

**Rochester Zoning Board of Appeals
Business Meeting Minutes
July 13, 2023**

Board Members Present:

Thomas Flynn, Richard Cutler, Davis Sullivan, Donald Spirlet, Jeffrey Costa

7:08 Meeting Called to Order by Vice Chair Thomas Flynn

Minutes:

- Motion to approve Business meeting Minutes of June 8, 2023, made by Richard Cutler and seconded by Donald Spirlet. Motion passed 4-0 with one (1) abstention (Costa).
- Motion to approve Public Hearing Minutes for #1193 of June 8, 2023, made by Richard Cutler and seconded by Donald Spirlet. Motion passed 4-0 with one (1) abstention (Costa).

Old Business:

- By-Law Review Committee: Requested by Chairman Arancio to remain on Agenda under Old Business until further notice.

Motion to recess until 7:15pm made by Richard Cutler and seconded by Jeffrey Costa. Motion passed 5-0.

**Rochester Zoning Board of Appeals
Public Hearing Minutes
July 13, 2023**

Members Present:

Thomas Flynn, Richard Cutler, Davis Sullivan, Donald Spirlet, Jeffrey Costa, Michelle Upton

7:15 Meeting Called to Order by Vice Chair Thomas Flynn

#1194

Vice Chair Flynn began by reading the petition aloud.

Robert and Christine Murphy for property located at 19 County Road, identified on Assessor's Map 10, Lot 3A, appealing a Notice of Violation/Cease and Desist order issued by the Town of Rochester Building Commissioner on April 25, 2023, for the operation of a trucking business with stockpiles of construction materials on the property in violation of the Rochester Zoning By-Law.

Vice Chair Flynn continued by reading the abutters list. The following abutters were present at the meeting:

- ❖ Kevin & Amy Bennett; 9 County Rd, Rochester
- ❖ Todd & Erin Zell; 2 & 4 Edwards Bridge Rd, Marion
- ❖ Sirjana Parajuli; 4 Teel St, Marion

Once the list of abutters was read, the meeting began with Attorney Chris Heep, Special Counsel for the Town of Rochester, summarizing the situation regarding the appeal before the ZBA. He began by explaining that on April 10, 2023, the Building Commissioner/Zoning Enforcer Paul Boucher, sent the first Notice of Violation/Cease and Desist to the appellants, however, the letter was returned to the office as undeliverable due to an apparent issue with their mailing address. A second Notice of Violation was mailed on April 25, 2023. The appeal of the Order was allowed for under M.G.L. Chapter 40A. He explained that the statute, under M.G.L. Chapter 40A, §15, requires that the appeal be taken within 30 days of the issuance of the Order. The date that the Order was issued for the second time was April 25th and so the 30-day appeals period concluded on Thursday, May 25, 2023. The appeal was sent by mail and email to the Town Clerk on Friday, May 26, a date that the Clerk's Office was closed, and was not received by the Town Clerk until Tuesday, May 30, 2023. Based on this information, the appeal came in after the 30-day filing deadline and the appeal is therefore no longer under the legal jurisdiction of the ZBA to hear on the merits. He suggested the best course of action would be to deny the appeal based on untimely filing.

Associate Member, Jeffrey Costa, asked if the statute pertains to business days or calendar days to which Attorney Heep stated it was calendar days. Member Richard Cutler asked Attorney Heep if the ZBA is unable to legally hear the appeal, what recourse do the appellants have? Attorney Heep said that the appellants may then appeal the ZBA's decision to the Superior Court or Land Court and argue that the Board incorrectly found the appeal was filed late. If they do not appeal the Board's decision, then the determination of the Building Commissioner would become final, and they either must comply with the Cease-and-Desist order or be subject to further zoning enforcement.

The appellants representative, Attorney Jordan Rodrigues, was asked to explain the issues regarding the untimely filing of the appeal but not the merits of the appeal itself. He began by stating he was in possession of only one of the two notices that were sent out and that one of the issues is the date of the notice and the date it was received. The notice the appellants have is dated April 10th but according to the tracking number, it was brought to the post office on the April 25th and his client signed for it on April 27th. Attorney Rodrigues stated that once his office was aware of the Order, they contacted the Building Commissioner Paul Boucher to advise him that the appeal would be filed, and a confirmation email was sent which stated that the appeal would be in by May 27th. A copy of this email was given to each ZBA member. The initial appeal was mailed on May 26th, stated Attorney Rodrigues. He continued by stating that May 27th was a Saturday, and that Monday was Memorial Day, which is a legal holiday. In his opinion, he felt that the appellant had until Tuesday, May 30th of 2023, which Special Counsel confirmed was when it was received and stamped by the Town Clerk. He stated that his experience in litigation has shown that courts often recognize a 3-day grace period for mailings.

Vice Chair Flynn read the statute aloud and asked Attorney Rodrigues to restate his position of its interpretation. According to Attorney Rodrigues, if it was based on the date of the notice, which was April 10th then May 10th would be the end of the appeal period. This is why, he stated, his office contacted the Building Commissioner because the letter was not mailed until April 25th and his client did not receive it until April 27th. The question, again, was whether this was being based off the date of issuance or when his clients received the letter.

With no further questions from the Board to Attorney Rodrigues, Attorney Richard Manning, who represents several of the abutters, began by distributing a packet to each Board member. He specified that he represents, Scot Machos, Vincent Barboza and Jeannette Barboza of 15 County Rd., Kevin, and Amy Bennett of 9 County Rd., Sirjana Parajuli of 4 Teel St. in Marion and Todd and Erin Zell of 2 & 4 Edwards Bridge Rd, also in Marion. He read the statute and explained that not only must the appeal be made within 30 days, but the appeal must be time stamped by the Town Clerk and then served to the ZBA and the Zoning Enforcement Officer, Paul Boucher. He disagreed with Attorney Rodrigues contention regarding the date of the Order. The original Order was issued on the 10th of April, but the appellants didn't receive it. Paul Boucher then reissued the Order, and it was mailed to their P.O. Box on April 25th, which Mr. Manning asserts is the operative date. He disagreed with Attorney Rodrigues about the so-called grace period for mailings. The appellants attorney should have brought the appeal immediately to be certified by the Town Clerk. He reiterated that the courts are strict about these appeal periods. Strict interpretation of the by-law shows that the appeal should have been certified by the Town Clerk

and served to within 30 days or it is legally no longer the jurisdiction of the Zoning Board of Appeals to hear the appeal. Attorney Manning concluded his argument.

Vice Chair Flynn asked if there was anyone who wished to speak on the matter at hand. Christina Murphy, the appellant of 19 County Rd, stated they receive their mail in W. Wareham. She stated that the town is aware of this. Robert Murphy, of 19 County Rd, stated he received a notice in his mailbox when he wasn't home to sign for the letter. Paul Boucher, Building Commissioner, stated that the address that he used came from the Assessor's property record card so the appellants may have to change that if it is a problem. Associate member Michelle Upton questioned whether this information was relevant or not, as the appellant still did not appeal within the time frame from the second notice, which they did receive and sign for. Vice Chair Flynn agreed and asked the Building Commissioner about the email that the appellant's attorney had sent to him to which he stated he did not remember seeing the email, but he remembered having a phone conversation with the Mr. Rodrigues. Vice Chair Flynn asked Special Counsel Heep if the Building Commissioner could extend the appeals period. Mr. Heep stated that no one had that ability. Chapter 40A is clear and strict.

Attorney Rodrigues stated there are set time requirements for appeals and that extensions can be made but hasn't found anything specific to what the Zoning Enforcement Officer can do by way of extending time frames. Attorney Manning stated that this was poor interpretation. There are specific references about extensions of time and that is provided for in chapter 40A for those conditions. ZBA member Sullivan questioned Attorney Rodrigues about the email sent to the Building Commissioner where there was a clear discrepancy and it was determined that the email was poorly written, which led to more confusion. Michelle Upton questioned Attorney Rodrigues about his earlier testimony where he stated that he called the Building Commissioner when the Order was received to ask if the date on the Order or the date it was received would be counted as the first day. He had stated that they were prepared to file immediately if the time frame began on April 10th which is the date the Order was issued. The appellant's confirmed with the Building Commissioner that the date the Order was received counted as the first day, however, they still did not get the appeal in on time. Attorney Rodrigues stated that it took time to write up a proper appeal and obtain all the proper evidence in defense of his clients. He elaborated but began speaking on the appeal itself. Attorney Manning interrupted and asked how it was relevant to the appeal not having been certified in time. Vice Chair Flynn agreed and asked Special Counsel if an appeal can be submitted with additional information being added and presented later during the hearing. Attorney Heep stated that this happens all the time, but the initial filing is supposed to give notice to the Town and the Board. Attorney Manning asked the Building Commissioner if he had received a time stamped copy? Paul Boucher stated he did not receive a time-stamped copy.

Richard Cutler made a motion to end public comment which was seconded by Donald Spirlet. Michelle Upton, having noticed Robert Murphy wanted to speak, asked if it was possible to hear him. Richard Cutler retracted his motion. Vice Chair Flynn asked the appellant's if there was something they would like to say regarding the Building Commissioner not having received a time stamped copy. Attorney Rodrigues stated the statute just states "forthwith" but confirmed that he did not serve a time stamped copy.

Richard Cutler again made a motion to close public comment which was seconded by Donald Spirlet. The motion passed unanimously, 6-0.

The Board deliberated for a short time. It was determined that the appellants did not file in a timely manner as the appellant's themselves admitted that they hadn't served a time stamped copy, which is part of the appeals process. If the statute was being interpreted loosely, the appellant's situation would be understandable, however, the statute should be strictly interpreted. The Board discussed the appellant's possible recourse should the Board deny their appeal. The Board decided that following Special Counsel's advice would be the best course for the ZBA.

Richard Cutler made a motion that the ZBA deny the appeal on the basis that it lacks jurisdiction because the appeal was not timely filed according to Chapter 40A, Section 15. This was seconded by Donald Spirlet. Richard Cutler stated he was comfortable that the appellants did still have another recourse if denied. Vice Chair Flynn to clarify, stated that a "yes" vote would be in favor of denying the appeal.

MOTION: That the ZBA deny the appeal on the basis that it lacks jurisdiction because the appeal was not timely filed in accordance with M.G.L. c.40A, §15.

Voting Members:

Thomas Flynn, Richard Cutler, Davis Sullivan, Donald Spirlet, Jeffrey Costa

VOTE: 5 in Favor 0 Opposed

The appeal is thereby deemed denied.

Richard Cutler made a motion to adjourn the meeting which was seconded by Jeffrey Costa. Motion passed unanimously. Meeting adjourned at 8:19 pm.