

**LINCOLN ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
THURSDAY – DECEMBER 8, 2016 – 6:00PM
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

APPROVED

Present: Chairman Jonathan Ham, Jack Daly, Board of Selectman Representative Jayne Ludwig, Paul J. Beaudin II, Don Landry.

Members Excused: Ray D’Amante, Jim Martin

Members Absent:

Staff Present: Fire Chief Ron Beard, Planning and Zoning Administrator Carole Bont, and Wendy Tanner (Recording Secretary)

Staff Excused: Town Manager/Planner Burbank

Town Attorney: Peter J. Malia

Guests:

- **Shawn Bergeron, Owner/Manager/Code Consultant/Home Inspector, of Bergeron Technical Services**, 50 Seavey Street, PO Box 241, North Conway, NH 03860-0241, representing Herbert Lahout Shopping Center, Inc. (Herbert Lahout, Principal) located on 165 Main Street (Map 118, Lot 076)

-
- I. CALL TO ORDER** by the Chairman of Zoning Board of Adjustment; announcement of excused absences, if any, and seating of alternates(s), if necessary.

Chair Ham called the meeting to order at 6:00 PM.

Ray D’Amante and Jim Martin were excused.

Jack Daly is seated.

- II. CONSIDERATION** of meeting minutes from:

1. November 30, 2016

Motion to approve the minutes of November 30, 2016 as amended.

Motion: Paul Beaudin Second: Jack Daly All in favor: 4-0

Don Landry abstained from the vote.

- III. CONTINUING AND OTHER BUSINESS** (Staff and Planning Board Member/Alternates).

- A. 6:00 PM.** Lincoln Zoning Board of Adjustment (ZBA) **Administrative Appeal** per RSA 676:5,ii(b)

1. **Case #:** **2016 ZBA AA 2016-02**
2. **Location:** Lahout’s Square
165 Main Street (Tax Map 118, Lot 076)
Village Center (VC) District
3. **Applicant/
Property Owner:** Herbert Lahout d/b/a Herbert Lahout Shopping Center, Inc.
26 Union Street
Littleton, NH 03561

4. Applicant's Agent: Shawn Bergeron
Shawn Bergeron Technical Services, LLC
50 Seavey Street, PO Box 241
North Conway, NH 03860-0241

Petitioner is appealing a decision of the Planning and Zoning Administrator made on March 1, 2016, (then reiterated in a letter from the Town Attorney Peter Malia to the Town Planner dated August 17, 2016, and forwarded to the petitioner) to the ZBA. Petitioner requests ZBA grant an administrative appeal was scheduled to be presented to the ZBA on **Wednesday, October 19, 2016 at 6:00 PM** in the Conference Room of the Lincoln Town Hall on 148 Main Street, Lincoln, NH 03251. Applicant requested and was granted a continuance until WEDNESDAY, November 30, 2016. A public hearing commenced on Wednesday, November 30, 2016, and **continued to Thursday, December 8, 2016.**

The petition was filed in connection with a request by Aubuchon Hardware Store, a tenant of Herbert Lahout Shopping Center Inc., to put in a propane refilling station behind Aubuchon Hardware Store located in the "Lahout's Square" shopping center located at 165 Main Street (Tax Map 118, Lot 076).

Petitioner proposes putting in a propane filling station where is currently is none in a shopping center where there are retail shops and restaurants. The Administrator stated that the Petitioner would need Site Plan Approval for a "change or expansion of use" as defined in Article IV, Paragraph A, subparagraph (d) of the Site Plan Review Regulations. Furthermore, the Administrator stated that the Petitioner would need a Special Exception from the ZBA to put a "Gasoline/Fuel Oil Sale & Storage" in the Village Center (VC) District as required under Article VI, Section B., Paragraph 2, Land Use Schedule, and Business Uses.

Petitioner argues that the Administrator has "mistakenly determined that a propane filling station (PFS) is within the gasoline/fuel oil sale and storage land use category when in fact the PFS is consumer service and retail sale of a product" and therefore no Site Plan Review is required and a PFS is allowed as a matter of right within the Village Center (VC) District.

ACTION: Upon a finding by the ZBA that the application meets the submission requirements, the ZBA may vote to accept the application for an Administrative Appeal as administratively complete.

ACTION: The ZBA may conduct a public hearing, or schedule a public hearing at some future date established during this meeting.

ACTION: The Zoning Board will vote to approve, approve with conditions or disapprove the application. Should a decision not be reached at the public hearing, this application will stay on the ZBA agenda until such time as it is either approved or disapproved.

Motion to delay the reading of the remainder of the agenda.

Motion: Jack Daly **Second:** Jayne Ludwig **All in favor: 4-0**

Summary by Town Attorney Malia:

Town Attorney Malia summarized the status of the case to date.

1. Town Attorney Malia said that the ZBA is to decide if the Petitioner's application was filed in a timely manner.
 - a. If the ZBA finds that the application was timely filed, then the Board will move on to decide the application on its merits. If the case continues forward, the ZBA will decide to either affirm or reverse the administrative decision that the applicant has to go through Site Plan Review.
 - b. If the ZBA decides that the application was not timely filed, the Zoning Board of Appeals (ZBA) Rules of Procedure allow the Board to waive the thirty (30) day filing period for "good cause" shown.
 - i. If the ZBA finds that the appeal was not timely filed, someone on the ZBA needs to make a motion to waive that thirty (30) day time period for "good cause".
 - ii. If the motion to waive the thirty (30) day period for "good cause" is seconded, the ZBA could have a discussion as to whether or not there was "good cause" and vote on it.

To bring Don Landry up to speed, Attorney Malia said that it was found at the last meeting that there were three possible dates that would have begun the 30 day appeal period.

- A. March 1, 2016 – Carole Bont's email to Shawn Bergeron, inadvertently marked "draft, draft, draft" stating that the applicant would have to come before Site Plan Review. If this email is determined to be the decision, the application should have been filed by April 1, 2016.
- B. August 16, 2016 – letter from Attorney Malia to Town Manager Burbank and emailed to Attorney Parnell on August 17, 2016. This letter affirms Bont's March 1, 2016 decision.
- C. August 29, 2016 – email from Town Manager Burbank to Attorney Parnell stating that Attorney Malia's letter dated August 16, 2016 is the town's decision and nothing further would be sent.

Attorney Malia said that at the last ZBA meeting:

1. There was a motion made to use the August 16, 2016 date as the trigger date for the start of the 30 day appeal period. That vote resulted in a 2 to 2 tie.
2. Then there was a motion to use the March 1, 2016 date and that also resulted in a 2 to 2 tie.
3. Then a motion to use the August 29, 2016 date which was also a 2 to 2 tie.

Attorney Malia said that the Board should try again and a Board member should make a motion to use one of those three dates to get a majority to decide on which date should be used as the trigger date for the administrative decision.

1. If the date is March 1 or August 16, then the Board would have to move on to whether there was "good cause" to waive the thirty (30) days.

2. If it was August 29, then the application would have been timely filed and the Board could move on to hearing the merits.

Bergeron said that one thing is that his record shows that as of last week we dealt with 4 triggering dates. The first one was March 1 and the board voted no, it was not a tie. Bont concurred saying that the actual vote was zero (0) for and three (3) against.

Bont read the November, 30 minutes on page 17 to recall how the votes and motions were made.

Motion that Attorney Malia's August 17, 2016 letter is the date that the administrative decision was made.

Motion: Paul Beaudin

Second: Jack Daly

Don Landry asked Paul Beaudin why he chose the date of August 17, 2016.

Paul Beaudin said that was the date that Attorney Malia notified the applicant's attorney, so the applicant should have known.

There was some question about Attorney Malia's letter and the exact date of the letter. The letter was emailed by Attorney Malia's administrator Tracy Boyd, to Attorney Parnell on August 17, 2016, so that was the date used by the Board.

Bergeron asked the Chairman if as each letter is addressed by the Board and before they are voted on, if he could have the opportunity to comment if necessary.

Chair Ham said, "Yes, you may".

Paul Beaudin continued with his response to Don Landry saying that if you read Attorney Malia's letter, it talks about numerous documents and the letter from Attorney Parnell. It agrees with Bont's March 1 email, and gives a more official indication of a need for Site Plan Review. The March 1st email from Bont to Bergeron did not make a whole lot of difference, but the August 17th letter lends credence to the case as the Town Attorney is the person who sent a letter to the applicant.

There was a brief interlude as Bont showed copies to and explained the emails and letters that were being discussed to Landry.

Attorney Malia read a passage from a Law Lecture Series training booklet prepared by New Hampshire Local Government Center 2010 Law Lecture, entitled "Administrative Decisions in Planning and Zoning: How They're Made, How They're Appealed" on page 12:

Generally, the time for an appeal from the administrative officer's decision begins to run ***when the appealing party knows or should have known*** about the decision... Some factors relevant to determining the reasonableness of a period of time include the knowledge of the parties, their conduct, their interests, the possibility of prejudice to any party, and any reason for the delay in appealing... Although the party relying on an administrative officer's action is entitled to know when the order becomes final, the parties objecting to the officer's action should be given sufficient time to file an appeal to protect their interests.

Attorney Malia stated that the key part boils down to is "when the appealing party knows or should have known".

Paul Beaudin said that another reason he believes that August 17th is the date is because what Town Attorney Malia is really doing is reaffirming Planning and Zoning Administrator Bont's decision of March 1st. However, from August 17th when Attorney Malia's letter was sent to Attorney Parnell, it took until August 26th for the applicant and his tenant to question that letter. When the applicant is looking at a period of thirty (30) days to appeal an administrative decision, and you know that an attorney has written a letter stating that he agrees with the findings of Planning and Zoning Administrator Bont, you would think that, in the interest of timing and the interest of preserving the appeal, you would not wait nine (9) days to get that done. An appeal process is something that you do not wait on. If you received a letter and thought there was anything wrong, you should not wait, but the applicant chose to wait nine (9) days until they questioned the letter. Beaudin said he believed that the urgency of the appeal was not taken on as an urgent matter on behalf of the client.

Bergeron, on behalf of the petitioner said that if the ZBA members look back through the history of this application, this application process started almost a year ago in January of 2016. It was a long process that was worked through for many, many months. Bergeron said he did not receive Town Attorney Malia's letter because it was sent to Attorney Parnell. If you asked Bergeron why the nine (9) days transpired, he could not say why because he was not aware of the letter.

Bergeron said, "Attorney Parnell expected unreasonable expectations". Bergeron said that Attorney Parnell looked at this August 17th letter as the Town Attorney's recommendation to Town staff. In turn, Bergeron expected to receive a final decision from Town staff. When nothing was received, it was at that time that Attorney Parnell questioned the letter to ask if Attorney Malia's letter of August 17th was the final decision. An indeed, Town Manager Burbank's response was that Attorney Malia's letter of August 17 is the official response to Aubuchon Hardware's request. That is the only correspondence received by the Applicant from a town official that actually said "this is the official response". The letter from Town Attorney Malia supports Planning and Zoning Administrator Bont's thought process as of March 1st, but does not say anything on it that it was an "official response".

Beaudin asked, if Bergeron did not think some kind of determination had been made, why did Bergeron say that both Town Manager Burbank and Administrator Bont were "involved in reviewing and deciding" the case in his March 8th to Planning and Zoning Administrator's letter. Beaudin pointed out that Bergeron also responded to Bont, apologizing about missing the fifteen foot (15') setback and would change the location so that it would be in line with the regulations. Beaudin also asked Bergeron why he told Bont that he had changed the location of the tank; the tank had been rotated to accommodate the minimum setback. Beaudin asked Bergeron if he did not think that he had received a formal letter from Bont on March 1st why did he go ahead and restructure the movement of the tank after receiving Bont's letter.

Beaudin asked Bergeron when Bergeron filed the Application for an Administrative Appeal, Bergeron listed three dates:

1. March 1st
2. August 17th
3. August 29th.

Beaudin said to Bergeron that it seems like Bergeron knew that a decision of some sort had been made because Bergeron said that "they reviewed and decided" and then he took action on Bont's

March 1st email to Bergeron by making a change and relocating the tank on the plan. Beaudin said, “So it kind of looks like you knew. And then when you filed for the administrative appeal, on the application you included the March 1 and [August 17] dates. Those are made up.”

Bergeron said:

This process has been going on now for almost a year. And it is not at all uncommon when you are dealing with a municipality or a state agency that you have an ongoing “back and forth” as the project moves along, in an effort to reach an agreement where there is no longer something that has to be appealed. It wasn’t until we got through an extended period of time when finally we said, “OK, we clearly have impasse here, the decisions have been made, they are done, we are now notified that the decision is official and complete.” That is when the appeal begins.

Many times Bergeron has projects that will go on for months going back and forth with the Town Planner or Building Official and after seven (7) months we reach a conclusion that is good. Permits are issued. There is no need for an appeal. If Bergeron filed an appeal every time his office and a municipal official did not hit it off swimmingly the first time they talked about a project, all they would do is appeal projects. It is a process. It began in January and terminated at the end of August. At that point in time we said, “OK, now is the time for an appeal.”

Paul Beaudin asked if Bergeron was aware of the 1998 decisions and applications for the Lincoln Planning Board where Aubuchon requested to have a waiver from Site Plan Review.

Bergeron said that he was not aware of it and read it for the first time this evening. Bergeron read part of the last paragraph of the Planning Board minutes for March 5, 1998, at 7:23 PM as follows:

Bob inquired if the Planning Board is receptive to having the proposal come before the Board as a waiver request with appropriate plan details and abutters notified. The board responded in the affirmative....

Bergeron said that at that point in time the reason why Aubuchon did not proceed was unknown. Bergeron said the Planning Board did not make a formal decision; the Planning Board made a recommendation. The Planning Board said if Aubuchon submitted a request for a waiver the Board might consider it. At that point in time Aubuchon had an opportunity to submit a request for a waiver to proceed or not proceed with the project. Bergeron said he was not aware of the reason why Aubuchon stopped the process in 1998.

Beaudin said that the Planning Board did not take an official vote which leads Beaudin to believe that “the issue was still up in the air”. Bergeron said, the issue was still up in the air and then brought forward again in 2016.

Paul Beaudin asked Bergeron if he was aware that Aubuchon had come before the Planning Board prior to now.

Bergeron said he thought that the only player that would have been involved in 2016 that would have been involved back in 1998 would have been Mr. Moran – the owner of Aubuchon who was at the ZBA hearing last week.

Bont said that she did not think Mr. Morgan was President of Aubuchon at that time. Bont said she thought she read that Mr. Moran became President in 2004.

Bergeron said he did not know what transpired twenty-four (24) years ago in 1998 rather than now in 2016. Paul Beaudin admitted that 1998 was a long time ago.

Bont said that the Planning Board did not just recommend that Aubuchon obtain a waiver of Site Plan Review. The Planning Board said that Aubuchon would need to obtain either Site Plan Review approval or a waiver. Bont read the minutes of March 11, 1998 on page 6:

Bob stated that the applicant needs to obtain *either* a site plan approval by the Planning Board *or* a waiver from site plan review from the Planning board before applying for a building permit to construct the propane filling station. Bob stated that the information submitted to date is lacking in detail in terms of providing sufficient information for the Planning Board to make an informed decision regarding the proposal.

Bergeron said that everything Bont read is accurate, but at the time of that presentation at a meeting between the Lincoln Planning Board and representatives of Aubuchon, there was no formal application pending. It was a “meet and greet” and a general conversation asking how to proceed.

Bont said she thought the meeting was a “Conceptual”.

Town Attorney Malia said that the 1998 material was not relevant to the decision that is before the ZBA. It might be relevant later on if the ZBA gets to the merits of this case. Attorney Malia said that his review of that material from 1998 was that there was no final decision made by the Planning Board.

Town Attorney Malia said the minutes say the applicant had to go to the Planning Board for Site Plan Review approval, but there was no “Notice of Decision”. The meeting was “Conceptual” so it would not be controlling. It might be controlling, if there was an application and a final decision made. Now the ZBA is faced with the very same application. ZBAs do not usually have to consider the same application more than once unless substantial changes have been made. Attorney Malia did not think the ZBA had a Planning Board decision from 1998 that the ZBA could rely on.

Town Attorney Malia said that as far as Bergeron’s point that there was a lot of “back and forth”, Attorney Malia does not dispute that, he knows there was. It is often the case in these situations. The statute does define “Decision of Administrative Officer” as “any decision involving construction, interpretation or application of the terms of the ordinance”.

Town Attorney Malia said that as an applicant is going back and forth with a municipal official, there are several points during that exchange when the applicant receives something from that municipal official which involves the interpretation of the ordinance that could qualify as a “Decision of the Administrative Officer” which could be appealed to the ZBA. The ZBA would have to decide if the Applicant who is the property owner or his agent are going back and forth with a municipal official, do they feel pretty good about their likelihood of success if they continue to negotiate with this municipal official or should they stop here and get that appeal file because they do not want to miss the thirty (30) day deadline. Sometimes that is a tough call to make.

Motion that Attorney Malia’s August 17, 2016 letter is the date that the administrative decision was made.

Motion: Paul Beaudin Second: Jack Daly

Two for (Ludwig and Beaudin). Three (Landry, Daly and Ham) against.

Motion that Town Manager Burbank’s email of August 29, 2016 is the date that the administrative decision was made.

Motion: Jack Daly Second: Don Landry

Three (Landry, Daly and Ham) for. Two (Ludwig and Beaudin) against

Town Attorney Malia said the ZBA determined that the application was timely filed and can now move onto the merits.

1. Under RSA 674:33 the Board can affirm, reverse or modify the administrative decision.
 - a. The ZBA could reread Attorney Malia’s letter that says Aubuchon has to go to the Planning Board for Site Plan Review approval.
 - b. At this point the ZBA could open it up to the Applicant to present an argument as to why should the administrative decision be reversed. Aubuchon is asking the ZBA to reverse the decision that Planning and Zoning Administrator Bont and Town Attorney Malia made.
 - i. Because Town Attorney Malia made the decision, he cannot give the ZBA unbiased advice because he is now here as Bont’s lawyer. If the ZBA is comfortable appealing this administrative decision without legal advice, the ZBA may continue.
 - ii. If the ZBA feels like they need legal advice then Town Manager Burbank can set the ZBA up with another municipal attorney. Attorney Malia just wanted to be clear that playing a role in making the decision; he cannot offer unbiased advice on how the ZBA should rule on the decision.
- “Only [Commissioner of the National Football League (NFL)] Roger Goodell can do that. He can make decisions [on “Deflate-gate”] and then he can hear the appeals on his own decision.”

Town Attorney Malia said that the ZBA can proceed. Then if they are feeling uncomfortable, the ZBA does not need to make that decision now. Aubuchon [or their landlord Herbert Lahout d/b/a Herbert Lahout Shopping Plaza, LLC,] can present the case as to why they should not have to go to the Planning Board for Site Plan Review approval. Members of the ZBA can ask Bergeron questions and proceed as they normally would.

Bergeron said that he would ask the ZBA to consider that they are appealing the decision that basically says that a propane filling station is within the “gasoline, fuel and storage” land use category. Aubuchon’s conclusion is that they do not agree with that. Bergeron directed the ZBA to look at page 4 of the Town’s Site Plan Review Ordinance at the definition of “Change or Expansion of Use”; that was the basis on which Planning and Zoning Administrator Bont

reached her conclusion. Bergeron said to the members of the ZBA, “If you look at the requirements, there are several different triggering mechanisms.”

Bergeron said that “Change or Expansion of Use” was the reasoning used by Bont saying, that Aubuchon had to go for Site Plan Review approval. If you look at the triggering mechanism, of which there are several, for “Change or Expansion of Use”, the one that is specifically being applied to the matter at hand is:

(d) A change of use from one category of permitted or special exception use, as listed in the land use schedule of Article VI of the Lincoln Land use Plan Ordinance, to another such category of listed use, regardless of whether the change involves construction; or

(e) Any material change to a previously-approved site plan, or series of changes over a 3-year period resulting cumulatively in a material change, as determined by the Planning Board Chair and Town Planner.

Bergeron asked members of the ZBA to look at the Land Use Schedule on (page 27 – 29) of the Land Use Plan Ordinance, under “Business Uses”. Bergeron said that Planning and Zoning Administrator Bont suggested that the propane filling station would be considered under the category for “Gasoline/Fuel Oil Sale & Storage”. In the Village Center (VC) District “Gasoline/Fuel Oil Sale & Storage” is only allowed by Special Exception. In Bergeron’s opinion, a propane filling station is not gasoline or fuel oil sale and or storage; “it is very, very different”. “We all know what a gas station is. We all know what fuel oil storage facility is. And it is neither of those.”

Bergeron said:

- He believes there are some distinct differences between the materials. Bergeron said that between propane, gasoline and fuel oil, there are significant differences that make up the rationale that leads to these ordinances being developed in this way.
- He believes that the ZBA should primarily consider that gasoline and fuel oils are a liquid whereas propane is a gas.
 - (1) When municipalities develop ordinances, the reason that they often separate out oil and gas facilities, is because oil and gas facilities are regulated by the New Hampshire Department of Environmental Services (NHDES) for their potential to cause groundwater contamination. Propane is not regulated by NH DES. You can put a propane tank in the ground anywhere without contacting NH DES because “propane does not contaminate the water source”. Bergeron believes that distinction is often the basis for establishing a separate category distinction in municipal ordinances.
 - (2) Aubuchon already sells retail propane. Aubuchon sells the small propane canisters that are used for propane torches, lights and camp stoves. These large propane tanks are about twenty (20) pounds and hold about four (4) pounds of propane. Aubuchon has been selling that size propane tank for nine (9) years. The only difference will be, you can bring your empty tank to Aubuchon and get it filled. “Filling a propane tank at Aubuchon is a ‘retail sale’ and a ‘consumer

service’ and in no way can you say that is the sale of gasoline because it is a completely different product.”

Landry asked Bergeron about the situation at these different stores with propane filling stations (PFS)?

1. “Have you seen pictures of where the propane filling stations are located and where the [property] boundaries are?” Landry said that he is concerned, in part, because of the tightness of the area proposed for the propane filling station (PFS) in the back of the Herbert Lahout Shopping Center building – one of the same reasons the Fire Chief is concerned.
2. Landry explained that he has a restaurant [Texas Toast] in Town and uses propane tanks on a grill. Landry said that this time of year he would like to have the ability to refill his propane tanks in town. Now Landry has to travel all the way to Agway in Plymouth to have his propane tanks filled during the winter months. Landry commented that the Agway propane filling station (PFS) tank in Plymouth is located a good distance from the building.
3. Landry said that a couple times he has been down at Agway in Plymouth to refill a bunch of propane tanks for a building he does not heat, so they could put a floor down. Landry’s concerns are not so much about the little propane tanks. He is concerned about people who bring much larger tanks to the propane filling stations in the back of their vehicles. Landry believes that people are now heating their homes with the larger propane tanks. Landry said that one cold day there were four (4) vehicles in line with large tanks, waiting for a turn on the propane filling station (PFS) tank. Landry asked Bergeron, “Was [that size or] type of refill thought of or considered by Aubuchon?”
4. Landry said that parking at the Herbert Lahout Shopping Center where Aubuchon is located is tight. Landry said that based on what he has seen, most businesses with large propane tanks for refilling smaller tanks are laid out with much more space and the tanks are located further away from the buildings than would be possible at Aubuchon’s location in Lincoln. He has considered “just the idea of how those places are laid out, and the tank at Agway”. Landry asked Bergeron if Agway had to abide by a certain code or set of regulations to put in or operate a propane filling station (PFS) or if there is a specific distance the tank needs to be from the buildings?

ZBA members asked Town Attorney Malia how much they can discuss.

Attorney Malia said:

- 1 Members of the ZBA can discuss anything they want.
- 2 The issue here is whether or not a propane filling station (PFS) is a “gasoline/fuel oil sales and storage or retail consumer service or other business non-industrial”.
 - a. If you find that it is “retail consumer service or other business non-industrial”, the Aubuchon could put in the propane filling tank (PFS) without any further review.
 - b. But if it is “gasoline/fuel oil sales and storage”, then Aubuchon will have to go through the Site Plan Review Plan. It is at the Planning Board level that they get into the details of the lot and whether or not it is appropriate.

Bont said that if the ZBA determines that the Propane Filling Station (PFS) is just a “retail operation”, then the propane refilling customers should be parking in the same spots as other customers of the shopping mall are and going into the same retail doors to get their propane tanks filled as opposed to driving up in a vehicle and waiting in line to fill a tank in the vehicle (not the vehicle itself) like filling a gas can at a gas station. Bont said she thinks that would be a “material change” to the previously approved Site Plan for the shopping center itself. A “material change” is addressed in subparagraph (e) in the definition of “change of use” in the Site Plan Review Regulations.

Bont said that if the ZBA decides to allow a propane filling station at the Aubuchon site, they need to envision customers driving up in cars and campers lined up like in a parade on a busy day, behind the shopping center building, in close proximity to the densely packed group of residences that are located behind the shopping mall. Bont said that even if Bergeron was to argue successfully that a propane filling station (PFS) is fundamentally not the same as a gas station, which Bont thinks it is, installing a propane filling station is going to fundamentally change how the business itself operates. Instead of customer traffic being concentrated in front of the building between the front parking spaces and the front door of the building, Aubuchon is going to have customers and someone from the Aubuchon regularly going out behind the building to do business. Bont asked if all of those customers were going to be doing self-service or would a trained operator from Aubuchon’s come out of the store and go back there and provide that service to the customers.

Bergeron said that with all due respect, his application is specifically appealing the reason that was given that we had to go to Site Plan Review. Everything that Mr. Landry asked for, he fully knows that he and his client are going to have to address. Bergeron said that he thinks it is important that everyone have a level of comfort with “what we are getting into”.

Bergeron handed out maps or charts to the ZBA members.

Bergeron said that he was responding to Mr. Beaudin’s comments.

Bergeron said:

When he goes through the planning process with a municipality to develop a project it often takes months and there is a lot of back and forth. On the map Bergeron handed out of the Herbert Lahout Shopping Center called “Lahout’s Square” he explained what was located where. Bergeron explained that when Aubuchon originally asked Bergeron to look at putting in a tank, Bergeron was looking to put the propane filling station (PFS) in front of the building. After exploring a few different locations in front of the building, now he has moved the proposed propane filling station (PFS) to the rear of the building. When the propane filling station (PFS) was originally presented to Bont, the tank was rotated 90° and Bont pointed out that the structure would be in the rear setback. By rotating the tank 90° Bergeron was able to take the structure out of the rear setback.

Bergeron said that although the propane filling station has to meet the zoning requirements, he felt that more importantly safety needs to be addressed. That is where the State Fire Code falls into place. Bergeron said that he could not do a propane station in any municipality in New Hampshire unless every single requirement of the State Fire Marshall is met. Bergeron said that he and Fire Chief Beard “are still working on that”. Bergeron believes that his plans do meet all the requirements of the State Fire Code.

Bergeron said he offered to Fire Chief Beard that “once I am through the land use process” he and Fire Chief Beard can “work out the details”. Bergeron said he has already sent this plan to the State Fire Marshalls office. Bergeron said that the State Fire Marshal’s Office has already reviewed his plan. Bergeron said that once the State Fire Marshal’s Office knows that Bergeron has the Town’s “Land Use approval” Fire Chief Beard can work with “them” if there are any issues to resolve. Bergeron said that those State Fire Code and Life Safety issues “are completely separate and distinct” from what Bergeron is here for tonight. Bergeron needs permission from the ZBA to do a filling station before Fire Chief Beard and Bergeron “can work out any intricacies that are left”.

Paul Beaudin said that he disagreed with Bergeron about the nature of propane. Beaudin said that propane is a liquid. Propane is pumped as a liquid and pumped off as a vapor.

Bergeron said:

- Propane at any temperature below -44°F below zero is “boiling”.
- Propane is transferred under pressure.
- If you see a tank of propane going down the road it is both a liquid and a gas.

Paul Beaudin said that they pump propane as a liquid and propane is pumped off retail as a gas; there is still liquid in the propane, so it is a liquid.

Paul Beaudin said there were three things he wanted to address.

First, Beaudin said he would like to call Bergeron’s attention to the same question that Mr. Romprey brought up back in 1998, “Is this tank going to be under ground or above ground?” Bergeron said that the tank will be above ground. Paul Beaudin said that in a letter attached to the 1998 minutes Mr. Romprey said that the original Planning Board approval for this shopping plaza required that all gas tanks be placed underground. This would have to be researched before the ZBA could take a look at this.

Bont asked a related corollary question, where is the proposed propane filling tank going to be in relation to the four (4) underground tanks that are presently buried in the ground on site behind the shopping mall building.

Second, Paul Beaudin said that he would like to bring to everyone’s attention is that Article III Section B of the Land Use Plan Ordinance (LUPO) states:

<p style="text-align: center;">ARTICLE III APPLICABILITY AND NON-CONFORMING USES</p> <p>Section B. <u>APPLICABILITY.</u> A lawful non-conforming use may be continued and such use is not affected by the provisions of Article V and Article VI. Except as expressly provided in this Ordinance, no building, structure, or land shall hereafter be used, constructed, or altered unless in conformity with the applicable provisions of this Ordinance.</p>
--

Paul Beaudin continued by saying that the current owner of that property is non-compliant with regards to parking. There are serious parking inadequacies associated with the property. There are some questions here that need to be answered by someone who can do that (like the Planning Board), but that is not him. Beaudin said that he has the questions, but he does not have the answers.

Third, Paul Beaudin stated that the Planning Board hearing and the Romprey letter that addressed the question of a propane filling station (PFS) for Aubuchon was in 1998. The Romprey letter indicated that all of the tanks at the shopping plaza were supposed to be buried. Beaudin stated that propane is a liquid. Beaudin said he personally has dealt with propane a lot. Propane is pumped off as gas but exists as a liquid. When you open the valve up, you don't just get gas, you get liquid.

Bergeron said that he has trouble with all of these questions. He is answering questions out of respect for the Board.

Paul Beaudin said that his questions are trying to address the issue about whether or not the ZBA should even be hearing this.

Bergeron said that his point is that he is here specifically because he was told that the a propane filling station (PFS) is a gasoline sale oil storage facility. Bergeron's point is that a propane filling station (PFS) is not a gasoline sale oil storage facility. Bergeron says he thinks that everything discussed here indicates that.

Bergeron said he brought this plan up out of respect for the members of the ZBA and just to speak to this issue. He said he did not want to get into the merits of code requirements and so on. Bergeron said, "For the record, I would like to say that we 100% meet every single NFPA and State of New Hampshire Fire Code requirement. And we are going to continue to address that with Chief Beard because that is the applicable forum to address those items. If we start getting into those now, we are getting away from the merits in the case and that is inappropriate in my opinion, Mr. Chairman."

Jayne Ludwig said that she would like to get back to what Bergeron was talking about is the merits of this case. Ludwig did not see anything listed in the ordinance about propane. Ludwig said she was not sure if propane was a liquid or a gas. Ludwig asked Bergeron if propane was explosive.

Bergeron said that "Any gas, oil or propane – they are all explosive. Under the right condition they will all burn and they will all explode."

Jayne Ludwig said that in her opinion, whoever wrote the Land Use Plan Ordinance, intended that a propane filling station (PFS) would fit in that category of "gasoline/fuel oil sale & storage" if propane is an explosive gas. Bergeron said that based on his experience, the difference between these products and the reason the municipalities are concerned about any of these products is that "you have to give consideration to fire and explosion, gasoline, oil, kerosene or propane. The greater concern with oil and gasoline and the reason you separate them out is because oil, kerosene and gasoline will contaminate ground water. Propane should not contaminate ground water. That is why we separate them out from propane."

Jayne Ludwig asked if there is an ordinance that specifically states "propane", which Planning and Zoning Administrator Bont did not acknowledge. Bergeron said that "There is not, but what usually happens is propane is considered a retail product and if we meet the State Fire Codes we are all done."

Jack Daly asked about a letter Fire Chief Beard sent to Bergeron on March 30th which Bergeron responded to on July 29th. Fire Chief Beard and Bergeron had a major disagreement on one of the points. Item number 4 about NFPA 58 indicates that Chief Beard said that a fire safety

analysis review has to be completed; Bergeron said that it did not. Daly asked if that issue has been resolved.

Bergeron said no, but the other part of that is...

Jack Daly said that Bergeron cited 2008 NFPA language and Chief Beard cited an updated version of NFPA 58.

Bergeron said that he thought Daly was right. Bergeron said, "With respect for Chief Beard, the State Fire Code, presently is the Uniform Fire Code 2009 edition." Now the State of New Hampshire, through the Department of Safety has adopted the 2008 edition of the National Fuel Gas Code. Bergeron said that you can get a copy of the Uniform Fire Code and then go to NFPA and purchase a 2016 version of the Uniform Fire Code, but the 2016 version of the Uniform Fire Code is not applicable in the State of New Hampshire. You have to use the edition that is adopted by the State of New Hampshire. We go through this often where inadvertently fire departments grab the latest and greatest version and it has no value because it has not been adopted by the State of New Hampshire yet.

Daly said that the issue was the word "both" in there. Bergeron said that there was no such terminology used in the 2008 edition, yet it seems that Fire Chief Beard and Bergeron both disagreed. Fire Chief Beard indicated that there was a minimum of four thousand (4,000) gallons of propane stored on the property already and Bergeron said there was none.

Bergeron said that he wouldn't disagree with that. There are four (4) one thousand (1,000) gallon tanks buried underground on that site right now, deeper into the site than where we are proposing to put this propane filling station. This propane filling station (PFS) will add a five hundred (500) gallon tank. There is nothing within the NH State Fire Code or NFPA standard to prevent that from occurring. Bergeron said when we get through land use permitting and then Fire Chief Beard says "I would like that fire safety analysis to be done", if Fire Chief Beard requests that, it is Bergeron's responsibility to do so.

Daly asked if that quantity triggered the Fire Safety analysis requirement. Bergeron said that that quantity provides Chief Beard with the opportunity to make that request. Bergeron said, "Frankly we would be powerless to not do that if Chief Beard wants us to do it." Bergeron said he had pointed out to Fire Chief Beard that in his experience, often when he does a fire safety analysis, "it comes back in our favor". "We can find other ways to fire safe things that make it perform better than the required NFPA standard."

Attorney Malia said that the "Administrative Decision" is that:

1. Aubuchon [the landlord/applicant] needs to go to the Planning Board for Site Plan Review; and
2. They need special exception from the ZBA.

In Town Attorney Malia's opinion, the ZBA could affirm that Administrative Decision and should affirm that administrative decision tonight. Attorney Malia does not think the ZBA needs to continue to a different night. Attorney Malia does not think the ZBA needs to request a legal opinion, although they certainly could if they made that decision. Attorney Malia believed that there is enough evidence for the Board to affirm that Administrative Decision tonight.

Town Attorney Malia said:

First of all, the letter references “change of use” from the Site Plan Review Regulations and it points to paragraph (d). However, tonight Bont made a good point that paragraph (e) also applies. Sub-paragraph (e) may apply as this is also a “material change” to a previously approved site plan. However, in our written decisions we did not cite paragraph (e) we only cited paragraph (d), contained in the same section of the ordinance that was cited. If the ZBA affirms our decision, you can cite (d) and (e).

Attorney Malia looked for a definition in the ordinance of “gasoline/fuel oil sales and storage” and did not find anything. So then Attorney Malia looked up the definition of “propane” in the Meriam Webster Dictionary because the courts say that if a term is not defined you use the normal dictionary meaning. Propane is defined as:

Propane is “a heavy flammable gaseous alkane C_3H_8 found in crude petroleum and natural gas and used especially as fuel and in chemical synthesis.”

Attorney Malia believed that seems to fit within gasoline fuel and oil sale and storage.

Attorney Malia said he believes that the administrative decision should be affirmed.

Bergeron said that he would ask that if the ZBA choses to follow along with the guidance of counsel, Bergeron respectfully asked that the ZBA make a finding of fact that a propane filling station as what Aubuchon has asked for is indeed “gasoline/fuel oil sale and storage”.

Paul Beaudin said that the ZBA cannot change the Land Use Plan Ordinance. Propane can be derived from the ground. Propane is when they create gas siphoned off the top at refineries.

Bergeron said that what Beaudin was referring to was “natural gas”, not propane.

Paul Beaudin said that something that really bothers him. In defense of putting a propane filling station (PFS) in there, is the fact that the ZBA has had two meetings on this. Both meetings have been advertised to the abutters and the general public and no one showed up. Beaudin felt that the abutters’ absence did not show a big concern from the public over the proposed location of this propane pump station. When the matter goes to Site Plan Review, the same abutters will get the same notices. Beaudin felt that if no one really cares about this, what are we doing?!

Bont said that when we notify abutters, we only notify the properties that actually touch the subject property. There are a lot of small residential lots behind there, but the lots are not technically ‘abutters’ so the owners did not get individual abutters’ notices by certified mail.

Paul Beaudin said that they would not be noticed for Site Plan Review either. Bont agreed.

Paul Beaudin stated he is more concerned about Section B where the Town really has a non-conforming issue with the owner of the property. The Town’s problem is not so much with the tenant who wants to put in the pump station, but with the owner of the property. From what Beaudin understands of the Land Use Plan Ordinance, this property cannot be altered or expanded if the property is out of compliance. They are out of compliance by not just one (1) or two (2) parking spaces, they are out of compliance by seventy (70) or more parking spaces.

Paul Beaudin said that the Herbert Lahout Shopping Center, Inc., also has an outstanding Cease and Desist letter because they installed a ‘temporary’ structure which then morphed into a ‘permanent’ structure within the setbacks. The apparent owner of the structure (Clermont (?) not Lahout) told Bont that he would remove the structure after he saw a copy of the letter. After several months of reducing the contents, the structure was almost empty except for one piece of

heavy equipment, however, recently he has stockpiled a large shipment of salt and sand in there and at least one piece of heavy equipment is back in there now.

Bont told the ZBA that the Town learned that Mr. Clermont was running a property management operation out of the “temporary” building in back of the shopping mall. The ‘temporary’ structure was supposed to be only a temporary tent to put over Mr. Lahout’s salt and sand in the winter. That was a couple of years ago. There is a huge tent back there with several pieces of heavy equipment and salt and sand in it. It is firmly anchored by huge cement blocks all along the bottom of the “tent”. Bont sent Lahout a Cease and Desist letter. The owner of the shed called her and said he was going to move his operation out of there. He said he had a better location for his property management operation. He was using that “temporary” building to store salt and sand for that shopping mall, but also salt and sand for another development across the Kanc. The “temporary” structure is still there. At one point Bont thought he had almost emptied it out. At one point there was only one piece of equipment in there, however, recently she saw photos and the “temporary” structure is now “chocker block full of stuff”.

Paul Beaudin said that he has fewer problems with the pump station itself, but has more concerns with the owner of the property with the non-compliance. The ZBA still does not know whether or not reference in the 1998 Planning Board minutes to a letter from Mr. Romprey (who was an abutter and the contractor who built the shopping mall) who said that all tanks must be buried under ground was accurate. We do not know because it has not been researched. That lends itself to a Site Plan Review.

Motion to approve the administrative decision for the addition of a propane filling station at the Lahout Shopping Center to go to Site Plan Review with the Planning Board.

Motion: Jack Daly Second: Jayne Ludwig

All in favor 5-0

Bergeron thanked the Board and said he believed that the ZBA gave the matter fair consideration.

IV. NEW BUSINESS

V. OTHER BUSINESS – ZBA members/alternates, Zoning Board Staff

VI. PUBLIC PARTICIPATION AND OTHER BUSINESS: Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the Zoning Board of Adjustment will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

VII. ADJOURNMENT

Motion to adjourn at 7:15 P.M.

Motion: Jack Daly

Second: Jayne Ludwig

All in Favor: (5-0)

Respectfully submitted,

Wendy Tanner,
Planning and Zoning Recorder

Date Approved: 12/21/2016


Jonathan Ham, Chairman