FINAL

Town of Henniker
Zoning Board Meeting
August 10, 2016
Henniker Community Center

Members Present:	Doreen Connor, Chair; Leon Parker; Robert Stamps Robert Pagano, Alt.
Members Excused:	Joan Oliveira; Gigi Laberge
Town Planner:	Mark Fougere
Guests:	Steve Bennett; Spencer Bennett; Linda McGuire; Atty. Mark Puffer; Ruth Ward; Atty. Jason Reimers; Steve Forster; Catherine Whalen; Tia Hooper; Lori Marko; Bill Marko; Danny Teage: Arnie Huftalen: John Kjellman; Kris Blomback; Kathleen Labonte; Bruce Trivellini, ,
Recording Secretary:	Karen Rose

1) Call to Order/Attendance

Chairman Connor called the meeting to order at 7:00pm.

2) Public Meeting

Motion for Rehearing-- Petitioner Stephen E. Forster request for a rehearing relative to the Board's decision on Case 2016:04: Appeal from an Administrative Decision, Planning Board approving Steve Forester's Site Plan for hosting wedding events at 347 Mount Hunger Road, because the proposed use was not ancillary or accessory to principal use; Applicant Stephen Bennett (Map 1 Lots 723, 723-A, 723-B) & others, Map 1 Lot 727,347 Mount Hunger Road, Zoned RR held on June 15, 2016. At the June meeting, the ZBA decided that there had not been a material change of circumstances between this application and that affirmed by the Court. Therefore, the finality doctrine should have precluded the Planning Board from accepting the case. The Planning Board's decision to approve a site plan on the subject site was overruled.

Chairman Connor presented a brief statement. She stated that both attorneys were informed the Board was missing one member and both agreed to proceed with the hearing. Ms. Connor informed the audience that - no testimony from the floor will be taken because the Board is acting on a Motion to Reconsider, which is open to the public, but is not a public hearing. The Applicant's Motion asserts the Zoning Board erroneously applied the finality doctrine. Ms. Connor asked both attorneys to provide brief statements from their legal memos for the benefit of the audience. Chairman Connor advised the audience that Board members have not answered questions from the press because it would be inappropriate for members to take a public position. She thanked the members of the board who volunteer their time. This application has presented a number of difficult legal issues and the Board understands that one side is going to leave the hearing unhappy. The Board will do its best to apply the ordinances of the Town.

Atty. Reimers spoke on behalf of Mr. Forster. At issue was whether there was a material change in the local laws. The board vacated a decision by the planning board based on the finality doctrine because it concluded there had been no material change. Atty. Reimer argued that conclusion was incorrect. He stated that prior to 2016, Henniker zoning did not mention agritourism in its definitions. Now there are two definitions of agritourism; one that allows on farm weddings and another that allows for gatherings, celebrations etc. Also the zoning ordinance allows the planning board to issue conditional use permits. These changes are material.

Atty. Reimers argued the planning board's use of the word accessory in its ordinance is different than that applied by the zoning board. It says uses ARE and not IF ancillary and accessory in the plain reading of the sentence. The planning board's definition is a closed list of uses as long as the principal use is agriculture. An applicant shouldn't be required to prove a use is ancillary which has already been listed by the planning board because it causes redundancy. The planning board drafted the definition and the voters voted. He stated that the definition deems the six uses to be ancillary and accessory as long as there is a principal use. He stated that the court cases submitted in their motion support that a change in the zoning laws that result in an applicant potentially receiving a change in outcome results in a material change.

Finally, Atty. Reimers stated that the planning board minutes show the planning board did not spend time on whether gatherings and celebrations are incidental to a tree farm because the definition already provided for this. The definition of agritourism already notes weddings as an accessory use. The planning board properly applied the statute which should be upheld.

Atty. Puffer spoke on behalf of his clients, the Bennetts who are abutters to the Forster property. He noted that at the outset Mr. Forster does not allege there is any new evidence but rather a technical error in applying Fisher v. Dover. On June 15th, the board found no material change in circumstances from the 2013 determination he challenged. Mr. Forster claims that the Henniker zoning ordinance defines all agritourism uses to be ancillary and accessory to existing farming uses. If that had been the intent of the planning board, there would have been no need for the Board to include the terms ancillary and accessory when describing agritourism. All they had to say was agritourism is agriculture, then all agritourism uses should be allowed.

He further argued that the phrase principal use and ancillary are opposites and there cannot be an ancillary use if there is not a principal use. When accessory use outstrips the principal use, as in this case, then it is no longer a principal use. Could someone have a vegetable garden, call it agriculture use and then agritourism would be allowed? Attorney Puffer compared the state definition to the town's ordinance.

Atty. Puffer asserted that Mr. Forster is applying for the same use that he did in 2013. This case has been tried and it's over. Atty. Puffer asked the Board to deny this request for rehearing because (1) the ordinance still states that agritourism must be ancillary and accessory and (2) this issue was previously litigated, therefore, the finality doctrine applies.

Atty. Reimers stated that he is not arguing all agritourism is allowed only those uses listed in the amended ordinance.

Board deliberations.

Chairman Connor was asked to describe the procedural options before the Board. She stated that if the Board reconsiders their June decision a second hearing on the merits would be scheduled. If the Board decides to deny the request, then the parties will likely litigate their dispute in Court.

The Chair stated the Motion for reconsideration asserts the agritourism definition in the planning board ordinance expressly finds uses A through F to be deemed ancillary and accessory. If that had been the intent of the ordinance amendment a period could have been placed after the word purposes. The ordinance would then define "AGRITOURISM" as "Attracting visitors to a working farm for one or more of the following purposes" as opposed to "Attracting visitors to a working farm for one or more of the following purposes that are ancilliary and Accessory to the principle Agriculture operation." If the listed uses are deemed to be ancillary and accessory under all circumstances, there would have been no need to add the terms accessory, ancillary and principle. She noted the Board must interpret the ordinance as a whole. She also questioned why the terms "Accessory" and "Agriculture" were capitalized? What does that infer? Doesn't that mean agritourism still requires a finding of accessory use? She stated she was not convinced the Board had erred.

Mr. Pagano stated that the spirit of the ordinance was to allow Mr. Forster the use he wanted. Chair Connor noted that there was no period after a sentence and that two words following it were capitalized making them terms of art which rendered a different meaning to the ordinance than the plain language. Mr. Pagano asked: What's more binding; the spirit or the punctuation placement? In response to Mr. Pagano's comments that the Board must act to fulfill the spirit of the ordinance Chairman Connor observed that the spirit of the ordinance has different meanings to everyone which is why we are grappling with the words. The Board must apply the words of the ordinance because we cannot determine the intent of each voter.

Mr. Stamps stated that if the spirit was to allow the use, then the terms would not have been added into the ordinance.

Mr. Parker said he wished more care was taken in the wording in the warrant articles.

Mr. Pagano said Att. Puffer's statement that if the Warrant Article was interpreted in favor of Mr. Forster then anyone could have a Woodstock type event is ridiculous. He stated that this type of function would not get by any of the boards. It is not the spirit of it at all.

Chairman Connor stated the Board was being asked to decide whether the amended agritourism definition still requires a finding of accessory use, which is in the definition and capitalized. If the Board concludes the wedding use must be accessory and ancillary to the principle tree farming activity the finality rule applies. Atty. Reimers believes that there is no requirement that the wedding use be accessory to farming as the amended definition deems it to be accessory.

Mr. Stamps said if there wasn't a requirement why would the planning board ask about subordinate use? Since they asked the question, they believe the ordinance still said it had to be subordinate use.

Chairman Connor stated she believes the Motion to reconsider asks the Board to apply only part of the definition as opposed to the whole definition. Atty. Reimers asserts his client couldn't hold a Woodstock event, because that gathering though deemed accessory would be a use that is greater than the principal tree farming use. Mr. Parker said not necessarily if it was held one day and the Christmas Tree farm the remaining days as was the argument to the planning board. Chairman Connor stated the ordinance limit on section F's Woodstock event still requires a principle Agriculture use and the Event must still be Accessory and ancillary.

Atty. Puffer was allowed to reply to the response submitted by Atty. Reimers the day before which he had not seen. He stated that if Atty. Reimers is going to concede the farming operation must be principal, then he has to concede that agritourism is ancillary and accessory; one gives meaning to the other. The finality doctrine still applies.

Mr. Stamps stated he didn't believe the basic situation between the Board's 2013 decision and today had changed as the ordinance still requires that the agritourism use be ancillary and accessory and thus, the finality doctrine applies.

A motion was made by Mr. Stamps to deny the request for reconsideration. Chairman Connor seconded; Motion passed 3 (Stamps, Connor, Parker) -1 (Pagano).

3) Approval of Minutes – June 15, 2016

A motion was made by Chair Connor to accept the minutes as amended. Mr. Stamps seconded. Motion passed 4-0.

Mr. Bruce Trivellini asked the chair to make a comment for the record as to why it took over 10 minutes to amend the minutes.

4) Adjournment

A motion was made to adjourn the meeting at 8:00 pm by Mr. Parker. Mr. Stamps seconded. Motion passed 4-0