

**Town of Kinderhook  
Zoning Board of Appeals Minutes  
September 27, 2012**

Approved

**MINUTES**

The Special Meeting of the Town of Kinderhook Zoning Board of Appeals was held on September 27, 2012 at the Kinderhook Town Hall, 4 Church Street, Niverville, New York. The Meeting was called to order by the Chairman at 7:00pm. The roll was taken by the Secretary.

**1. Roll Call**

**PRESENT**

Tom Puchner, Chairman  
Andy Howard, Attorney  
Keith St. John  
John McManus  
Stephen Hotaling  
Nataly Dee, Secretary

**EXCUSED**

Jeff Ouellette

**ABSENT**

None

**2. Minutes & Correspondence:**

- A. Minutes from March 1, 2012 – Approval held until next month pending further review.
- B. Minutes from August 2, 2012 – Two typographical errors on page 3 of the minutes were pointed out and corrected.

A Motion to approve the revised minutes from the August 2, 2012 Meeting was made by Mr. Puchner. Motion seconded by Mr. St. John. Mr. McManus recused himself from the vote due to his absence from the meeting in question. The remaining members voted in favor to approve the minutes. Motion carried; Minutes approved.

**3. Public Hearings:**

- A. 7:05pm - Kinderhook Prospects Inc – Appeal of Determination of the Code Enforcement Officer

Kinderhook Prospects has appealed a violation issued by the Building Department for work done at the Niverville Pub.

The Public Hearing was opened by the Chairman, and the Notice as it appeared in the newspaper was read by the Secretary.

There was no one present representing the Building Department.

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A letter of response was submitted by the property owner, Mr. Smalling, which has been added to the file. Mr. Tim Laurange representing the property owner was invited to address the Board.

Mr. Smalling asked for clarification as to why they had been issued a violation. They are not clear about exactly what the violation is referencing. Initially, they thought the violation was due to some work that was done on the driveway, then it became about repairs that were made to the porch, and finally the question of whether they were operating a separate business out of the take out window of the tavern became an issue.

Mr. Smalling stated that any work that was done was to existing structures, nothing new was added. Further, he stated that all operations are under one ownership.

Mr. Puchner referenced the violation issued by the Building Department dated July 9, 2012. Correspondence from the Building Department regarding violation states, "building without a permit...doing work without a permit and site plan approval from Planning Board and approval from ZBA per Town Code 250-50." Further, correspondence from Mr. Voss of the Building Department referenced, "work being done on the side porch in order to establish a walk-up ice cream service window. At the August meeting, CEO Mr. Kirsch brought up the need for site plan review for an alleged second use on the property. There has been no mention of the driveway.

Mr. Laurange stated that repairs were made to floorboards on the existing porch. Guardrails were also added around the perimeter of the porch, and that a Building Permit was issued for that work.

Mr. Howard added his recollections from the previous meeting at which the central question was whether or not the ice cream component of the business was a prior non-conforming use. There was a question about whether you could have more one or more uses on the property, which according to 250-7 of the Code which recognizes that you can have one or more uses provided that they are permitted within the district. This sort of use would be permitted.

Mr. Puchner questioned the non-conforming nature of the use.

Mr. Howard noted that if someone were looking to add a new use that didn't previously exist, there would be a site plan component involved. The issue in this case is did the walk up window exist, and has this business existed prior to any requirement for site plan, or was it contained in a prior site plan that received approval.

Mr. Laurange stated that according to his knowledge the window was established in 1994. Mark's Pizza originally sold pizza out of the window. Mr. Laurange provided some of the history of the establishment for the Board. He indicated that it has been in continuous use since that time.

Mr. St. John had a line of questions for the applicant.

Mr. St. John: How long have you worked there?

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- Mr. Laurange: Two years.
- Mr. St. John: How long has the Pub been operating out of that building?
- Mr. Laurange: It predates back to the 1990's, maybe 1980's? Not sure.
- Mr. St. John: What kind of establishment would you describe the Niverville Pub?
- Mr. Laurange: It is a restaurant/tavern.
- Mr. St. John: What sort of food is served at the restaurant/tavern?
- Mr. Laurange: A variety, from burger to steaks, fried foods, salads, ice cream.
- Mr. St. John: And deserts?
- Mr. Laurange: Correct.
- Mr. St. John: And beverages?
- Mr. Laurange: Coffee, soda, alcoholic beverages.
- Mr. St. John: How many people does the restaurant/tavern accommodate?
- Mr. Laurange: Occupancy of 54 people.
- Mr. St. John: Is there a bar at which people can also sit?
- Mr. Laurange: Yes
- Mr. St. John: People go there, and they eat in?
- Mr. Laurange: Eat in and take out.
- Mr. St. John: Do you have the ability to prepare and sell orders that you take over the telephone?
- Mr. Laurange: Correct.
- Mr. St. John: Do you make deliveries?
- Mr. Laurange: No.
- Mr. St. John: From where is the food prepared and dispensed for the purposes of take out orders?
- Mr. Laurange: Same as the tavern, from the central kitchen.
- Mr. St. John: If I called ahead, and I came in to pick-up my order, I would do that in the main restaurant area?
- Mr. Laurange: You can come in through the main door.
- Mr. St. John: Is there any other area from which food is dispensed?
- Mr. Laurange: You could come in from the front, the back, or the side window.
- Mr. St. John: That window has been used to serve tavern food? For how long?
- Mr. Laurange: For at least the two years that I have worked there and going back through the years.
- Mr. St. John: Has this use been continuous or has there been any interruption in the use of the side window to hand out food.
- Mr. Laurange: As far as my recollection it has been continuous.
- Mr. St. John: Since you've been there, how frequently have people used that side window to either place orders or pick-up orders?
- Mr. Laurange: In the summer time, everyday. In the fall there are a lot of orders during football season. Less in the winter, people tend to come inside, though the window is still available. It's an option also, if you have youngsters and don't feel comfortable brining them into the bar to pick up your food.
- Mr. St. John: Is there any limitation on what kind of food I could order to pick up through the side window?
- Mr. Laurange: No limitations, anything that can be purchased inside, except alcohol.

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Mr. George Newkirk, member of the public, addressed the Board. Mr. Newkirk lives at 112 Parker Hall Road and is a neighbor of the establishment in question. Mr. Newkirk's family has lived in Niverville since 1957. He provided the Board with some history of the establishment. He stated that the pub, then the Van Huessen House, has been in operation since that time. He noted that recent changes have been made to the parking area, which have had a positive impact on the flow of traffic.

Mr. Puchner asked if there were any more questions or comments.

Mr. St John asked about work and improvements that were done on the deck. Mr. Laurange stated that rotten boards were replaced and a railing was replaced around the perimeter of the deck. Stair boards were replaced. Repairs and improvements were made to what already existed. A Certificate of Compliance was issued from the Building Department for the work completed. Further, Mr. Laurange stated that pot holes in the driveway and parking area were filled with stone dust. Railroad ties were placed strategically to deter patrons leaving the bar from driving past the take-out window where there may be more foot traffic. No additional parking was added.

A Motion to close the Public Hearing was made by Mr. Puchner. Motion seconded by Mr. McManus. All in favor. Motion carries; hearing closed.

Mr. Howard addressed the issues before the Board. The applicant was cited for building without site plan approval. Does the use have a prior site plan approval or preexist the requirement of a site plan review? The question for the Board is have you received proof from the public and from the applicant on the issue of whether or not this has been in continuous use. Mr. Howard reminded the Board that at the last meeting Mr. Kirsch stated that the business was required to seek site plan approval in 1994 for the sale of pizza. It was Mr. Kirsch's opinion that this situation was similar, and that the applicant might need site plan approval for the sale of ice cream as well.

Mr. Puchner spoke to the multiple uses of the building. Mr. McManus was of the opinion that in regard to the issue of use was that it falls under a prior non-conforming use. Mr. Pucher proposed the idea of tabling a decision until further review of the file could be made. There was another argument for resolving the issue tonight.

Mr. St. John stated that he was prepared to dispose of the matter this evening. Furthermore, he thought it was a shame that a representative of the Building Department was not in attendance to argue their case or to defend their administrative actions. Mr. St. John was comfortable in concluding that there was no structure that was erected on the subject property that would have otherwise have required a site plan approval, and, or a zoning permit. Additionally, that the use of the structure has not been changed in a material way. Mr. St. John stated that he does not agree with the violation that was cited by the Building Department, and moved to vacate the Building Department's violation notice and allow Kinderhook Prospect to continue their business.

Mr. Hotaling agreed with Mr. St. John.

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A Motion to vacate the Notice of Violation and grant the appeal of the violation of the applicant was made by Mr. St. John. The Board's interpretation of Article 250-50 of the Code concluded that the service of ice cream through the take-out window does not constitute a change of use of the existing structure. Additionally, repairs made to the existing rear deck do not constitute the erection of a new building or structure. Motion seconded by Mr. Puchner. All in favor. Motion carried unanimously; appeal granted.

Mr. Laurange thanked the Board.

**B. 7:45pm - John Murray – Appeal of Determination of the Code Enforcement Officer**

A motion to open the Public Hearing on the Murray Appeal was made by Mr. Puchner. Motion seconded by Mr. McManus. All in favor. Motion carried; Hearing opened.

The notice of the hearing was read by the Secretary at the start of the meeting.

Mr. Pucher stated that this was an appeal of a denial of an application for a building permit to construct a bank barn on the property at 169 Mason Road in Valatie. Grounds for denial are that the proposed structure may fit the description of accessory apartment. The structure will have plumbing and heating and habitable space that has the potential to be used as accessory apartment, dwelling unit without having a permit for such and it is not attached to the existing residence, and as such would require an area variance.

Parameters of an accessory apartment were reviewed. The Code states that an accessory apartment, dwelling unit must be attached to a building and requires a permit according to Article 250-30. Additionally, the inhabitant must be a relative of the owner and the permit lasts for a fixed period of time. Area variances have been granted in the past in instances where the accessory apartment, dwelling unit had to be placed outside of the main residence. If an area variance were granted, then the applicant would need to appear before the Planning Board for site plan approval.

Mr. Howard offered that in regard to this particular application, does Mr. Murray's application and intention for the structure fit the definition of an accessory building which would otherwise be permitted and would require no further activity from the Planning Board or anyone else. Or, does it constitute an accessory apartment, dwelling unit would then require further action. The definitions of an accessory building and accessory apartment, dwelling unit as listed in the Code were referenced by the Board.

Mr. Murray addressed the Board. He provided the Board with detailed plans of the barn. He provided some history about the structure which was originally constructed in the 1780's. Mr. Murray also had photographs of the barn taken in 2010 before it was dismantled. Further, Mr. Murray stated that while the barn will have some facilities, a washroom, kitchenette and heat, for convenience, it is not intended to be lived in by anyone. This project, he stated, was a labor of love. Mr. Murray's intentions are to raze the existing garage built in the 1970's. The

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barn would be used for the storage of equipment. The kitchen area would have a service sink and a small refrigerator. There would also be an open area for recreation, gatherings, recitals, and things of that nature. Mr. Murray stated emphatically, that there are no intentions for the building to be living space.

When construction is complete the Building Department will have to inspect the site to insure that everything is up to Code before issuing a Certificate of Compliance. The fear is that in the future the property could be split and then there are two independent structures, one on each new parcel. It was inquired whether the uses were tied together by utilities, electric, water, etc. Mr. Murray stated that water and electric are common to both barn and house. This situation would make it more difficult to separate the two in the future. The space will have radiant heat that will be used modestly. The barn will have some insulation. Mr. Hotaling inquired about the septic system. Mr. Murray stated that the septic for the house is located to the north of the house making it difficult to connect the barn directly to it. A small septic field would be put in to the east of the house to cover the use from the barn. There are notes on the plans indicating the septic field.

Mr. Puchner asked if there was anyone from the public that would like to address the Board.

Mr. William Jew addressed the Board. Mr. Jew resides at 187 Mason Road, next door to Mr. Murray. Mr. Jew expressed concern that this will not stay a barn. He also expressed concern about the septic to be installed. Tonight's meeting was the first time Mr. Jew had heard about plans for the septic system. He had not received that information from the Building Department when he spoke with them. He is satisfied that there are plans for a septic system.

Mr. McManus confirmed that septic systems require Department of Health review and approval.

Mrs. Starron, who farms Mr. Murray's land, spoke in favor of Mr. Murray's proposal.

A Motion to close the Public Hearing was made by Mr. Puchner. Motion seconded by Mr. McManus. All in favor. Motion carries; hearing closed.

Mr. Puchner addressed the issues of the matter. An accessory apartment, dwelling unit includes language about a toilet, which could be troubling in this situation. However, a dwelling is meant to be lived in, over night, on a repeated basis, as opposed to something that is incidental and subordinate to the main structure. Mr. Puchner expressed an understanding for the Town's concern.

Mr. McManus thought it comes down to enforcement. Each application has to be addressed individually. This applicant has gone on record as saying that no one is going to live in that space. That takes it out of the accessory apartment, dwelling unit and puts it in the accessory building arena. If the appeal were granted, the applicant should go back to the Building Department with a full and complete set of plans.

Mr. McManus made a motion to grant the applicant's appeal and remand the application back

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to the Building Department for consideration as an accessory building. Full and final plans, including a septic system, for the accessory building will be submitted to the Building Department for their consideration. Motion seconded by Mr. Puchner. All in favor. Motion carries; application approved, appeal granted.

**3. New Business:**

None

**4. Old Business:**

None

**5. Other:**

A. Liaisons

B. Public Comments

A motion to adjourn was made by Mr. Puchner. Motion seconded by Mr. McManus. All in favor. Meeting adjourned.

Regretfully submitted,

Nataly Dee, Secretary