

Mr. Sherman stated he worked for almost a year on the zoning subcommittee, and recalled they struggled with the Table (Page 12 of the Zoning Ordinance, Table 3 – Allowed Uses / Prohibited Uses). He said they worried with acreage and density and included the verbiage because they didn't want to see multiple buildings in the Mixed Use Zoning District ('MUZD'). He felt Mr. Gowan's (Administrative) decision should be set aside.

Mr. McNamara replied he wasn't questioning the subcommittee's intent, and stated 'intent' was not what was relevant. He said the words in the Ordinance were, and those words were interpreted by Mr. Gowan (as Zoning Administrator) and the decision was written. Mr. McNamara believed the Board could leave the Administrative Decision in place and proceed forward with the merits of the application. If they decide to do so, he will ask the applicant to continue the case (at least into January, 2016) so the appeal period on the Administrative Decision would run before the Board took any final action. Alternately, if the Board decided to appeal the Administrative Decision, or ignore such, he said they could move forward with the application.

He warned the Board, if the matter was appealed at this stage it wouldn't go to the Zoning Board of Adjustment, it would go directly to Superior Court (by the applicant). He said at court, there would be an Administrative Decision contrary to what the Board had ruled along with an implicit review by the Board's engineering review firm who never brought the matter up. Also, the matter wasn't brought up during the previous occasions that the applicant had been in front of the Board; they made good faith efforts to comply with the concerns that were raised at the initial meetings, came back and were then presented with the zoning question that would 'knock them out' making their application 'dead in the water' if the Board voted in that manner. He believed it would be a difficult case for a judge.

Mr. Sherman stated the first time the applicant came in front of the Board, most members received information approximately two days prior to the meeting. He bet the majority of members 'breezed' through and thought they would come to the meeting. He pointed out it was the first case under brand new zoning and because of such it should have come in as a preliminary plan so the Board could find the things they disagreed with. He didn't feel all plans should be this way, but believed the first plan on every new Zoning had to come in as preliminary.

Mr. Montbleau agreed with Mr. McNamara's proposal to wait for the appeal period to end. He also felt Mr. Sherman's comments held some merit. Mr. McNamara stated doing so would make the process 'cleaner' and not 'muddy the water' further. Mr. Montbleau added it would also be fair to the applicant.

Mr. Doherty pointed out to the voting members that during the last meeting there was an issue with structures. He referenced the sentence in Table 3 (page 12 listed under Prohibited Uses) reads: *Multiple detached dwelling structures per lot*. He reviewed the wording of the Administrative Decision that read '*I interpret the words dwelling and building to have the same meaning*'. He said if the Board recognized that the decision wasn't technically what was being discussed at the last meeting, they could let it go through the appeal period, but not give it much weight. He said the Board was discussing the word 'structures' at the last meeting, not the comparison of the words 'building' and 'dwelling'. He commented that a building was any structure occupied or intended for supporting or sheltering any occupancy. With that, he believed more definitions would have to be reviewed, such as occupancy is the purpose for which a building, or portion thereof, is utilized or occupied. When looking at the definitions, Mr. Doherty said the 'dwelling' was the occupancy and the 'building' was the structure, which meant they weren't the same. He commented that a building could be a shed, an outhouse, a commercial use or industrial. He reiterated his belief that a dwelling and a building were not the same and had nothing to do with what the Board discussed at the last meeting, which was 'structure'. Mr. Doherty felt the Administrative Decision should be taken for what it says, which had no relevance on what was being discussed. He said the Board should move on with their discussion regarding multiple detached structures per lot. He noted 'building' wasn't in that statement.

For the record, Mr. McNamara went to the Webster International Dictionary to look up the two words. Dwelling is defined as a place of residence or abode, a house. Building is defined as a structure, usually with a roof and four walls, generally intended for use as a working or dwelling place. Mr. Passamonte replied the word 'dwelling' was a usage inside a structure. Mr. Doherty said it was an occupancy. Mr. McNamara stated the Board had an Administrative Decision in front of them and a motion was offered by Mr. Culbert.

For clarification, Mr. Culbert said his motion was to uphold Mr. Gowan's Administrative Decision. For further clarification, Mr. McDevitt understood if the Board voted 'yes' to uphold the Administrative Decision they would consider the application on its merits. If they vote 'no' they would effectively ignore the Administrative Decision and then consider the application on its merits. Mr. McNamara replied that was correct. Mr. McDevitt seconded the motion for further discussion. Mr. Croteau asked if a vote in the affirmative would allow the appeal period for the Administrative Decision to run. Mr. McNamara replied the intent was to let the 30-day appeal period of the Administrative Decision run, but he would allow the applicant to speak. He explained that the abutters or any interested party had a right to appeal an Administrative Decision, which was typically a 30-day window beyond which there could not be an appeal. He believed the

decision was entered on December 2, 2015 and the prudent thing would be to wait for the appeal period to run before the Board took final action.

Mr. Gowan stated he drafted the Administrative Decision weeks ago, he felt (through discussion with Town Counsel) that it made sense to date the official decision later to give the opportunity for conversation and people the opportunity to appeal if they wish to do so.

Mr. Passamonte wanted to know if they voted in favor of the motion they would be saying multiple structures were okay on the lot. Mr. McNamara replied the Planning Board would still have discretion to vote against that down the road if they felt it violated Zoning. He said the Board had authority to interpret the Zoning because it was an innovative land use control the applicant came in as. Mr. Passamonte asked if an affirmative vote would simply allow the appeal period to run. Mr. McNamara replied a vote in the affirmative the Board would move on, wait for the appeal period to run and then consider the application on its merits. Mr. Passamonte understood that a 'no' vote would allow the application to move forward not on its merits. Mr. McNamara answered yes. He said either way at this point, the Board would move on.

**MOTION:** (Culbert/McDevitt) To uphold Mr. Gowan's Administrative Decision.

**VOTE:** (5-2-0) The motion carried. The majority of the Board voted in the affirmative; Mr. Passamonte and Mr. Croteau voted in opposition.

Mr. McNamara told the applicant he felt the better procedure would be to wait until the appeal period had run and then consider the application. He asked if they wanted to add anything.

Mr. Jordan agreed with the approach of letting the appeal period run its course.

Mr. McNamara opened discussion to public input.

Mr. Frank Kirkpatrick, 7 Mossey Lane questioned if an appeal would come from abutters. Mr. McNamara replied if a direct abutter (who received certified notice of the hearing) disagreed with Mr. Gowan's decision, they had thirty days to file an appeal to the Planning Department. The abutter's appeal would go to the Zoning Board of Adjustment for a *de novo* (a new) determination as to whether the Administrative Decision was correct. Mr. McNamara reiterated that would not be a final determination of the application; the Planning Board has the final determination of such. He noted a Planning Board decision can also be appealed.

Procedurally, Mr. Sherman asked if he could make a proposal to the Board, or if it would have to come from a voting member. Mr. McNamara replied he could make a proposal, but they needed to be careful that any proposal from a non-voting member would not influence the voting members. He said once the meeting was closed to the public and brought back to the Board the discussion should only be between voting members. Mr. Sherman asked why the Board couldn't take an 'up or down' vote at the present meeting as to whether or not it met Zoning. He didn't feel the proposal met the spirit and intent of what was written, regardless of Mr. Gowan's determination. Mr. McNamara said that could be done, the problem was the procedure. He believed the best method to deal with it was to first let the appeal period run, after which the Board could make a decision.

Mr. Doherty pointed out after the Board makes a final determination, any appeal would have to go to Superior Court, not the Zoning Board because it was under an innovative land use.

The case was date specified to Thursday, January 21, 2016. This date was acceptable to Mr. Jordan.

**DATE SPECIFIED PLAN(S) –**  
**Thursday, January 21, 2016**

PB Case #2015-00016 - Map 22 Lot 8-130 - 52 WINDHAM ROAD, LLC - 52 Windham Road

**MINUTES REVIEW**

**November 2, 2015**

**MOTION:** (Passamonte/Dadak) To approve the meeting minutes for November 2, 2015 as amended.

**VOTE:** (5-0-2) The motion carried. Mr. Montbleau and Mr. Croteau abstained.

**ADJOURNMENT**

**MOTION:** (Culbert/Croteau) To adjourn the meeting.

**VOTE:** (7-0-0) The motion carried.

The meeting was adjourned at approximately 7:57pm.

Respectfully submitted,  
Charity A. Landry  
Recording Secretary