

6-11-2020. The court will not give an advisory opinion on the zoning issue. Nothing stops plaintiff from physically filing an appeal to the ZBA. If plaintiff does that, and if the ZBA issues a ruling, the issue might then be brought before the court.

ROCKINGHAM, SS
Until such time, the court has no occasion to comment on either the merits of the zoning issue or the timeliness of an appeal of the zoning issue.

Clerk's Notice of Decision
Document Sent to Parties
on 06/11/2020


STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Richard and Sanaz Anthony

v.

Town of Plaistow Planning Board
Case No. 218-2019-CV-00968


Honorable Andrew R. Schulman
June 11, 2020

PARTIAL OBJECTION TO PETITIONERS MOTION FOR RECONSIDERATION

NOW COMES the Town of Plaistow Planning Board, by and through its attorneys,

Wadleigh, Starr & Peters, PLLC and objects to Petitioners Motion for Clarification and

Reconsideration as to the issue of the Zoning Determination, and states as follows:

1. On May 19, 2020, the Court issued a Final Order which remanded the Plaistow Planning Board's site plan approval, specifically conditions numbered 3 and 7, back to the Planning Board for further proceedings.
2. Petitioners have filed a Motion for Clarification and Reconsideration of such Final Order ("Petitioners Reconsideration Motion").
3. The Plaistow Planning Board objects to the Petitioners Reconsideration Motion only to the extent it asserts that the Plaistow Code Enforcement Officer's Zoning Determination that the Applicant's proposed use of the subject property is a permitted use under the Plaistow Zoning Ordinance is an issue on appeal before this Court.
4. The Plaistow Code Enforcement Officer made his written Zoning Determination on February 6, 2019. See Zoning Determination attached hereto.
5. RSA 676:5 provides, in part, "Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person

aggrieved . . . by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The “administrative officer” means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance . . . A “decision of the administrative officer” includes any decision involving construction, interpretation or application of the terms of the ordinance.”

6. The rules of the Plaistow Zoning Board of Adjustment (“Plaistow ZBA”) provide that “Appeals from an administrative decision taken under RSA 676:5 shall be filed within twenty (20) days of the decision.”

7. Although Petitioners had notice of the Zoning Determination, no appeal of it was ever filed with the Plaistow ZBA.

8. The Zoning Determination was a written decision of the Plaistow Code Enforcement Officer clearly within the framework of RSA 676:5 I and any appeal of such decision should have been filed not later than February 26, 2019.

9. Petitioners claim that they are entitled to wait for a third party to instruct them to appeal to the Plaistow ZBA before such an obligation exists. However, this argument ignores RSA 676:5 I and RSA 674:33 I(a) and misconstrues RSA 676:5 III and RSA 677:15 I-a.

10. As noted above, Petitioners were obligated to appeal the Plaistow Code Enforcement Officer’s Zoning Determination to the Plaistow ZBA within twenty (20) days of the date of that written decision. RSA 676:5 I, II; Plaistow ZBA Bylaws.

11. Assuming, without admitting, that the Planning Board rather than the Code Enforcement Officer made the decision that the Applicant’s proposed use of the Subject Property

was permitted by the Zoning Ordinance, Petitioners were required to appeal such Planning Board decision dated June 19, 2019 to the Plaistow ZBA within twenty (20) days of that decision.

12. Petitioners did not and have not appealed the Planning Board decision to the Plaistow ZBA.

13. RSA 677:15 I-a provides, in part, “If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5 III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section.” (Emphasis supplied).

14. “When a party is aggrieved by a planning board decision that interprets both planning regulations and zoning ordinances and wishes to appeal issues involving both, the party is obligated to file separate appeals with the superior court and the zoning board of adjustment.” *Route 12 Books and Video v. Town of Troy*, 149 NH 569, 576 (2003).

15. The New Hampshire Supreme Court has ruled that there is no indication in New Hampshire law that an aggrieved party must wait for final approval of a site plan by a planning board before such party should appeal to the ZBA challenging the planning board's interpretation or application of a zoning ordinance. *See Atwater v. Town of Plainfield*, 160 NH 503 (2010).

16. The Petitioners failed to timely appeal the Zoning Determination made by the Code Enforcement Officer to the Plaistow ZBA and, in the alternative, failed to timely appeal the Zoning Determination, if made by the Planning Board, to the Plaistow ZBA.

17. The Court is correct that the Zoning Determination is not before it as the Petitioners did not pursue their administrative remedies.

WHEREFORE, TOWN OF PLAISTOW PLANNING BOARD, respectfully requests
this Court:

A. Deny Petitioners Motion for Clarification and Reconsideration as to the zoning
issue; and

B. Grant such other relief as may be just and equitable.

Respectfully submitted,

Town of Plaistow Planning Board

By Its Attorneys,
WADLEIGH, STARR & PETERS, PLLC

June 3, 2020

By: /s/ Charles F. Cleary
Charles F. Cleary, Esquire - NH Bar #8145
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140
ccleary@wadleighlaw.com

CERTIFICATION OF SERVICE

I hereby certify that on this date a copy of the foregoing was sent to counsel for the
Petitioners, Scott E. Hogan, Esquire and Intervenor, Derek D. Lick, via the Court's e-file system.

/s/ Charles F. Cleary, Esq.
Charles F. Cleary, Esq.



Town of Plaistow

Office of the Planning Board & Planning Department

Town Hall • 145 Main Street – 2nd Floor • Plaistow, New Hampshire • Tel. 603-382-5200 X202 • Fax. 603-382-7183

ZONING DETERMINATION

Project Address: 143 & 145A PLAISTOW RD

Map-Lot: MAP 30, LOT 72 & 73 District: C1

Applicant(s) Name(s): PROQUIP EQUIPMENT RENTAL

Contact Phone: 207-553-7792 (Lee Allen)

Consultant/Engineer of Record: COLBY COMPANY ENGINEERING – LEE ALLEN

Intent of Plan: NEW SITE PLAN FOR 12, 000SF EQUIPMENT RENTAL AND MAINTENANCE FACILITY; 1,800SF EQUIPMENT WASH BUILDING; 9AC OF EQUIPMENT DISPLAY AND STORAGE; RELATED FUEL STORAGE; DRAINAGE/STORMWATER MANAGEMETN; LANDSCAPING AND LIGHTING.

In your capacity as Zoning Officer, the Planning Board requests your completion of the following information related the above application which has been filed with the Planning Department for Planning Board action.

Is the proposed use(s), as stated on the Plan, permitted use in the District: Yes ☒ No ☐

~~If no, please explain:~~ Equipment rental is a permitted use in the C-1 District

Are there any existing legal non-conforming uses on this property: Yes ☒ No ☐

If yes, please explain: RESIDENCE TO BE REMOVED

Is the existing lot substandard: Yes ☐ No ☒

If yes, please explain: _____

Does the Proposed use(s) require relief from the Zoning Board of Adjustment: Yes ☐ No ☒

Article: _____ Section: _____

Non-Conformity: _____

Article: _____ Section: _____

Non-Conformity: _____

Additional Comments: _____

Signature

2-6-19

Date