

Zoning Board of Adjustment

Minutes of June 18, 2015

6:30 PM

*Sugar River Valley Regional Technical Center at Newport High School
(245 North Main Street)*

MEMBERS PRESENT: Ben Nelson, Chairman; Melissa Saccento, Vice Chairman; Jeffrey Kessler, BOS Representative; Elizabeth Cassorla, David Lain, Scott McCoy, Alternate.

MEMBER ABSENT: Donald Boutin

PRESENT FROM THE COMMUNITY: Bob Evans, Richard Kay, Henry Blaine, Gertrude Blaine, Joanne Stone, Ron Stone, Kyle Stone, Stuart Clifford Stone, Peter Franklin, Bert Spaulding, Sr.; Frank Pitkin, Beth Pitkin, Sandra Cornish, Floyd Cornish, Michael Batista, Sherri Cummings, Tom Cummings, David Hoyt (ZBA BOS alternate representative, not sitting), Tom Callum, Tom Hubert, Gloria Kibbey, David Kibbey

APPELLANTS AND AGENT: Richard Kelley, Jessica Kelley and Mr. Mark H. Puffer, Esq. (legal counsel)

STAFF PRESENT: Julie M. Magnuson, Planning & Zoning Administrator and Mr. Shawn Tanguay, Esq. (Town legal counsel)

CALL TO ORDER: Chairman Ben Nelson called the meeting to order at 6:32 pm followed by an introduction of the sitting members. Chairman Nelson stated that Mr. Scott McCoy (Alternate) would sit with the Board and participate in discussion but would not vote.

ADMINISTRATION: There was none.

MINUTES: On a motion by Mr. Kessler, seconded by Mrs. Cassorla; *the Board voted to approve the minutes of the April 23, 2015 meeting as presented. The motion passed 4-0-1(Saccento abstained).*

NEW BUSINESS:

Case #1028: Richard D. Kelley, Jr. (Appellant) requests an Appeal From An Administrative Decision made on April 16, 2015 by Julie M. Magnuson, Planning & Zoning Administrator, regarding Article II, Section 206.1 (Permitted Uses in the Rural (R) Zoning District) to allow the activity of Commercial Septage Hauling on property identified as Map 260 Lot 018 and located at 566 Unity Road.

Before he opened Case #1028, Chairman Nelson explained that the appeal before the Zoning Board of Adjustment was an appeal to either uphold or rescind the administrative decision made by Ms. Magnuson on April 16, 2015. He stated that the Zoning Board would hear testimony from the two parties (appellant and Ms. Magnuson). He further explained the ZBA format concerning an appeal to the public and asked that all conform to the ZBA appeal format in order to have an orderly meeting. Chairman Nelson stated he would not allow public comment. Mr. Bert Spaulding interrupted and addressed the Chair with a point

of order. Chairman Nelson acknowledged Mr. Spaulding. Mr. Spaulding asked Chairman Nelson (with the attorneys present) to determine whether the 06.18.15 hearing was an administrative hearing or if it was subject to Winslow vs Holderness. He explained. Chairman Nelson thanked Mr. Spaulding and stated that that was the reason for no public comment. Chairman Nelson explained. Chairman Nelson deferred to Mr. Tanguay to confirm whether the Zoning Board was correct in their decision. Attorney Tanguay addressed the Chair and confirmed he should proceed. Mr. Spaulding addressed the Chair and asked that as the appeal hearing proceeded, if the Chair would allow public comment on the claims. Chairman Nelson stated no. Mr. Spaulding asked if he would deny public comment even if the comments held relevant information to the decision that the Zoning Board would be making. Chairman Nelson addressed Mr. Spaulding and stated that the Zoning Board of Adjustment had the purview over the administrator (Ms. Magnuson). The Board did not want people to begin commenting on her performance. There was a short discussion. Attorney Tanguay addressed the Chair and stated it was advisable to start the appeal. Chairman Nelson addressed Mr. Spaulding and stated as to public participation, the Board would see. Chairman Nelson reiterated that the Zoning Board (on 06.18.15) would concentrate on use of the property.

Chairman Nelson reiterated the ZBA format for the appeal hearing.

Chairman Nelson opened Case #1028.

Chairman Nelson asked for the agent of record to give his name and state why he thought the Zoning Administrator had erred. Mr. Mark H. Puffer, Esq. introduced himself. He had been asked to represent and speak on behalf of Jessica and Richard D. Kelley, Jr. who were requesting an appeal of the administrative decision requiring a variance to create a business at 566 Unity Road, Newport, NH (Map 260260 Lot 018018).

He thanked the Chairman for stating the scope of the 06.18.15 hearing. He stated that the hearing was not about whether spreading septage was positive or negative as a source of fertilizer. That (argument) was something that the Planning Board was looking at. The scope of the 06.18.15 hearing was to determine whether the administrative decision that Julie (Ms. Magnuson) made was correct. The real narrow issue was whether what was being proposed was farming (which was allowed in Rural Zoning Districts in Newport), or whether it was some type of commercial use. Attorney Puffer addressed the Chairman of the Zoning Board. He passed out (with Chairman Nelson's consent) a booklet to the Board entitled: "Newport Zoning Board of Adjustment, June 18, 2015 Case #1028: Richard D. Kelley, Jr. (Appellant)". He asked the Board to reference it when he presented his client's case. Mr. Puffer presented one to the recording secretary to accompany the official record (The booklet in its entirety is on file in the TOPAZ office).

Addressing the Zoning Board, Mr. Puffer stated that he would review the documents (contained in the booklet) in order.

Number One: A notification letter from Mr. Kelley to the Board of Selectmen on April 1, 2015.

Number Two: A notification letter to one of the abutters, dated April 1, 2015. It was sent per the NHDES regulations.

Mr. Puffer stated that Mr. Kelley described the use in his letter. The letter was written before the administrative appeal and the administrative decision that is subject to appeal.

Number Three: The Administrative Decision.

Mr. Puffer stated that in the determination the administrator made a decision and the ZBA would decide whether it was correct or incorrect. Mr. Puffer read from Ms. Magnuson's letter dated April 16, 2015 (on file).

Referring to number two, Mr. Puffer stated that there was no mention of septic hauling or septic service business (in the letter). He repeated that this was before the administrative decision was made. The intent of the appellant was to produce high quality horse hay. It was farming.

Number Four: The administrative appeal that Mr. Kelley filed.

Mr. Puffer explained. Addressing the Board, Mr. Puffer stated that the sole question before the ZBA was whether or not it (Mr. Kelley's proposal) was farming.

Number Five: Newport Zoning Ordinances pages 12 and 13.

See Newport Zoning Ordinances.

Number Six: Page 90 from Newport Zoning Ordinance (under definitions, the definition of farming)
He explained the proposed use of the land and farming.

Number Seven: The state definition of farming. Mr. Puffer briefly went through the state statute and explained their (Kelley's) position concerning farming.

Numbers Eight and Nine: General definitions of farming.

Mr. Puffer stated that the question was whether farming on the site would stand alone.

Mr. Puffer then gave the Zoning Board a description of how the septage would be delivered, stored and distributed on the land as fertilizer. He conferred with his client and asked if his description was correct.

Chairman Nelson addressed Attorney Puffer and stated that the detail of septage to the Zoning Board was too much information. Mr. Puffer restated that he was illustrating how their intent was indeed farming and allowed under the Town Zoning Ordinance. He gave analogies to the case.

Number Ten: Definitions from the state.

Number Eleven: Code of Administrative Rule Requirements.

Number Twelve: Emails concerning case.

Concluding, Mr. Puffer stated that the solid septage (after a filtering treatment) would be hauled off site and brought to a treatment plant.

Chairman Nelson addressed the appellants and public and stated that Ms. Magnuson would speak next and then the Board would ask questions of both parties. He then introduced Ms. Magnuson, Planning and Zoning Administrator; Mr. Shawn Tanguay, Esq. Town legal counsel and Mrs. Maura Stetson, recording secretary. Conferring protocol with Mr. Tanguay, Mr. Tanguay stated that the ZBA should ask the appellants and agent questions before Ms. Magnuson's testimony.

Chairman Nelson addressed the Board members and asked if they had any questions.

Mr. Scott McCoy, for clarification, asked if the septic company would pay the farm to accept septage. He asked if it would be one (joint) company or two separate business entities. He was told two was correct: one was a farm; the second was a septage hauling company.

Mr. David Lain asked what there was on the farm (lot) now. He asked if it was woodland or fields. Mr. Puffer stated that most was wooded; there were two acres of field (open space). Mr. Lain repeated Mr. Puffer's answer-two acres of open space? Mr. Puffer stated that the land would need to be cleared (of trees). The soil had been tested to make sure it was appropriate for growing hay. Mr. Puffer listed the processes Mr. Kelley would have to undertake to create farmland.

Mr. Lain addressed Mr. Puffer and stated that technically it was not a hay growing farm. Mr. Puffer stated that was correct and said they needed fertilizer for the fields. The Kelley's were proposing the use of septage (for fertilizer). Addressing the Board, Mr. Puffer stated that the area to be cleared was between thirteen to eighteen acres.

Chairman Nelson addressed Mr. Puffer and asked if his contention was that the Kelley's were farmers. Mr. Puffer answered that they would engage in farming. Chairman Nelson asked if there was a business plan for the farm. Mr. Kelley stated there was. Addressing Mr. Kelley, Chairman Nelson asked what the soil test requirement for NPK per acre was. Mr. Kelley did not know. Chairman Nelson asked if Mr. Kelley had done a soil test. He replied yes.

The Chair again asked for the NPK (nitrogen/phosphorus/potassium). Mr. Kelley stated he did not know; the UNH extension service had done it (soil test). The service calculated the findings and told what the soil needed. Chairman Nelson concurred, stating there would be a NPK requirement per acre. Mr. Kelley addressed the Chair and stated he did not know what it was. Continuing, Chairman Nelson asked Mr. Kelley what the pH level was. Mr. Kelley stated it was around 6. Chairman Nelson asked which site it (the testing) was from. Mr. Kelley stated it was on his site, that there were multiple tests taken. Chairman Nelson asked if there had been soil samples taken from in the wood lot. Mr. Kelley replied yes.

Chairman Nelson addressed the Board members and asked if there were further questions.

Ms. Saccento referred to the description of the septage being brought in and the process of filtering the solids from liquid through a series of tanks and piping. She asked if the tanks would be on site. Mr. Puffer stated yes, they would be on site and underground. She asked for an additional explanation concerning irrigation equipment. Mr. Puffer explained. Continuing, Ms. Saccento asked (for clarification) if the farm was accepting septage, treating it and then using it. Mr. Puffer stated the statement was correct.

Ms. Saccento asked Mr. Kelley what other facilities he was planning on having on the property in addition to the (underground) tanks. Mr. Kelley said none. Mr. Puffer added that any equipment associated with the septic business would be located elsewhere. Reiterating, Ms. Saccento stated that the septage treatment would be at the farm. Mr. Puffer stated the statement was correct.

Chairman Nelson addressed the appellant and asked if he knew for a fact that the other individuals (who had a permit) had underground tanks and a similar setup as he was proposing. Mr. Puffer stated that he did not know...Chairman Nelson stated that he (Mr. Puffer) had just stated that. He asked if Mr. Puffer was retracting his statement. Mr. Puffer stated that he could only restate information he had received from one person (he couldn't recall her name) at NHDES who had told Mr. Puffer of the other locations (in NH).

The other locations were all defined as farms and they all grew agricultural crops. They all treated and irrigated on site. Addressing the Chair he stated he did not know whether the other farms were set up like they (Kelley) proposed. For clarification, Chairman Nelson queried if the individual at NHDES had

stated that others treated their septage on site. Mr. Puffer agreed. The Chair repeated the query. Mr. Puffer again agreed.

Mr. Lain addressed the appellants and asked if the clearing of trees had already started. Mr. Puffer stated no. Mr. Kelley stated that brush had been cleared, trees had not been cut. Mr. Lain stated that they (Mr. and Mrs. Kelley) were not farming yet. Mr. Puffer concurred. He stated that they (appellants) were seeking permission to farm. Mr. Lain addressed Mr. Puffer and repeated his answer, asking, they were seeking permission to start a farm? Mr. Puffer stated yes. He explained. Mr. Lain addressed them and asked if they were putting the cart ahead of the horse. Mr. Puffer stated no and explained their position. Mr. Lain stated they did not have to have permission to have a farm. Mr. Puffer stated Mr. Lain was correct, but that the Kelleys needed to have permission for the use of septage as fertilizer and the process they would use. Mr. Lain stated they could do that if they had a farm; they did not have a farm. Mr. Puffer stated he was correct. Continuing, Mr. Lain stated that if there was a farm, the appellants and agent would not be before the Zoning Board of Adjustment. He asked why they didn't have the farm first, and then come to the ZBA. Mr. Puffer stated that was not the way his clients were proposing to do it. Mr. Lain had no further questions.

Mr. Kessler addressed Mr. Puffer and asked about the list of places (that had septage permits) in the handout. He asked if those listed (12-13 locations) were the only places in the state that grew hay. Mr. Puffer stated no. Mr. Kessler then stated that septage was not a requirement for growing hay (to the best of his knowledge). Mr. Puffer stated no, it was not. Mr. Puffer stated that chemicals or other types of fertilizer could be used. Referring to the list (of locations), he explained they were the only locations in NH permitted to use septage.

Mr. Kessler asked what entity was responsible for the treatment of the septage on site. Mr. Puffer stated the farm-Springfield Farm, LLC. Mr. Kessler asked where it was registered. Mr. Puffer stated with the NH Secretary of State. Mr. Kessler addressed Mr. Puffer and stated it was not on their site as of 06.18.15. Mr. Puffer stated it was. Mr. Kessler again stated it wasn't (and explained). Mr. Puffer stated that Attorney Dunn was the individual setting up the entities. Attorney Dunn had emailed and stated he had set up all three corporations on 06.18.15. Mr. Puffer conferred with the appellant who explained the problems Attorney Dunn had had.

Mr. Kelley further explained the problems to the Zoning Board.

Mr. Kessler asked for the capacity of the tanks they proposed to use and how much septage the company proposed to process. Mr. Kelley stated that the 1st tank would be a 2,000 gallon tank, the 2nd would be approximately 6,000 gallons and the 3rd would hold 1,000 gallons. He explained. Mr. Kessler asked how much land the 1,000 gallons would irrigate. Mr. Kelley stated one acre. They discussed the frequency and amount of septage Mr. Kelley would need for his proposed purposes.

Ms. Saccento addressed Mr. Kelley and stated he had a business plan. She asked if the business plan stated that he would only grow hay on the property or would it be used for other purposes as well. She inquired about his 5/10 year plan. Mr. Kelley stated initially it (the land) would be for hay. Ms. Saccento asked Mr. Kelley why the septic company did not place the treatment tanks on its own property instead of the farm property. Mr. Kelley stated that it would be difficult to move the septage onsite and irrigate with it. It could be screened and treated (off site) and then trucked onsite and tailgate spread, but it wasn't a good process for good quality hay. He explained the downsides of tailgate spreading.

Chairman Nelson stated he had previously asked what requirements the land would need. Addressing Mr. Kelley he asked what the analysis of the spray would be. Mr. Kelley asked for clarification. Chairman Nelson repeated the analysis of the spray, of the septage. What was the analysis? Mr. Kelley asked for

an explanation. Chairman Nelson asked for the NPK. Explaining further, Mr. Nelson stated the septage was a fertilizer, what was the NPK. Mr. Kelley did not know.

Chairman Nelson asked if there were any other questions from the Board.

Ms. Saccento addressed Mr. Kelley and stated that when he decided to grow hay he proposed the use of septage as fertilizer. Would he grow hay and not use septage as fertilizer? Mr. Kelley stated that he would use other fertilizer. Due to the cost of other fertilizer and from visiting a site that used septage as fertilizer, he was also interested in using septage. There was a short discussion.

Mr. Kessler asked what type of hay he was planning to grow. Mr. Kelley did not understand. Mr. Kessler asked what the seed crop was. Mr. Kelley did not know.

Mrs. Cassorla addressed Mr. Kelley and asked if he was denied permission to use septage as fertilizer, would he still farm at the Unity Road location or would he sell the property (at a loss). Mr. Kelley stated that it would depend. Other sources of fertilizer were very expensive.

Ms. Saccento asked what the farm would earn from receiving the septage, how much Mr. Kelley estimated he would earn from selling the hay and how much hay he estimated to produce. He asked for clarification. Mr. Kelley stated he would produce between four and eight thousand bales a season. Ms. Saccento asked what the going rate for mulch hay was. Mr. Kelley answered \$3.50-\$4.50 for mulch hay and hay for horses was \$4.50 to \$8.00 per bale. Ms. Saccento asked what his profit would be from the hay per year (in theory). Mr. Kelley stated approximately \$12,000. Ms. Saccento asked what the farm would earn by accepting the septage. There was a discussion. Mr. Kelley stated probably \$15,000.

Mr. Kessler addressed Mr. Kelley and asked how many times a year he could plant and harvest hay (how many crops a season). Mr. Kelley stated that initially he would only get two crops until things were established and well seeded. He hoped to get three cuttings a season. Mr. Kessler asked how long it took to grow the hay. He was told it was dependent on the year and weather.

There being no further questions from the Zoning Board, Chairman Nelson addressed Ms. Magnuson and asked for her testimony.

Ms. Magnuson stated that she didn't know where to start. As Planning and Zoning Administrator she had recently been approached by an individual wanting to start a "wind farm" in Newport. When she questioned him he stated it was farming and explained his business plan. Ms. Magnuson had addressed the gentleman and stated what he proposed was a commercial facility. Addressing the Zoning Board, Ms. Magnuson stated that just because an individual stated something was a farm, didn't mean it was a farm.

Ms. Magnuson chronicled the events that took place up to her administrative decision and then to the ZBA appeal.

- April 6, 2015 Ms. Magnuson was told of the proposed use of the property. Mr. Tom Cummings went to the TOPAZ office with the abutter letter he had received. Ms. Magnuson described their conversation. She had told Mr. Cummings she would find out about it.
- Ms. Magnuson had then called NHDES, spoke with three people and inquired about the proposed use. She asked for an explanation. They gave her general information on the spreading of septage and land permits.
- Ms. Magnuson called Mr. Kelley, explained who she was and asked to meet him. Mr. Kelley told Ms. Magnuson that he was a plumber and that he was adding septic hauling to his business. Ms. Magnuson had asked if Mr. Kelley had a farm at the Unity Road

location. They had had a discussion. Ms. Magnuson stated she had asked him if he would be having other haulers tipping on his property and he had stated not initially, maybe later.

- Ms. Magnuson had pulled the lot file (04.06.15). There was a non-conforming cottage on the property.
- 04.10.15. When Mr. Kelley and Ms. Magnuson spoke he had stated there was a well on the site that would have to be decommissioned (his estimate was \$5,000).
- Ms. Magnuson stated that she had later contacted him (Kelley) and stated that even if the NHDES issued a permit, it was contrary to Newport Zoning and would require a Zoning Variance. She told the Zoning Board that she had wanted to make sure that Mr. Kelley was aware that even if he received the (state) permit he would have additional steps he would have to take.
- On 04.13.15 Ms. Magnuson met with Mr. Kelley in her office to determine whether or not his proposal was a permitted use. They had a lengthy discussion; Ms. Magnuson stated she had asked him many questions about his business plans on the Unity Road property.

Addressing the Zoning Board members, Ms. Magnuson stated she had been Planning and Zoning Administrator for fourteen years and knew the questions she should ask to justify that what was being proposed was a business use under the guise of an accessory use of farming for a septic hauling business. Therefore she asked a lot of questions.

- 05.11.15 Ms. Magnuson saw a deed was recorded to Richard D. Kelley, Jr. trustee of the Richard D. Kelley Irrevocable Trust. The appellants' application stated that the deed was Richard and Jessica Kelley. Ms. Magnuson could not find a copy under that name.
- Ms. Magnuson stated she had contacted the (NH) Secretary of State office. The Kelley LLC's are pending. They had not been approved by the Secretary of State's office as of 06.17.15.
- Ms. Magnuson stated that when Mr. Kelley had gone to her office the septage business was not in existence. He was exploring the possibility (When she had met with him he had on a Newport Plumbing and Heating tee shirt.). Mr. Kelley had just purchased/was in the process of purchasing a pumping truck. He stated (she believed her statement was correct) that trucks were licensed to a specific site. He was looking into the Unity Road site.
- Ms. Magnuson stated that Mr. Kelley had many legal entities for different purposes. All appear to be commercial in nature.
- Mr. Kelley had told her that Kelley Septic Service, LLC existed and its sole business was pumping septic tanks.
- Operating a commercial business in the Rural Zoning District would not be a permitted use.
- Ms. Magnuson addressed the Zoning Board and stated emphatically that Mr. Kelley told her that he would allow other haulers to spread septage on the site. His statement was one of the key elements of her administrative decision: whether he would benefit from revenue (or savings) by dumping on Newport land instead of going to the WWTP. She reiterated that she did ask that question and that Mr. Kelley had stated he would initially be the one to dump septage on the site, however later others would as well.
- Ms. Magnuson stated that Mr. Cummings had told her on 04.07.15 that McKenzie and Stearns were "on board with this". Whether it was misinformation she did not know. For clarification she stated that McKenzie and Stearns were two other septic haulers in the area.
- She asked the Zoning Board who Mr. Kelley would be charging 'market rates' (for dumping) to if he would not be having other haulers.

- Ms. Magnuson stated she had contacted Mr. Roger Landry in Sunapee (Planning and Zoning Administrator). She had asked Mr. Landry if he had had problems or complaints with the Sunapee site. Mr. Landry had stated each year he had numerous complaints. The Sunapee location was a grandfathered use, no other sites would be allowed in Sunapee.
- Mr. Kelley had stated there would be no structures on the property. She explained to the Zoning Board the necessity of going to the different boards for the various approvals needed if there were structures on a property. Ms. Magnuson reiterated that Mr. Kelley had stated there would be no structures on the land.
- Ms. Magnuson had told Mr. Kelley her job was to interpret and enforce the local zoning regulations in Newport. When they had spoken she had asked him directly if the primary purpose of the land was for his septage business. He had said yes. She had asked him if the growing of hay was incidental or secondary to the septic business and he answered yes. Those statements were said to her in her office and were part of why she made the administration decision that she did.

Ms. Magnuson finished her testimony by addressing the Zoning Board of Adjustment and stated even tractor trailers were not allowed to remain overnight (in RZD). Newport did not allow commercial activity in the Rural Zoning District.

Chairman Nelson addressed the appellants and agent and stated they could give a rebuttal. Mr. Puffer thanked the Chair and stated he would be brief.

Mr. Puffer agreed that wind farms were not (agricultural) farms.

He stated there was a well on the property that would need to be decommissioned. The NHDES permit was conditional on the well being decommissioned.

As to the LLCs, Mr. Puffer stated that what the entities were and who they were owned by was irrelevant. The question before the Zoning Board was the use of the property.

Mr. Puffer explained about the other haulers. Mr. Kelley originally said that he would have other haulers. That had changed.

Mr. Kelley said that that proposal changed at the meeting with Ms. Magnuson. She had stated that if other haulers brought septage in it would absolutely be a commercial business. Mr. Kelley stated that (then) he wouldn't consider it.

He refuted the conversation (between Mr. Kelley and Ms. Magnuson) as to whether the septage hauling was primary or secondary. Mr. Kelley stated there had been a neighborhood meeting. He stated that much of what Ms. Magnuson said (at the appeal) sounded a lot like Mr. Tom Cummings. He gave instances when Ms. Magnuson spoke with individuals and stated that his case should not be granted. The statement that the land would benefit only his septic company was not true. He stated that he would accept the Zoning Boards decision, but he took offense to Ms. Magnuson's statement and he wanted it on record that it had not been said.

Mr. Puffer stated that they acknowledged there would be a site plan review because it was a nonresidential use and structures would be proposed on the property. That would be the Planning Board's review.

Concluding, Mr. Puffer stated it was a very specific question before the Zoning Board of Adjustment. Was it farming? The fact that there was a related business involved was irrelevant. It was the use of the property that was the key. The property would be used much as the other 12-13 others with permits in NH. The source of their (Kelley) fertilizer would be septage.

Chairman Nelson addressed Mr. Puffer and asked what structures would be on the property. Mr. Puffer stated the underground tanks. Chairman Nelson followed up by asking if there were additional structures proposed. Mr. Puffer stated pipes and other items. They were subject to site plan review.

Chairman Nelson then asked where the 8,000 bales of hay would be stored. Mr. Kelley stated that initially he would have the assistance of another farm. Chairman Nelson reiterated his question of where the hay would be stored. Mr. Kelley stated at the other farm-they had multiple places to store it.

Mr. Kessler asked if the other farm would be providing the tractors and equipment. Mr. Kelley replied some of them. Continuing with his question, Mr. Kessler asked if Mr. Kelley would be acquiring his own tractors and equipment. Mr. Kelley explained that initially the other farm would be providing all the equipment; in his long term business plan Mr. Kelley would acquire his own.

Mr. Kessler addressed Mr. Puffer and stated there had been concern of other haulers. Mr. Kessler asked if legally, Kelley Septic, LLC was another hauler. Mr. Puffer stated that legally yes. Mr. Kessler stated that every hauler was 'another hauler'; the farm did not have its own truck. Mr. Puffer stated that Mr. Kessler was correct. Continuing, he stated that what was important was the question of if there was farming occurring at the location with septage (from a hauler) as the fertilizer.

Mr. Kessler reiterated that every hauler would be a separate entity (from the farm). Mr. Puffer agreed; but stated it was irrelevant. Mr. Kessler stated it was relevant because it would be an accessory use to Kelley Septic, LLC (there was a short discussion).

Chairman Nelson had a question for Ms. Magnuson. If the site had been deemed a farm, would the appellants be at a ZBA appeal hearing? Ms. Magnuson stated that if someone wanted to farm in the Rural Zoning District it was a permitted use. They would get their permit from NHDES. When Mr. Kelley went in to the TOPAZ office he stated he owned a business and he was buying a septage hauling truck. He had asked if he could do this (use septage as fertilizer). That was what started the whole idea that it was commercially related. She was confused about the PB discussion and explained the process.

Mr. Kessler asked Ms. Magnuson for a clarification. He asked if farming was a commercial use of a property. Ms. Magnuson relayed information on farm stand revenue and percentages of their revenue. Mr. Kessler asked specifically about the Kelley property where they proposed to grow and sell hay for profit, without living on it (the property); would it be considered a commercial farm. Ms. Magnuson said not necessarily (she explained). It was the way it was initially presented and the connection to the septage hauling business.

Chairman Nelson polled the Board concerning allowing individuals to briefly speak. There had been several names mentioned by both parties and they might want to speak with a relevant point. Chairman Nelson conferred with Mr. Tanguay as to protocol. The consensus of the Zoning Board was to allow abutters to speak as long as they kept their comments brief and to farming.

Mr. Bert Spaulding addressed Ms. Magnuson through the Chair, asking what the definition of structure was as defined in the Newport Zoning Ordinance.

Mr. Tanguay addressed the Chair and stated that he (the Chair) had stated he would take comment. The Zoning Board was not present for a trial. He recommended that if the Zoning Board took comment, they take comment and then move on (with the appeal) as opposed to accepting back and forth questions.

Mr. Spaulding addressed the Chair and explained his question. Chairman Nelson explained the Zoning Board was taking comments (Mr. Spaulding argued). Chairman Nelson opened comment to the public in attendance.

Mr. Frank Pitkin, abutter, stated he knew the appellants land well. The land was woods with big pines. The land would need massive clearing. Mr. Pitkin described streams on the property and the need for setbacks if any farming was to be done there. He had a map showing the topography and the two acre spot on the land. Mr. Pitkin stated he had hayed before and didn't know where Mr. Kelley was coming up with 4,000 bales of hay. He stated that he thought Mr. Kelley was taking the land and calling it something it wasn't.

Mr. Stuart Stone, abutter, stated he had received his letter from Mr. Kelley and briefly described his reaction to it. Mr. Stone stated he had called and asked to meet Mr. Kelley in his (Stone) home. Mr. Stone stated Mr. Kelley had told the truth at the appeal hearing, but not the whole truth. He told the Board that Mr. Kelley had told him the same things that Ms. Magnuson had stated (06.18.15). He wanted the Zoning Board to know. He thanked the Board for their time. For clarification, Chairman Nelson asked if Mr. Stone lived directly across the street (from the property). Mr. Stone stated yes.

Chairman Nelson acknowledged Mr. Tom Cummings. Mr. Tom Cummings, abutter, stated that since his name had been brought up at the appeal hearing he wanted to clarify something. He stated that residents on Unity Road had had a discussion with Mr. Kelley on 04.09.15. Mr. Kelley would not commit to either no haulers or to himself (hauling). Mr. Cummings stated when he had brought up the two (mentioned) haulers, Mr. Kelley would not say whether they would tip or not at the location. Also, when he had had a conversation with Ms. Magnuson, he had stated they (McKenzie and Sterns) would be potential haulers. Addressing the Board, he stated that one potential hauler was in a court case similar to this appeal. Continuing, Mr. Cummings stated that if this (spreading septage) was a great way to farm why did...Chairman Nelson interrupted Mr. Cummings...Mr. Cummings finished his sentence stating that he did not understand it. Mr. Cummings stated that there were two sections of wetlands on the property. Continuing, he explained the water flow through and around the property...Chairman Nelson stopped Mr. Cummings and stated the Zoning Board only wanted to hear about the farming. Mr. Cummings stated that it still was not clear where the hay would go and who would buy it. He relayed to the Board that numerous horse owners had told him they would not feed their horses hay grown with the proposed fertilizer.

Chairman Nelson addressed Mr. Kelley and asked for his rebuttal. He asked that he address all answers to the Chair. Mr. Kelley addressed the size and make-up of the land for the Zoning Board. Mr. Kelley addressed the meeting with Mr. Stone, stating that many things were said at the meeting, but they had nothing to do with the issue of farming.

As to the wetland on the property, it had been delineated by a wetland scientist. The soil had been tested by a soil scientist. Mr. Kelley told the Zoning Board there was more property available to hay than he proposed to do based on what he felt was a good way to farm. He could probably find as many people that felt it was a great way to farm. He thanked the Zoning Board.

Chairman Nelson addressed the Board members and asked if they had any questions. Mrs. Cassorla stated there were woods on the property that had not been filed with an intent to cut. Mr. Kelley stated that was correct. Mrs. Cassorla asked if they were waiting on the (Zoning Board) ruling to file an intent to cut and start the farming process. She then asked if Mr. Kelley was trying to get in for the 2015 season or the 2016 season. Mr. Kelley stated he would not be able to get anything in this (2015) season. Addressing the intent to cut, Mr. Kelley stated that process was on hold by the foresters (Mrs. Cassorla helped with the word) he had contacted. Mrs. Cassorla stated that NHDES required site plans, etc. for

everything proposed on the land. She asked if Mr. Kelley had started that. He stated he was ready to go except for the Zoning Board's decision (everything was on hold since the administrative decision).

The Chair acknowledged Mrs. Beth Pitkin. She submitted a topographical map to the Zoning Board to illustrate the land that was under question. Chairman Nelson thanked Mrs. Pitkin.

Mr. Puffer addressed the Chair and stated that if there was any concern of wetlands, the state would make sure that nothing would be compromised. He explained.

Chairman Nelson addressed Mr. Kelley and stated he wanted to clarify that Mr. Kelley would be putting tanks on the property and filtering/treating the septage onsite. Mr. Puffer stated that was correct.

Chairman Nelson asked the Board for further questions. Mr. McCoy asked who had oversight to what would be spread. He briefly repeated the processing given, then asked who was the oversight and what was the enforcement mechanism to ensure what he (Mr. Kelley) met the NHDES criteria.

Mr. Kelley stated that the individual who would oversee his process would be Mr. Tim Sweat, a field agent from NHDES. Mr. Puffer stated that the NHDES would oversee the process and periodically inspect.

Mr. McCoy repeated that NHDES would be the overseers. He asked if Mr. Kelley would be sending periodic reports, or if the NHDES would take samples; he asked for an explanation. Mr. Kelley stated he believed he submitted reports on an annual basis. In addition, Mr. Kelley would submit soil samples twice a year. The soil samples would go to the UNH Cooperative Extension. Mr. Kelley stated that the level of lime was calculated differently on a yearly basis. It was based on the needs of the crop.

Mrs. Beth Pitkin addressed the Chair and asked who took the soil samples, what entity? Mr. Kelley stated he did not know if NHDES took the samples. He knew that he was required to take samples and send them in. Mrs. Pitkin stated that they had heard many different things and they were not sure exactly what the plan was, what was going to happen, whether the farm would ever materialize. She stated they did know he would earn money from "charging the going rate" for septage. She stated they had no other definitive ansewrs. She thanked the Chair.

Chairman Nelson addressed Ms. Magnuson. She had no comments.

Chairman Nelson closed the hearing and stated the Zoning Board would recess to confer with legal counsel. They would return shortly. Chairman Nelson recessed the appeal hearing at 8 PM.

Chairman Nelson reopened the ZBA appeal hearing at 8:16 PM.

Chairman Nelson asked for a motion from the Zoning Board of Adjustment. Mr. Kessler made a motion, seconded by Mrs. Cassorla; ***to uphold the administrative decision of Ms. Magnuson made on April 16, 2015.*** Chairman Nelson asked for discussion.

Mr. Kessler stated that the key thing that swayed him in his decision was the fact that Mr. Kelley had no knowledge of the type of seeds he needed for haying. That should be a primary consideration going into the activity (of farming).

Mrs. Cassorla stated there was intent for a farm, but a farm didn't exist (right now). The farm entity (LLC) created alongside the septic entity lent her to believe that the farming was a secondary thing to septage hauling.

Mr. McCoy stated that the situation was the direct connection between the hauling business and the growing of hay. He thought the Zoning Board was seeing evidence that they were not connected; they were two separate businesses, one buying from the other (in which case it would be an acceptable use and

not a commercial activity). Addressing the Chair he explained his supposition. Continuing, Mr. McCoy stated that Mr. Kelley might learn how to grow hay.

Mr. Lain addressed the Chair and asked if he could give his opinion. Chairman Nelson agreed. Mr. Lain stated Mr. Kelley didn't have a farm. The Zoning Board was assembled (on 06.18.15) to determine whether it was a commercial business or a farm. Mr. Kelley didn't have a farm yet. Mr. Lain stated it was commercial; who was to say that there ever would be a farm. The Zoning Board could not decide on something that might be done.

Chairman Nelson stated that if it was an existing farm, it would go straight to NHDES and not go to ZBA. What the Zoning Board was determining was whether Ms. Magnuson was correct in that the farm plan was incidental. Chairman Nelson explained that the ZBA does deny proposals that don't exist (He gave examples of proposals brought before the ZBA in the past). He explained to Mr. Kelley that applicants come to the Board with detailed plans and knowledge of their product and/or business. He explained the reasons for the questions he had asked at the appeal hearing. He explained that he had not seen or heard knowledgeable information on the farming aspect Mr. Kelley presented. There were no maps or details of what would be done onsite. Continuing, he explained it was one thing to bring in fertilizer and spread it; it was different to process the septage (fertilizer) onsite. He knew that the process was an allowed use for an existing farm subject to NHDES regulations (who had stringent hurdles).

Ms. Saccento stated she was not convinced that the concept of having a farm (growing hay) existed before he was doing his septic business. Mr. Kelley realized that it would be beneficial for his business. Ms. Saccento stated there was a lot of 'he said/she said' testimony; but it sounded as though the businesses and planning were scrambled together. From listening to the appellants, she did not feel as though the farming was an actual business. Ms. Saccento listed her reasons and conclusion that the (Kelley) presentation lent itself to illustrate how using septage would be beneficial to the septage hauling business.

Chairman Nelson addressed the Zoning Board members and called for a vote. Chairman Nelson reiterated the motion before the Zoning Board: ***to uphold the administrative decision of Ms. Magnuson made on April 16, 2015.***

Chairman Nelson called for a roll call vote.

Mrs. Cassorla: **yes**

Mr. Lain: **yes**

Ms. Saccento: **yes**

Mr. Kessler: **yes**

Chairman Nelson: **yes**

Chairman Nelson stated that the Zoning Board of Adjustment vote was to uphold the administrative decision made by Ms. Magnuson on April 16, 2015.

Chairman Nelson asked if there was any further business on 06.18.15. There being none, on a motion by Mr. Kessler, seconded by Mrs. Cassorla; ***the Board unanimously voted to adjourn at 8:35 PM.***

Respectfully submitted,

Maura Stetson
Recording Secretary