

**Nottingham**  
**Zoning Board of Adjustment**  
**June 21, 2016**

**Accepted by the Board:** October 4, 2016

**Members Present:** Mike Russo, Chair; Bonnie Winona-MacKinnon, Vice- Chair; Peter White, Terry Bonser; Teresa Bascom, Kevin Bassett, Alternate

**Others Present:** JoAnna Arendarczyk, Land Use Clerk; Paul Colby, Code Enforcement Officer; Peter Landry, Surveyor- Representative of the applicant, Chris Albert, Resident; Gary Anderson, Resident; Lou Serra, Applicant

**Prior to the start of the meeting Mr. Colby gave the Board a copy of the response from the Town Lawyer to the Planning Board (PB). This response was a confidential letter stating his opinion regarding the case being appealed before the Zoning Board of Adjustment (ZBA) at this meeting.**

**Call to order:** 7:00pm

**Public Hearing Cases**

**Public Hearing Opened:** 7:00pm

**Case 16-006-AA-** Application from Jason White, J & L Terra Holdings, INC. requesting an Appeal to an Administrative Decision made by the Nottingham Planning Board on May 11, 2016. The decision is in regards to an interpretation of the Zoning Ordinance Article II Section C.2.c & Article II C.2 . The property is located on Smoke Street, Nottingham, NH and is identified as Tax Map 10 Lot 4-1.

**Board Member Recusal:** Teresa Bascom recused herself as the case being heard is an appeal to the PB's decision, of which she is a voting member and was present at the time it was heard.

**Alternate Seated and Voting:** Kevin Bassett for Teresa Bascom

Mr. Landry, representing the applicant, provided the Board members: *New Hampshire Municipal Association (I) Court Update Regulation Requiring a Minimum Size for Building Site Serves Legitimate Land Use Purpose Doyle v. Town of Gilmanton No. 2006-797, 7/19/2007.* (In file) an article regarding a case referenced in the lawyer's letter. He then briefed the Board on the history of his case, and stated his defense- referencing the materials in the packets the Board members were provided. (In file)

**Public discussion:** Chris Albert informed the ZBA that his opinion is that the setback change that was voted on was interpreted by the voters just as Mr. Landry interpreted it as. "What the Town Attorney has done is contrary to the spirit of what the voters went to vote for..." Gary Anderson spoke, as a resident and builder, in support of the applicant. He stated that this case is clearly an interpretation issue. What the meaning was, may have been misconstrued and there have been subdivisions followed through with the 50ft dwelling setback with a 20 ft setback for the building envelope.

No one spoke against the case.

Mr. Bonser asked if Mr. Landry had read the "Doyle" case prior to the night the lawyer's decision was presented. Mr. Landry replied that he had not read it prior to that night and it wasn't until he did some research that he determined that the "Doyle" case does not apply to setback situation at hand.

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Mr. Colby stated that the part of the “Doyle” case that does apply is part of “Attorney/ client privilege”. He also put the Smoke St. plan that this appeal case pertains to, up on the screen for the Board to see. He pointed out that under his original interpretation of the Ordinance the plan is accurate. Mr. Landry has the dwelling in the 50ft setback and then the rest in the 20ft setback. One Board member asked Mr. Landry how many cases have gone through the PB with the 20ft setbacks. Mr. Landry said that he can only speak to his cases which he put in his packet for the ZBA- two (2) Subdivision plans totaling five (5) new lots between March 2015 and April 2016. It was then noted that the PB had ample opportunity to put an amendment to the voters this past March, amending the change to clarify the intentions of the setback change.

**Public Hearing Closed: 7:44pm**

A discussion ensued about what the ZBA originally had in mind for the change in the Zoning Ordinance back in 2014 for the 2015 Election. Their change was intended for Accessory Structures not dwellings. This changes was requested based on the excessive amount of cases the ZBA heard, requesting a variance on the setbacks to allow a garage, shed, barn or porch. The Board agreed that a change in the language is necessary.

It was pointed out that accessory buildings, which have the 20’ setbacks, may have septic systems which would be allowed per the approved amendment.

Mr. Russo requested Mr. Colby read the definition of Building Envelope from the *Subdivision Regulations* (“BUILDING ENVELOPE- Shall mean the area of a newly created subdivided lot eligible for the placement of dwelling units. Building envelopes are restricted by operation of local federal and state law and can be further restricted in their location by operation of a subdivision approval to enhance the purposes and further the requirements of these regulations.”) He then read the definition of Lot Envelope from the *Subdivision Regulations* (“LOT ENVELOPE - A two-hundred by two-hundred (200’ x 200’) foot square or a minimum of thirty thousand (30,000’) contiguous square foot upland buildable soil area, depicted on a plat or building permit, which is being designated as a suitable area that can meet all local and State requirements. The thirty thousand (30,000’) contiguous square foot areas shall also be of adequate width and/or depth so as not to create an hourglass effect of less than fifty (50’) feet at the narrowest point. The lot envelope shall not include either areas unfit for building and their appropriate setbacks or building setbacks.”) He then emphasized that a developer has to show to the PB that there are 30,000 square feet of buildable area within the setbacks on that lot. His interpretation has been 20’ as long as the dwelling is within the 50’ setback as Mr. Landry’s plans show.

One Board member stated that the change was proposed to help existing property owners who couldn’t fit accessory structures like sheds, garages, and porches within the 50’ setbacks. The ZBA has never had a septic issue come before the Board.

Mr. Colby replied that the PB has seen the septic issues not the ZBA.

It was stated that it would change the character of subdivisions if we grant this so a thorough public discussion should be had before a wide range of change is made.

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Mr. Russo stated that the proper process was followed in making this change however he felt “it got politically high jacked at the Planning Board when the discussion at the public hearing came up.” He also feels that a septic tank and a leach field is part of the primary structure even though that is not what the state code says.

Mr. Colby agreed with the ZBA’s consensus that the PB needs to make changes to this Ordinance and the PB is already aware of this necessity, however, it cannot be done until March 2017 at the Town Meeting Elections. Until then cases that conflict with this Ordinance must be sent to the ZBA for relief.

The conflicting issue is from the Zoning Ordinance Article II C,1,c: “Each lot must contain a 200’x 200’ square fit for building or a thirty thousand (30,000’) square foot contiguous area lot envelope in which **a house and septic system** shall be placed to meet all existing setbacks ordinances...” Which led the Town Attorney to determine that the more stringent setback must be used as the setback for the house and septic system. The stringent setback comes from the Zoning Ordinance Article II C, 2: “2. There shall be between the property line, water’s edge (“reference line” as described in RSA 483-B:4 XVII), and **any dwelling, a minimum distance of fifty (50’) feet**, twenty (20’) feet for grandfathered non-conforming lots of less than two (2) acres, as of the date of passage (03/08/94), **in all directions.**” Even though that article continues with: “**Setbacks for accessory buildings including septic systems shall be fifty (50’) feet minimum distance from the lot frontage property line (20’) feet for grandfathered non-conforming lots of less than two (2) acres and twenty (20’) feet minimum distance from the side and rear property lines.**”

Mr. Colby added that the zoning change was not sent to an attorney for review prior to the election. This practice prevents errors, like conflicting setback issue, this from occurring.

The majority of the Board agreed that erring on the side of caution and agreeing with the PB is best, not knowing what the intent of the Zoning Ordinance change was and it can be interpreted either way.

The Board members agree that it is confusing that the Planning Board allowed the past cases to be subdivided and built with the 20’ setbacks and then dis-allowed this case.

Mr. Russo added that he feels that by relieving the septic area to the 20’ setback it creates a takings issue, because an abutter would have less room for placement of a well, due to setback requirements for septic systems from wells and that this should be a Supreme Court issue to decide due to the mistakes made in the setbacks.

The Board would be more comfortable leaving the decision of changing the setbacks to the voters rather than making the decision to do so at this meeting.

**Motion made by:** Ms. Winona-MacKinnon to “deny this application and uphold the decision of the Nottingham Planning Board.”

**Seconded by:** Mr. White

**Vote:** 4-1-0 **Motion Passed**

**Case Closed:** 8:08pm

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118 The Board discussed the fact that more changes to the Zoning Ordinance are needed. The Land  
119 Use Clerk agreed to send the ZBA the list of action items that she has so they can add to them  
120 prior to the joint meeting the ZBA and PB plan to have the end of the summer.

121 **Ms. Bascom was reseated**

122 **Sign updated By Laws**

123 **Motion made by:** Mr. Russo to approve the By Laws as amended

124 **Seconded by:** Mrs. Bascom

125 **Discussion:** Mr. Basset asked for a moment to review before voting. He was then informed that  
126 they are the same as every year with the one edit of stating that “A Clerk *may* be elected” instead  
127 of “A Clerk *shall* be elected”.

128 **Vote:** 6-0-0 **Motion Passed**

129 **Minutes**

130 April 19, 2016

131 **Motion made by:** Mr. Russo to approve the minutes of April 19<sup>th</sup> as written.

132 **Seconded by:** Mr. Bonser

133 **Vote:** 5-0-1- **Motion Passed**

134 **Adjournment**

135 **Motion made by:** Mrs. Bascom to adjourn

136 **Seconded by:** Mr. Russo

137 **Vote:** 6-0-0 **Motion Passed**

138 **Adjourn at:** 8:22 pm

139 For the Nottingham Zoning Board of Adjustment

140 JoAnna Arendarczyk; Land Use Clerk