

**TOWN OF EPSOM
ZONING BOARD OF ADJUSTMENT MEETING
Epsom Central School, 282 Black Hall Road, Epsom, New Hampshire
October 4, 2023, 7:00 PM**

PRESENT

Glenn Horner, Chair
Ryan Kehoe, Vice Chair
Alan Quimby, Member
Prescott Towle, Alternate Member
Jason Johnson, Alternate Member

ALSO PRESENT

Jennifer Riel, Recording Secretary
Virginia Drew, Board of Selectman Representative
Justin Guth, Zoning Compliance Officer
John Newton, applicant
Maria Newton, applicant
Kirsten Allen, Esq., representative for the applicant
Ronald Powers, resident
Don Paquette, resident
Gerry Paquette, resident
Rob Topik, resident
Frederick Anderson, resident
Joann Breen, resident
Harold Estabrook, resident
Ciaradell Anderson, resident
Dorothy Dodge, resident
William Dodge, resident

CALL TO ORDER

Chair Horner called the meeting to order at 7:00 PM.

Introductions were made of the Board members present. Chair Horner asked Mr. Johnson and Mr. Towle to sit on the Board as full members for this meeting.

APPROVAL OF MINUTES

Meeting of September 20, 2023 – Edits were made.

MOTION: To approve the minutes as amended. Motion by Mr. Quimby. Second by Mr. Johnson. Motion passed, 5-0-0.

Case 2023-12 (Norton – AA) - John and Maria Norton have applied for an Administrative Appeal seeking to establish grandfathered rights to use their property for short-term rentals. A

prior variance and special exception appeal had been submitted by the applicants to allow this use which was denied in Case 2023-05 (Norton – Var & SE). A decision on the Case 2023-05 (Norton – Var & SE) motion for rehearing has been suspended pending a decision on this administrative appeal. The property is located on Lake View Road within the Residential/Agricultural Zone and is identified by Epsom Tax Map U-19 as Lot 21.

Chair Horner read the public notice into the record. It was confirmed the public notice was published in *The Concord Monitor*, and posted at the Town Offices and the Post Office; certified letters were sent to abutters and most receipts were returned with the exception of the following: John and Maria Norton, Shant and Vilma Cimenion, and Rita Cloutier.

Chair Horner stated there was an error on the mailing address to the Nortons; the address the certified mail was sent to was 69 Champlin Hill Road, but the correct address is 69 Champlin Ridge Road; and it was confirmed the certified mail was not properly delivered. He said he called Mr. Norton this morning to inform them of tonight's public hearing.

Chair Horner opened the public hearing at 7:15 PM. He stated the applicant is seeking a rehearing on an Administrative Appeal seeking to establish grandfathered rights to use their property for short-term rentals. Chair Horner clarified there is no consideration of a variance or special exception criteria involved in this appeal. He explained an administrative appeal happens when an entity in town, with the authority to make a decision, makes a decision that affects a landowner, often this is the Zoning Compliance Officer. A landowner has two options: to abide by the ZCOs direction or challenge the decision by the ZCO using an Administrative Appeal to the Zoning Board of Adjustment. Chair Horner referenced state statutes referencing Land Use: RSA 674:33 and 676:5, Powers of the Zoning Board of Adjustment. He stated the ZBA can decide whether to uphold or over turn the ZCO's decision.

Kirsten Allen, Esq., the representative for the Nortons, stated they have been operating a short-term rental at the property since June 2022; rental operations have been through VRBO and Air B&B. She stated evidence was submitted of the rental activities. Chair Horner confirmed the evidence was received and distributed to all Board members. Ms. Allen stated in April 2023, the Town amended the ordinances relative to Short Term Rentals which are permitted by Special Exception however in Section 4, preexisting short-term rentals are exempt. She stated preexisting uses are also protected by the State of New Hampshire Constitution. She stated when the Nortons started the short-term rental, the only information they were aware of, were draft amendments to the ordinances which did not include section 4 and the final version of the ordinance was not published until after June 2023. Ms. Allen stated on May 15, 2023, the Nortons spoke with Megan at the Town Offices and explained their situation, and requested guidance for proceeding. Megan advised the Nortons to cancel existing reservations and proceed with requesting a Special Exception however that advice was erroneous as the property would have been exempted. She stated the application for a Special Exception was submitted on May 16, 2023. On May 22, 2023, the Nortons were contacted by Chair Horner who indicated additional information was needed and a variance would also be needed because the property is on a private road. Ms. Allen stated the application is clear that the Nortons have a preexisting use and they should have been advised to proceed under Section 4. She stated they relied on the information provided to them by the

Town as they had no access to the final version of the approved amendment until after their application was submitted. Ms. Allen stated the correct version of the zoning ordinance amendment would have informed them of Section 4 but it wasn't made available until June. She stated the appeal for a variance and special exception was decided at a public hearing held by the Zoning Board, at which the Nortons were not represented as they were not notified. Ms. Allen stated they are requesting that the ZBA affirm the grandfather status and allow them to continue operating a short-term rental and request a return of the filing fees for applications they should not have needed to file.

Mr. Towle stated the applicants were notified of the previous public hearing. Chair Horner confirmed that an abutters letter was sent by certified mail addressed to the Nortons was sent to 69 Champlin Ridge Road in Rochester; several attempts were made to deliver but it was returned to sender on July 7, 2023.

Chair Horner opened the hearing to input from abutters in favor of the appeal.

Chair Horner opened the hearing to input from abutters in opposition to the appeal.

Ronald Powers, 101 Chestnut Pond Road, he owns the land the right of way the private road is on; he stated Lake View Road is a private Class VI road. He stated it is a dead-end road. Chair Horner stated it's his understanding that a Class VI Road is a road that has either been abandoned or is not currently kept up to standards as a town road; he stated it could be a private road or a town right of way over private land but the town does not recognize it as a public road; it is not maintained or insured by the town. Mr. Powers stated he isn't looking to stop anything but he owns the land the right-of-way goes over and he wants to protect the private road so it doesn't get used as a through-way.

William Dodge, resident of Lake View Road, stated the State of New Hampshire has six classes of road and referenced the description for a Class VI road. He stated he submitted a written objection to the last public hearing as he was unable to attend in person; he stated he read both the request for a variance/special exception and the administrative appeal submitted by the applicants' legal counsel which seem to be exactly the same wording; he stated he doesn't believe the loss of revenue has anything to do with the zoning denial but is based on what the market will bear. Mr. Dodge noted all the documents in the file submitted by the Nortons and their legal representative refer to Lake View Road as Drive. He stated no additional rationale has been presented as to why they need to run their business on a private road. He stated since the denial, the Nortons have continued to rent the units including all of August and September, every day they have been getting income. Chair Horner stated Mr. Dodge's letter was addressing variance criteria however this is not the appeal being addressed at this public hearing; the Nortons are not looking to violate an ordinance. He stated the issue being proposed by the Nortons' legal representative is that they should not have put in applications for a variance/special exception and the administrative appeal is based on section 4 of the ordinance amendment which addresses grandfathered rights. Mr. Johnson suggested discussing what was under the old ordinance so they can clarify the standards to which the Nortons are being held. Chair Horner clarified there was no old ordinance. Mr. Johnson stated there were no stipulations

regarding the road because the ordinance was not written and that is the basis for the grandfathering. Chair Horner confirmed with Mr. Powers that he owns the road and clarified that the property owners have the right to cross over his property via the right-of-way contained within their property deeds. Mr. Powers confirmed that is correct, but the public doesn't have the right to do so. Chair Horner stated he believes renters have the same rights as the property owners.

Justin Guth, Zoning Compliance Officer, explained the reason the application for the variance/special exception have the same wording as the administrative appeal because they are using the same rationale. He explained the applications for the variance /special exception should have never been submitted and the advice given was wrong. He stated he was never contacted by the Nortons; they tried to do the right thing in accordance with the advice given by the Town Offices; he stated the evidence by the Nortons never changed. Chair Horner clarified this hearing is not a continuation of the previous application and previous public hearing; these are two completely separate hearings. He stated they have to look at the criteria for an administrative appeal which upholds the zoning ordinance as written and not the 5 criteria for the variance which permits a violation of the zoning ordinances. Mr. Dodge stated at the public hearing, they were told to submit additional information and that has not been done. Chair Horner stated this is a separate case.

Ms. Allen explained she filed for a rehearing on behalf of the Nortons which was filed under a specific statute to appeal a decision within 30 days; she stated Chair Horner advised this was not the appropriate avenue, and it was agreed an administrative appeal would be appropriate. Ms. Allen stated there was no request for additional evidence, but she submitted the request for an administrative appeal at the advice of Chair Horner. Chair Horner explained the ZBA application form which indicates applicants should seek the advice of the Zoning Compliance Officer however the Nortons followed advice from the Town Office clerk and mistakes were made.

Mr. Powers asked if taking the Class VI designation out of the legal briefings is possible so that the determination isn't used in a future case. Chair Horner stated evidence cannot be deleted but his concerns will be captured in the minutes. Vice Chair Kehoe stated whatever the attorney or applicants say about the road is arbitrary; it doesn't make that the official classification.

Mr. Dodge asked why the applicants and the attorney put the Class VI Road designation in the application. Ms. Allen responded that it was referenced in the appeal and legal brief because that was the basis for the denial by the Zoning Board. Chair Horner stated the classification of this road has no bearing on the administrative appeal in this case and advised anyone with concerns about the classification to discuss it with the Town and the ZCO.

Vice Chair Kehoe stated preexisting uses do not abide by the class of the road. If the appeal fails and it goes back to a variance, then the class of the road comes into question.

Gerry Paquette, resident, asked for clarification on the application and questioned why the Nortons can request compensation for lost income. She stated the Nortons assert they have lost \$13,000 due to denial by the ZBA; she stated she has examples of the dates of availability for the

rental in June, July, and August. Ms. Paquette stated she filed an official complaint form with the Town when there were numerous short-term rentals through the months of July and August; she stated she doesn't understand how the loss of income was calculated. She stated to comply with the new short-term rental ordinance, there were four criteria to ensure the safety of the other residents in the area and the lake. She stated the documentation provided by the Nortons does not include any water test results; a well was dug on May 17, 2023. Ms. Paquette stated she spoke with a few of the renters, and they indicated there is a posting in the rental unit to advise against drinking the water so there is no proof of potable water. They also rented the property after suspension and should preclude them from any compensation from Epsom taxpayers.

Ms. Allen clarified that the Nortons are not seeking compensation from taxpayers but was used for illustration only to show the loss of income. She clarified there is a current rental in the property now, but it is for a two-month term which is also a significant loss of income. Ms. Allen stated there is in fact potable water at the property. Vice Chair Kehoe asked the last time the water was tested. Mr. Norton stated water testing is only required when property is being sold in New Hampshire and is not required when a new well is put in; he stated they are not taking water from the lake as they have a new well along with a filtration system. He stated he has evidence of receipts for the filter system and changing the filters. Vice Chair Kehoe stated preexisting short-term rentals are still required to have proof of potable water.

Ms. Paquette before the well was installed, they were pumping water out of the lake into the house; she stated that has been there since the short-term rentals started and reiterated a test for potable water should be required.

A resident expressed concerns about a business being operating in a residential/agricultural zone. Chair Horner replied he believes that the use is still residential.

Rob Topik, resident, asked if the conflicting provision, Article 7 in the zoning ordinance, indicates they should read the deed to see what the right-of-way easement says. Chair Horner asked the Norton's if they had looked at the deed and verified access over the right of way. Mr. Norton confirmed they do have access to their property.

Mr. Dodge stated the right-of-way has existed as far back as mid-1940s; he stated during that time, there has never been a commercial or business enterprise and they don't want it. Chair Horner stated it is a residential property and the use continues to be residential. He stated the ordinance does not address whether this is a commercial use; he stated the ordinance indicates short-term rentals can exist but, in this case, a special exception is not needed because it was in operation before the ordinance was in effect. Chair Horner stated the ordinance is very clear about establishing a short-term rental and that is what they need to follow.

Chair Horner asked if this property is a seasonal dwelling. Mr. Norton stated it is seasonal; he can't speak for the previous owners or other residents as to whether they live there year-round. Ms. Norton stated they could rent it year-round because it has all the systems necessary to do so. She stated when they filed the first application, they didn't know they had the right to be grandfathered and they thought they would be restricted to 7 months. Vice Chair Kehoe stated

the 7-month limit will apply to grandfathered properties as well. Ms. Norton stated they would comply with that.

Chair Horner referenced the ordinance for pre-existing, non-conforming, seasonal dwellings, Article 3.B.7. He stated per this ordinance, expansion from seasonal to year-round use, will require a variance and is considered a change of use; it will be the burden of the applicant to establish the seasonal use under the short term rental ordinance, but the more restrictive ordinance indicates dates of May 15 to October 15 for summer or winter being October 15 to May 15. Chair Horner stated in the absence of other evidence, this property has been used as a summer rental.

Chair Horner stated per the new short-term rental ordinance, documentation must be provided to show the preexisting operation. He stated evidence was submitted showing data obtained from VRBO and Air B&B. Mr. Norton stated the State of New Hampshire takes taxes directly from the fees collected. Chair Horner stated per the rules from the New Hampshire Department of Revenue, files must be kept for 3 years but the spreadsheet submitted as documentation isn't proof of payment. He stated he called NH DRA and it was confirmed that fees are collected directly from VRBO. Ms. Norton explained the spreadsheet submitted shows all the fees collected as well as the taxes collected which are submitted on their behalf to the State of New Hampshire. The Board agreed the evidence submitted is appropriate.

Chair Horner noted the documentation submitted indicates there were rentals outside of the ordinance dates and in the future, they need to abide by those dates previously indicated.

Mr. Johnson asked if anyone contests the fact that the short-term rental was in operation prior to the enactment of the ordinance, on April 1, 2023. None was indicated.

Ms. Allen asked why they are potentially being restricted to May 15 to October 15 instead of the seven-month terms if this is considered pre-existing. Chair Horner stated Article VII in the ordinance conflicts with the short-term rental ordinance; he stated this house is on a lake and historically the more restrictive ordinance is the limitation.

Chair Horner confirmed tax evidence has been submitted indicating the short-term rental was operating prior to the enactment of the ordinance. A resident expressed concerns that this is being referred to as a business with income and questioned why that is being allowed.

Mr. Dodge stated reference has been made numerous times about loss of income and that should not be taken into consideration by the Board. Chair Horner confirmed that is correct; the refund of application fees should be taken up with the Board of Selectmen. Mr. Norton reiterated they are not looking for compensation.

MOTION: To close the public hearing. Motion by Mr. Towle. Second by Mr. Quimby. Motion passed 5-0-0.

The public hearing was closed at 8:54 PM.

Findings of Fact

1. The applicant contracted with VBRO and Airbnb recognized short-term rental assistance companies, to collect rent as well as pay the associated NH State Meal and Rooms tax.
2. A phone conversation between the Zoning Board Chairman and personnel at the State of New Hampshire, Department of Revenue Administration on October 4, 2023, confirmed that VBRO is a legitimate service which a property owner can use to ensure short-term rental taxes are paid. Airbnb is considered an identical service for these purposes.
3. A spreadsheet verifying that VBRO and Airbnb collected and paid the taxes was included as evidence.
4. Such method of paying the taxes using VBRO and Airbnb satisfies the requirements contained in Article III.U.4 for paying the NH State Room and Meals Tax to the State of New Hampshire, Department of Revenue Administration.
5. Based on a review of the dates contained in the VBRO and Airbnb spreadsheets, the property was rented in 2022 outside of the more restrictive Article III.B.7.c seasonal dwelling (lake house) dates for seasonal summer use presumed to be May 15 through October 30. Article VII Conflicting Provisions require that this more restrictive time frame be observed than that provided in the Article U.5.a General Requirement which states "If the property is determined to be a seasonal dwelling, it may only be available for rental for no more than seven (7) months of the year."

MOTION: To accept the Findings of Fact as stated. Motion by Mr. Towle. Second by Vice Chair Kehoe. Motion passed 5-0-0.

MOTION: Based on the evidence submitted by VBRO and Airbnb documentation, the seasonal dwelling identified on Tax Map U19 as Lot 21 was used as a short-term rental prior to the enactment of Epsom Zoning Ordinance, Article U, Short Term Rentals. As such, the property is "grandfathered" for continued pre-existing use for Short Term Rentals per Article III.U.4. The duration of the short-term rental use shall be from May 15 through October 30 in accordance with the seasonal dwelling (lake house) dates for a seasonal summer use contained in Article III.B.7.c. This decision overrides and negates the prior Case 2023-05 (Norton) Variance and Special exception decision made on June 21, 2023 which denied the use of this property as a short-term rental including the need for the applicant to pursue a rehearing before the Board in that case.

Motion by Vice Chair Kehoe. Second by Mr. Johnson. Motion passed 5-0-0.

Other

Chair Horner stated he discussed having a presentation with Vincent Pagano, Chair of the Economic Development Committee; it is tentatively planned for October 18.

Mr. Topik made comments regarding his request for a rehearing. Chair Horner stated they cannot discuss this issue at this time as it is premature.

ADJOURN: Motion by Mr. Johnson. Second by Mr. Quimby. Motion passed, 5-0-0.

The meeting was adjourned at 9:16 PM.

Respectfully Submitted,

Jennifer Riel

Jennifer Riel, Recording Secretary

APPROVED