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VIA E-MAIL

Town of Barrington
Zoning Board of Adjustment
PO Box 660
333 Calef Highway
Barrington, NH 03825

Re: Stephen Jeffery Appeal of Administrative Decision
128 France Road, Tax Map 256, Lot 43

Dear Board Members:

This office represents Barrington Code Enforcement Officer John Huckins in the above matter. Mr. Huckins issued a Notice of Violation to Stephen Jeffrey on September 29, 2014, based on Mr. Jeffery's nonresidential use of his property at 128 France Road ("the property") without site plan approval. Mr. Jeffrey's appeal of Mr. Huckins's decision is without factual or legal basis and should be denied.

As an initial matter, it is important to emphasize that the town does *not* claim that the property cannot be used for forestry purposes, to include cutting logs and selling the resulting boards: the forestry use itself is permitted. The Barrington Zoning Ordinance does not explicitly address forestry as a use. However, the legislature has enacted a statutory scheme to protect forestry and agricultural uses from unreasonable local regulation. Therefore, the use is allowed pursuant to the provisions of RSA 672:1, III-c; RSA 672:1, III-d; and RSA 674:32-a.[1] The legislature specifically provided that the statutorily permitted forestry and agricultural uses are not exempt from site plan review. RSA 674:32-c, II.

The issue in this case is whether site plan approval of the permitted use is required because the forestry use is a non-residential use. The town believes that Mr. Jeffrey's use of the property for the commercial production and sale of boards, beams and clapboards requires site plan approval. Mr. Jeffrey admits that he has been conducting the *business* on the property since 1983, and further that he has been bringing logs from other sources onto the property for processing and selling in addition to utilizing logs from trees cut on the property.

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[1]RSA 674:32-a provides that when agricultural activities, to include forestry, "are not explicitly addressed with respect to any zoning district or location, they shall be deemed to be permitted there, as either a primary or accessory use," subject to certain regulatory requirements.

Article 3, Section 3.1.6 of the Barrington Zoning Ordinance ("zoning ordinance") provides that non-residential development is subject to the planning board's Site Plan Review Regulations. Mr. Jeffrey's business is a non-residential use and therefore site plan review is required. Mr. Jeffrey does not dispute that he has not obtained site plan approval, instead claiming that his use is not subject to the site plan review requirement. None of his arguments have merit.

Mr. Jeffrey contends that his non-residential use of the property is not subject to site plan review because the forestry use does not constitute nonresidential "development" of the property as the term is used in Section 3.1.6 of the zoning ordinance. Article 18 defines "development" as including "[a] change in the intensity of use of land, such as...a material increase in the number of businesses[.]" Mr. Jeffrey's initiation of the commercial use constitutes a change from noncommercial to commercial, and thus constitutes "development" which requires site plan approval.

Mr. Jeffrey also asserts that the nonresidential use did not require site plan approval when it was initiated in 1983, and concludes that the use was therefore lawful when initiated and thus is a nonconforming use exempt from the current site plan review requirement. This argument is without merit. The site plan review regulations in effect in 1983 provided that the rules apply to "the review of nonresidential and multi-family dwelling units site plans[.]" Clearly, the rules apply to both nonresidential uses and multi-family dwelling unit uses, which is consistent with the statutory provisions in effect both then and now which authorize the planning board to regulate such uses through site plan approval. Mr. Jeffrey interprets the language as providing that site plan approval is only required when a building is to be constructed. Nothing in the language supports this notion; the language does not even mention a building in the context of a nonresidential use. Mr. Jeffrey's interpretation would exclude from site plan review excavations, parking lots, and a host of other nonresidential uses that can be made without constructing a building. His assertion has no merit.

The property is not exempt from site plan review because the forestry use is accessory to Mr. Jeffrey's primary residential use of the property. Neither the zoning ordinance nor the site plan review regulations exempt non-residential accessory uses from site plan review. In addition, Mr. Jeffrey appears to be conducting his business on two lots: the subject lot identified as Tax Map 256, Lot 43, and the abutting 2.64 acre lot identified as Tax Map 256, Lot 42. Lot 42 does not contain a residential use; the business use is the primary use. Mr. Jeffrey failed to obtain site plan approval for the non-residential use on either lot. Mr. Huckins only issued the enforcement letter on Lot 43; the unlawful use on Lot 42 will be addressed at an appropriate time and manner.

Mr. Jeffrey appears to assert a claim that the town is equitably estopped from enforcing its zoning ordinance because he has been operating in violation of the ordinance for over thirty years. The passage of time does not legalize his violation. The law does not favor estoppel against municipalities, especially the enforcement of its ordinances. *Turco v. Barnstead*, 136 N.H. 256 (1992). Mr. Jeffrey would have to show more than that the town has been historically lax in enforcing its zoning ordinance, he would have to establish that the town consciously and intentional discriminated against him in enforcing the ordinance; no such facts exist. *See Alexander v. Hampstead*, 129 N.H. 278 (1987).

Mr. Jeffrey has failed to meet his burden of establishing that he is not required to obtain site plan approval for the nonresidential use of his property. His appeal should be dismissed and the Notice of Violation affirmed.

Sincerely,

Judith E. Whitelaw
jae@mitchellmunigroup.com

cc: John Huckins, CEO
John Scruton, Town Administrator
Justin L. Pasay, Esquire
(All via email only)