

**Town of Epsom  
Zoning Board of Adjustment  
6/29/11**

**In Attendance:** Glenn Horner, Chairman; Rick Belanger, Vice Chairman; John Dodge, Planning Board Liaison; George Carlson; Alan Quimby; Mike Hoisington, Alternate; Mark Riedel; Darlene Phelps Recording Secretary

**Also in Attendance:** Jay Hickey, Zoning Compliance Officer; Keith Cota, Selectman; Claudia Morrison; Attorney Robert E Murphy; Frank Morrison; Tim Sult; Jay Hickey; Rob Topik; 3 names illegible

**7:05 PM** Glenn opened the meeting and stated that the only item on tonight's agenda is the deliberation on Case #2011-05. There will be no public input taken on this case. The minutes of 6/15/11 were reviewed. Ricky made a motion to approve the minutes as amended. Alan seconded the motion. All in favor.

Glenn stated that tonight Mike will be sitting in for John Dodge. The following members will be voting on tonight's case: Mike, Alan, Glenn, George & Rick.

**Case 2011-05 (Morrison) (Continued) Attorney Robert E. Murphy, on behalf of Claudia Morrison, has applied for an Administrative Appeal to overturn the Zoning Compliance Officer's (ZCO) March 23rd, 2011 decision. The March 23rd, 2011 ZCO decision expressed the intent to fine the owner for continued year round occupation of the dwelling on the property which is classified per Article III.B.7 [Pre-existing non-conforming seasonal dwellings] and allows for seasonal use only. The property owner appeals the order on the basis that the dwelling is a single family residence having a vested right to year round occupation. The property is located at 217 Chestnut Pond Road (private road) within the Residential/Agricultural Zone and is identified by Epsom Tax Map U-19 as Lot 33.**

Glenn began by asking the board members if they feel this property is a seasonal dwelling. All members replied yes. Glenn asked if the members feel that the property has been being used as a full time, year round residence since 1969. Rick replied no, George replied no. Rick clarified that it has not been used as a full time dwelling, although there have been periods of time that it has been used year round.

Glenn distributed a draft decision he prepared to the other ZBA members and read it aloud. (\*copy attached)

Rick made a motion to uphold the Zoning Compliance Officer's decision dated March 23, 2011. Alan seconded the motion.

All in favor.

**7:54-7:58 PM Old/New Business**

Glenn read a letter from Mr. Topik asking that the ZBA members and the Recording Secretary refrain from making attempts at humor at his expense, and making any defamatory comments. Glenn asked Mr. Topik to clarify what he means. Mr. Topik said he has witnessed several times that the Board or the Darlene have made comments that are inappropriate.

It is Mr. Topik's opinion that Glenn should take better charge of the meetings and limit any wordy responses.

Glenn read another letter from Mr. Topik regarding discussions between ZBA members and BOS members and topics such as harassment and intimidation.

Dave Fiorentino commented that he feels intimidated by Glenn, and that Glenn should not make statements about meetings (i.e. BOS meetings) that he does not attend.

Jay noted that at the end of deliberations on the Morrison case, an abutter asked when the minutes from tonight's meeting would be available, and made a comment that Mr. Hickey received a copy of the considerations that Glenn read out loud tonight. Jay wants the record to reflect that he has not seen a copy of the considerations or the draft decision, and he feels it would be inappropriate for him to have seen it.

There was a brief discussion about a new application that has been received.

Glenn advised the board members that he attended the BOS meeting on Monday night, and briefly mentioned the ZBA's dissatisfaction with the waiving of the fines assessed to Mr. Fiorentino. The BOS said that if Glenn would like to discuss this further then he should request to be put on the BOS agenda. Jay feels that the ZBA should just "let this go". Glenn agreed and said the BOS has the right to waive those fees.

Mr. Topik said that after Glenn left the BOS meeting the other night, Jay had told the BOS that he is in favor of having the fines set aside for a period of time as long as there are no other compliance issues.

After discussion it was decided to have the agenda posted on the website. Keith advised that it would be a good idea to post the decisions on the website as well. Keith noted that the BOS has been discussing what items should be posted on the website in an effort to put as much information as possible in the hands of residents as soon as possible.

Rob Topik said in his opinion, the Right-to-Know law grants him the right to source materials. He has asked the BOS for source materials that are used in preparing the minutes. In his opinion, the minutes are easily edited when they are typed directly into the laptop. Rob feels the only way to get the source materials is to get a printout tonight or by inserting a USB drive into the Recording Secretary's laptop.

Keith said the BOS is researching this and will advise the ZBA of its decision.

**8:41 PM Alan made a motion to adjourn. Mike seconded the motion. All in favor.**

## **BACKGROUND**

The Town of Epsom originally approved its zoning ordinances in 1969. Notably in 1978, the Town's Legislative Body amended the ordinance to restrict single-family residences to the requirements imposed by today's zoning standards for a minimum two (2) acre lot size and 200 feet of frontage on a public road. With the adoption of zoning, the development of any new seasonal dwellings was, for all practical purposes, "zoned out" through not being listed in the Table of Principal Use (Article II, Section C). This restrictive approach toward seasonal dwellings is also acknowledged in the Town's Master Plan.

Historically in deciding whether "seasonal dwellings" have a distinct use different than permitted "single family residences" several factors were evaluated. Is the property being used in a substantially similar manner or generically similar manner than non-seasonal properties? Does the building and on-site facilities have the equivalent and usual amenities expected of non-seasonal properties? Is the property being used as a legal domicile? The use of seasonal properties is for a limited residential use (generally associated with recreational cottages on ponds and lakes or hunting camps in the woods) and is used in a generic similar manner to residential properties. The use is limited in duration and is not year round as evident by tax and inventory records. The cottages or camps often don't have the necessary household amenities to provide for the comfort of long-term living arrangements, particularly during long periods of inclement weather (i.e. electrical and heating system is limited, water and septic loading limited; building insulation limited, etc.), the general access to the property is not on a public roadway, and the use existed prior to the adoption of zoning.

As written in the 2001 Master Plan, the Town views lake front properties as having a distinct use; different than single-family residence. The property use along the lake fronts are recognized to be limited to a "seasonal/recreational" use that has existed prior to the adoption of zoning. As referenced in Chapter III, (Existing and Future Land Uses [Page III-24]) and Chapter IX, (Conservation, Preservation and Open Space [Page IX-12]), the Master Plan describes the six lakes and ponds within the Town, including Chestnut Pond. It points out that for better part of the last fifty (50) years; the pond's water quality has been greatly impacted by the seasonal, recreational uses that have existed prior to zoning. Due to the small lot sizes and high density of the seasonal properties around the lake/pond(s), there is a concern for the conversion of "seasonal cottages" to year round use. It is felt that this change would cause an increase strain on the limited onsite septic systems and further threaten the Town's natural resource. The Master Plan goes as far as recommending a special district zone for one of the lake front areas and to implement restrictive conversion requirements that would merge small lots to improve septic loadings and to balance the impact on the Town's natural resources.

To further support that seasonal use of properties is a distinct use different than year round residence use, a review of the NH Water Management and Protection statues shows the unique and distinct difference by State law and NH Department of Environmental Services (NHDES) rules. Under RSA 485-A:39, the owner of waterfront properties is required to complete a site assessment study to determine if the site meets the current standards for septic disposal systems of the State of NH. In accordance to

RSA 485-A:38, any structure that is occupied on a part time bases (sic: seasonal) is required to submit an application for approval of sewage disposal systems to the State. As administered by NHDES under Department regulations (Env-Ws 1004.14-16), any property owner converting to full time use is required to file an application for individual disposal system with NHDES. As can be viewed by State law and NHDES regulations, part time use of properties (seasonal dwellings on lakes and ponds) are viewed distinctly different than full year property uses and requires a “regulatory process” prior to the conversion of use to full time residence.

For these reasons, the Town has long held that “seasonal dwelling” use is distinctly different than “single-family residence” use.

In 2005, an Administrative Appeal (Case 2005-03) was filed by the owner of Tax Map U-19, Lot 34, located on Chestnut Pond Road, seeking to overturn the Zoning Compliance Officer’s (herein referred to as the ZCO) interpretation of the Zoning Ordinances in ruling that prior property use as a seasonal dwelling is a pre-existing, nonconforming use and that an expansion of its seasonal use to single family residence requires a zoning appeal in accordance with Article III, Section B (Pre-Existing, Non Conforming Uses) of the Epsom Zoning Ordinances. The applicant in Case 2005-03 argued that a change in dwelling use, which had been previously occupied only on a seasonal basis, to year round occupancy for single family residence is not a change of a pre-existing use unless the Zoning Ordinances specifically distinguish between seasonal use and year round use. The applicant reasoned that because the Epsom Zoning Ordinance’s Article II, Section C (List of Principal Uses Table) did not differentiate seasonal use, then the conversion or change of a seasonal dwelling use to year round residential use was permitted within the Residential and Agricultural Zone.

The Board of Adjustment upheld the ZCO’s findings and denied the appeal in Case 2005-03 based on its historical differentiation between seasonal and year round use and it’s interpretation of it’s non-conforming use ordinance in place at that time. The Board also denied a rehearing request in Case 2005-03 and the Applicant went on to appeal the Board’s decision in Superior Court. The Petitioner’s motion was granted and the Zoning Board’s decision reversed due to the fact that the Town’s Zoning Ordinances drew no distinction between seasonal and year round occupancy of single family residences [Severance v. Town of Epsom, 155 NH 359 (2007)]. In 2007, the Town of Epsom amended it’s Ordinances to acknowledge it’s long held use distinction by including Article III, Section B (Pre-Existing, Non Conforming Uses), Subsection 7 (Pre-existing non-conforming seasonal dwellings). The Ordinances, with regard to this Article, remained in effect to this day.

### **ADMINISTRATIVE ORDER**

On March 23, 2011, the Epsom ZCO issued a letter to Claudia Morrison addressing non-compliant use of property identified on Epsom Tax Map U-19 as Lot 33. The ZCO had determined that the property located at 217 Chestnut Pond Road (a private road) is a seasonal camp and had illegally been expanded to a full time residence without appropriate appeal to the Board of Adjustment as required under Article III, Section B (Pre-Existing, Non Conforming Uses) of the Epsom Zoning Ordinance (Revised March, 2007). The March 23<sup>rd</sup> letter stipulates that the owner must commence resolution of the cited violation no later than 30 days from the issuance of the

ZCO's letter. Failure of the owner to respond would result in a Cease and Desist order and/or fines assessed.

### **ADMINISTRATIVE APPEAL:**

The Applicant seeks relief to the administrative order in accordance with the authority granted to the Board of Adjustment under Article VI, Section E.2.a of the Zoning Ordinances. The applicant argues the ZCO erred in his assessment of the dwelling as a seasonal dwelling based on the Town's Ordinances and, more importantly, it has been used on a year round basis historically and continuously either by the owner and family members or on a rental basis to hunters. The applicant points out that the New Hampshire Supreme Court has repeatedly held that the change of the occupant from tenant to owner is not a change of use. Further it is argued that should the structure be determined to be "designed to be used" seasonally, its non-conforming use and right to occupy year round was vested prior to the effective date of Epsom Zoning Ordinance Article III, Section B (Pre-Existing, Non Conforming Uses), Subsection 7 (Pre-existing non-conforming seasonal dwellings). The applicant concludes, therefore, that they have a constitutional right to continue the pre-existing vested right of year round occupancy on this property.

### **DISCUSSION**

The following is a general finding of facts as to the property and neighborhood:

- The property is located at 217 Chestnut Pond and is identified as Lot 33 on Tax map U-19.
- The property is adjacent to Lot 34, Tax map U-19 with address 219 Chestnut Pond Road. As noted in the Background Section above, this property was at the center of the prior court case resulting in the amending of the Epsom Zoning Ordinances to acknowledge conversion from seasonal to year round use as a substantial change [Severance v. Town of Epsom, 155 NH 359 (2007)];
- The property has a right-of-way along a private, dirt woods road with varying travelway widths of approximately 12 to 15 feet;
- The property is situated approximately 0.4 of a mile from Class V section of Town Road;
- The property was created prior to the adoption of zoning and consists of 0.34 acres having approximately 100 feet of shoreline on Chestnut Pond (30 +/- acres) and 100 feet of right of way frontage;
- From 1969 to time of the Administrative Order, a dwelling has existed on the parcel and has been used primarily for recreational use;
- A septic system design was approved by NH Department of Environmental Services in November of 2009. The Town has no record any previous design or it's approval. The new design approval was granted with the following notes and restrictions:
  - Restricted the dwelling to seasonal use only;
  - Is intended to improve the existing septic disposal conditions on the property only;

- Mandated the relocation of the well. Relocated well's protective radius crosses approximately 15' over the property line and into the adjacent lot;
- The primary dwelling on the property is listed in the Town's property and tax records as a single story "cottage" or "camp" with limited plumbing and power services and has a 2011 assessed value of \$32,000 and
- The property ownership was transferred to the applicant by Quitclaim Deed from Juliann G. Davis on July 29<sup>th</sup> 1997.

As with any administrative appeals to the Board of Adjustment, the Applicant bears the burden of proof to demonstrate that the ZCO incorrectly applied the zoning ordinances in making his administrative decision. In this case, Attorney Murphy argues that the applicant has continuously used the property year round prior to zoning and more specifically the effective date of Article III, Section B (Pre-Existing, Non Conforming Uses), Subsection 7 (Pre-existing non-conforming seasonal dwellings) which acknowledges a change of seasonal to year round use as a substantial change requiring a variance as found by the ZCO. Consequently, the property has a vested right to continued year round usage due to its having been established prior to the adoption of Article III.B.7 in March 2007. As evidence of historic and continuous year round usage, verbal testimony was given by the applicant, her husband, her son-in-law, an abutter, two neighbors and a hunter from years past who now resides on Chestnut Pond. In addition, written evidence was submitted by two abutters, a former abutter and three neighbors who stated that they had witnessed some degree of year round usage in prior years.

In support of his case, Attorney Murphy submitted three New Hampshire Supreme Court cases. One case [New London Land Use Association v. New London Zoning Board of Adjustment, 130 N.H. 510, 515-516 (1988)] was referenced to establish a legal precedent for vested rights to continued use on pre-existing, non-conforming lot. Two other cases [Isabelle v. Newbury, 114 N.H. 349, 403 (1974) and Dovaro 12 Atlantic, LLC v. Town of Hampton, 158 N.H. 222, 229 (2009)] were referenced to establish a legal precedent that a change in occupant from owner to tenant is not a change in use.

In support of administrative decision, the ZCO stated the Town has consistently treated seasonal dwellings differently from single-family residences since as far back as the adoption of Zoning in 1969 and now recognized by Article III.B.7. He provided information consisting of the property record, assessment records and inventories all of which showed that the prior property owners used the property consistently as a camp. He also pointed out that Town property tax assessor inventories (tax records) confirmed that the seasonal dwelling has been referenced primarily as a "camp" or "cottage" and resulted in a significant reduction in property value.

### **FINDINGS FOR DECISION**

Attorney Murphy included a Statement of Reason's (Statement) with the initial Application for Administrative Appeal which laid out his client's case and was the basis for his presentation at the Public Hearing. At the Deliberative Session which followed, the Board addressed each Reason as written to determine it's applicability and validity to the case at hand. The Statement provided an outline with which the Board could accurately and completely address the entire request and determine if sufficient

evidence had been presented to warrant the granting of the Appeal. Below are the Board's findings on each Reason, repeated in *italics*, and numbered correspondingly as it appeared in the Statement:

1. *Claudia Morrison's property is a single family residence located in the residential/agricultural zone.* From a Zoning perspective, if the property were indeed a single family residence, it would not be subject to temporal restrictions of a seasonal dwelling as determined by the ZCO. Therefore the Board must first determine if the dwelling on the property is a seasonal dwelling or not. According to Article III.B.7 a seasonal dwelling is "a structure that is designed to be used, or is actually used for temporary residential use for less than twelve (12) months per year, or primarily for a specific or distinct season. This term includes, but is not limited to, lake house, hunting or snowmobile lodges or camps, summer\_camps or lodges." Leaving aside the temporal use component of this description for a moment, the other aspects were considered. From the evidence and testimony provided at the public hearing, the following design characteristics and examples of seasonal dwellings included in the Ordinance were reviewed:
  - The size of the primary dwelling is a 714 ft<sup>2</sup> one story cottage located within approximately 20' of the pond's shoreline on little more than a third of an acre;
  - is a lakefront dwelling assessed at \$32,000;
  - has a foundation constructed out of piers in the front and stone in the rear;
  - obtained and installed a septic system approved by the NH Department of Environmental Services (NH DES) in 2009 which has been restricted to seasonal use only;
  - uses the pond water as a source of water;
  - has a functioning privy;
  - is located on a narrow private road amongst other seasonal camps:
  - is in a location in Town (Chestnut Pond) where seasonal dwellings are known to exist based on identification in the Master Plan and
  - is listed in all official town records as a camp or cottage and specifically as a summer camp in a town inventory.

Based on these design characteristics, limitations and examples provided in the Ordinance, the Board concluded that the dwelling was designed as a seasonal dwelling and, more specifically, a "summer camp".

2. *Residential use is permitted in the residential/agricultural zone pursuant to Zoning Ordinance Article II.C.17.* The Board agreed but found that the ZCO did not challenge residential use per se and therefore this finding is not relevant to the Decision.
3. *The subject property has been used for year round habitation in every month of the year historically and continuously by Claudia Morrison, and her parents before her since 1994. From 1994 through 2009, the property has been occupied spring, summer and fall by Claudia Morrison's immediately family and winter on a rental basis to hunters. The winter leasing to hunters ended in 2009; Claudia and her husband Frank Morrison have occupied the property year round*

*since then except for vacations.* This point is central to the applicant's request. Should sufficient evidence be submitted to substantiate this claim it would establish a pre-existing use of year round residency on this non-conforming lot prior to zoning as allowed by Article III.B.3. Furthermore, this would be a pre-existing use in the general sense with no further consideration for the fact that the dwelling is designed as a seasonal dwelling as found in Reason 1.

Evidence submitted to establish historic year round residency was exclusively in the form of verbal and written testimony by the applicant, family members of the applicant, a "historic" hunter, a current and former abutter, and other neighbors. An analysis of this testimony in support of year round use begins at the earliest point at which the property became non-conforming due to adoption of the 1969 Zoning Ordinances requiring a minimum area of 40,000 ft<sup>2</sup>. The testimony of year round use by the "historic" hunter revealed a significant gap in the continuity of use between the years 1969 and 2005 when his hunting use was discontinued. Specifically, the hunter testified that the camp was used for hunting during this period of time from October 1<sup>st</sup> to December 31<sup>st</sup>. When combined with the claim of spring (March 20<sup>th</sup>), summer and fall usage by the property owners this would result in a duration of about 9 ½ months or 41 weeks leaving an 11 week gap from January 1<sup>st</sup> to March 20<sup>th</sup>. Taken on its face then, the claim of historic continuous year round habitation was not established by the combined use of the former owner, current owner property and hunter prior to 2005.

Beyond 2005, testimony to prove year round residency was vague and inconclusive. When attempting to determine who the actual person was living at any particular time at the camp, inconsistencies were found including overlapping residency. Specifically while one neighbor testified that an unnamed person lived there year round from 1995 through 2007, another neighbor testified that it was the hunter and the Morrison's who lived there year round through this period. However the hunter himself claimed to have discontinued his use in 2005 which was supported by other testimony. Also between 2005 and 2009 a relative claimed to have been there "frequently". It seemed unlikely that between 2005 and 2007 a small cottage would be shared "frequently" by the relative and an unnamed tenant. Also, overlapping residency was not included in any testimony.

Other claims of year round residency given in verbal testimony included circumstantial evidence such as:

- lights in the camp observed on;
- vehicles in the yard;
- help from camp occupants during an ice storm;
- ice fishing on the pond and repairs made to the structure during the off season

Written testimony generally supported the use by unnamed hunter(s) over various periods of time during the winter. One neighbor based this on seeing trucks on the property and hunters in the woods. Another neighbor mentioned seeing hunters there in the fall and family members on winter weekends over 20 years. Another described the use of the cottage by family members as their "weekend get away". Family use duration was also described as having occurred "a good deal of time".

The Board agreed that to achieve the level of certainty in support of year round usage a more definitive course of testimony would have been necessary. For instance, if the neighbor's verbal or written testimony had named the

individual who they witnessed hunting as the same hunter who testified at the Public Hearing it would have added context in place of conjecture. After the hunter's discontinued his use in 2005, the remaining testimony was more in line with occasional weekend or periodic visitation to a summer camp than continuous residential use.

Despite several requests by the Board, both at the initial public hearing and again at the continuance hearing, no written documentation was submitted to further substantiate the applicant's claim of off season residency such as copies of leases, rental receipts, utility bills, posted envelopes, proofs of residency such as car registrations etc. Consequently it must be assumed that none exists.

In establishing that the dwelling was a summer camp, the ZCO submitted the property record, assessment records and inventories all of which consistently listed the property as a camp or cottage. The most compelling of these were the property inventories. The first inventory of significance was for the period from April 1, 1997 to April 1, 1998 during which time the applicant obtained title to the property. Question 2 on the form asks if any changes to the property were made since April 1, 1997 where the "No" block is checked. In the census block of the form the words "summer residence only" appeared in place of names of all persons who occupied the premise. Together, these answers provide definitive evidence that Ms. Morrison obtained the property with the full understanding that it had been a seasonal dwelling (i.e. "no" changes) and that this seasonal usage continued from the outset of their ownership. Similarly the 1999 inventory states "None-used as Summer Camp" in the census block and lists "0" for those persons occupying the premises. The 2001 and 2002 inventories again list no changes and "0" occupants. The first indication that a change of use has occurred is the period April 1, 2009 through April 1, 2010 when both the applicant and her husband appeared in the census requirements. All inventories were signed under penalty of perjury and sent to the town as required by NH RSA 74:4.

Based on all evidence submitted, the Board concluded that the property had not been used for year round habitation historically and continuously. Instead, taken in conjunction with the evidence and conclusions drawn in Reason 1, the property is an established summer camp which was used during the summer and to some extent during the off seasons until the year 2009.

4. *The Zoning Compliance Officer's decision is in error because it is based upon an erroneous factual find[ing] that "this structure was classified and allowed as seasonal use only."* Based upon the conclusions contained in previous Reasons, the Board disagrees and finds that the ZCO did not err in this classification of the structure as a seasonal dwelling.
5. *As a matter of fact, the property has never been "classified" for seasonal use. Other than the Zoning Compliance Officer's March 23, 2011 [Decision], Claudia Morrison, and her predecessors in title, have never received any notice from any Town official indicating that the property was other than the single family residence it has been historically used as.* The Board found several errors contained in this Reason. First, all Town records reviewed find that the property was listed as both a camp and cottage. Article III.B.7 specifically identifies

camps as a term synonymous with a seasonal dwelling and therefore it should be concluded that a camp is a seasonal dwelling restricted to seasonal use by the Ordinance unless established as a year round residence prior to zoning or by variance approval.

As to when the owners were notified, the ZCO testified that he informed the property owner's husband in December of 2009 that their camp was a seasonal dwelling and they would need to pursue relief through variance application to the Board of Adjustment. This meeting took place as a part of the septic system upgrade after which the septic design approval issued to the applicant clearly restricted the dwelling to seasonal use. Further, Mr. Morrison testified that he knew of the difficulties his next door neighbor Don Severance was having with a "seasonal" issue and having a problem with year round use. He also knew that the Severances had taken their case to court. The Severance case came before the ZBA in 2004 and ended in court in 2005. Although it cannot be assumed that such information would immediately cause a neighbor to contact the Town to determine the status of their property, some degree of concern and inquiry would be expected prior to the neighbor establishing year round residency. Consequently, the Board concluded that the Morrison's should have realized their property was limited to seasonal use in 2009 and quite possibly as far back as 2004.

6. *Any classification without notice and an opportunity to be heard is a violation of the due process clauses of the Federal and New Hampshire constitutions.* The subject of constitutional law is outside the scope of Boards abilities and mandate with regard to interpreting local zoning ordinances and deciding administrative appeals. In the abstract, the concept of not notifying this applicant that their property was restricted by this specific zoning restriction (seasonal use) was unconstitutional calls into question the nature of zoning and the legality of its implementation. To single out a specific zoning requirement and expect notification of all those potentially affected by it would be a highly burdensome governmental task for any community. By extrapolation of this premise, and assuming that all zoning restrictions must be applied and enforced equally, notification of all zoning requirements and their applicability to all residents on a continuous basis would also be necessary thereby making even the concept of zoning untenable. Clearly this is not the case and the more common understanding that "ignorance of the law is no excuse" should apply to property owners in a community which has adopted zoning.
7. *Any attempt to classify the property as "seasonal" is contrary to and in violation of the Zoning Ordinance, which defines a "seasonal dwelling" as "a structure that is designed to be used, or is actually used for temporary residential use for less than twelve (12) months per year or primarily for a specific season."* This statement would be true if the evidence had shown that the use was commenced prior to the enactment of the zoning restriction and maintained continuously on this non-conforming lot. However as discussed in Reason 3, this was not the case and therefore this Reason is without merit.
8. *There are no design limitations on the use of the property, and it has indeed been used every month of the year for over 16 years as a residence. Over that time it, has been maintained and consistently improved to permit its year round*

*occupancy.* As discussed in Reason 1 and 3, it was concluded that the property was designed to be a summer camp and had not been used year round until about 2 years ago.

The Board agrees with the ZCO's comment to the Morrissions in 2009 that septic system improvements on the property are commendable. Such improvements are especially important in light of the environmentally sensitive area in which this property is located. However, the fact that the applicant recognized the need for improvements in order "to permit it's year round occupancy" reinforces the fact that design limitations existed on the property in stark contrast with the assertion of "no design limitations" put forth in this Reason.

9. *The neighborhood in which the subject property is located contains numerous year round homes. Map U19, Lots #34 and #32, located on either side of the subject property, are used year round. The lots across the street from the subject property, Map U19, Lots 40, 41, and 43 are also occupied and used year round. In the near vicinity of the subject lot, Map U19 Lot #38, #39, #29 and #24 are presently used year round and Map U19 Lots #36 and #35 have been used year round in the past although they are presently occupied on a seasonal basis.* The Board concedes that there may be other properties in the area which are legally or illegally being used on a year round basis depending on circumstances which have not been brought before it on appeal. Summing the number of lots as presented and without verification, finds that about 20% of the properties on private roads surrounding Chestnut Pond have been or are being used year round leaving the remaining 80% as seasonal dwellings; a clear majority. However, the primary concern before the Board is the case at hand, and the circumstances relevant only to it, making a discussion of this point academic.
10. *To the extent that the subject property is deemed to be designed to be used seasonally, it is a nonconforming use, and the right to occupy year round was vested prior to the effective date of III.B.7 in March [2007]. The applicant has a constitutional right to continue a preexisting vested right. New London Land Use Association v. New London Zoning Board of Adjustment, 130 N.H. 510, 515-516 (1988). The ZBA agrees that the New Hampshire Supreme Court Decision submitted by the applicant is established case law and that property owners have a vested right to continue pre-existing uses on non-conforming properties. This precedent is incorporated in the Town's Zoning Ordinances under Article III, Section B (Pre-Existing, Non Conforming Uses), Subsection 3 (Pre-existing uses). However, as pointed out at the Public Hearing, this Ordinance also specifies in subparagraph 3.b that the use must not have ceased for any one year period after having been established and not be substantially changed or enlarged. As amended in 2007, Subsection 7 (Pre-existing non-conforming seasonal dwellings) of Article III. B defines a change of the temporal use of a seasonal dwelling from seasonal to year round as "substantial" requiring the approval of a variance in accordance with Article VI.E.4. Having found in Reason 3 that year round use has not been established on this non-conforming lot, it is not pre-existing and therefore not a vested right.*

In reviewing the full text of this Supreme Court Decision, the Board noted the following salient point regarding nonconforming use. Beginning at the last

sentence on Page 4 it is stated that: "Zoning by its nature is restrictive. Although zoning ordinances may expressly permit the continuation of nonconforming uses, such uses by their very nature violate the spirit of zoning. Therefore it is the policy of zoning law to construe strictly zoning ordinance provisions which provide for the continuation of nonconforming uses. The ultimate purpose of zoning regulations [contemplates that nonconforming uses] should be reduced to conformity as completely and as rapidly as possible...". The Board concluded, therefore, that it must strictly construe Article III.B.7 and its reference to Article III.B.3 when deciding nonconforming use cases. This is especially true for cases which involve an administrative decision identifying the expansion of the nonconforming use such as the case at hand. To do otherwise would violate a basic tenant of zoning law as established by the New Hampshire Supreme Court.

11. *The New Hampshire Supreme Court has repeatedly held that the change in occupant from a tenant to owner is not a change in use. Id.; Isabelle v. Newbury, 114 N.H. 349, 403 (1974) and Dovaro 12 Atlantic, LLC v. Town of Hampton, 158 N.H. 222, 229 (2009).* The Board recognizes and concurs with this case law. However, as determined in Reason 3, no tenant was found which established historic and continuous use to prove pre-existing, year round residency on the property.
12. *Claudia Morrison asks the Zoning Board of Adjustment to overrule the Zoning Compliance Officer's decision and revoke its March 23, 2011 decision.*