Appeal Hearing

Day and Janet Showers Patterson

February 26, 2020

*To consider an appeal submitted by Day and Janet Patterson pertaining to a ruling by the Zoning Administrator regarding the limbing of a tree in the Shoreland Protection District.*

**Warnings** were posted on December 23, 2020 at the Greensboro Town Hall, the Greensboro Post Office, the Greensboro Bend Post Office, and Willey's and Smith's Stores. The warning was sent to the applicants on December 23, 2020. This hearing was postponed.

The warning for the rescheduled hearing was posted at the same five public places on Friday, January 31, 2020. It was also sent to the applicants on Friday, January 31, 2020. It was published in the Hardwick Gazette on Wednesday, February 5, 2020.

**Development Review Board members present**: BJ Gray, MacNeil, Linda Romans, Nat Smith, Jane Woodruff, Lee Wright, Wayne Young, Janet Travers (alternate) and Mike Metcalf (alternate),

**Development Review Board members absent:** none

**Others present**: Day and Janet Patterson (by phone), Rob Brigham, Peter Romans and Audrey DeProspero, Zoning Administrator

**During the course of the hearing the following exhibits were submitted:**

Town #1 copy of the certified letter sent to Mr. & Ms. Patterson about the violation

Patterson #1 colored photo of the tree in question before the limbs were cut and relative to the boathouse, the dock, and the boat racks on the dock

Patterson #2 Various pictures from the three ring binder which were referenced in Mr. and Ms. Patterson’s testimony. (Mr. Brigham brought the binder to the hearing.)

**Summary of Discussion**

Ms. Woodruff, chair, began the hearing at 7:06 PM. She noted the hearing is an appeal, and explained the procedure for the hearing. Ms. Woodruff asked Ms. DeProspero if she still felt Mr. Smith should recuse himself as she had previously requested. Ms. DePropero said she would still like him to do that because he was called as a witness in the Boester/Wright hearing in Environmental Court. After reading the transcript of the trial, Ms. DeProspero found that he testified about trees on the property. Ms. Woodruff then asked Mr. Smith if he felt he should recuse himself and he replied that he would like to wait until the Board went into deliberative session. Ms. Woodruff informed him that he would have to make the decision before the Board went into deliberative session. Mr. Smith then said he would not recuse himself and felt that he could be fair and impartial. Ms. Woodruff then asked Ms. DeProspero if she wanted her to recuse herself since she was also a witness at that trial. Ms. DeProspero answered that Ms. Woodruff’s name was not on the list of DRB witnesses she was given, so she does not feel that Ms. Woodruff needs to recuse herself. Ms. Gray and Ms. Travers added that they were related to Mr. Patterson by marriage (their husbands are Mr. Patterson’s cousins), but felt they could be fair and impartial and it would not affect their decision.

Ms. Woodruff asked the clerk to swear in everyone who would be speaking at the hearing.

Ms. Woodruff then asked Ms. DeProspero the basis of how the tree came to her attention and why she made the decision that cutting the limbs was in violation of the by-laws. Ms. DeProspero said an application had just come in for a nearby property (Think House LLC) and she was down in area to look at it. While she was in the area, she went to check Boester/Wright’s property since they had asked to cut a few tree and they were going to plant more trees. While she was there, she saw the tree in question which she thought was on the Boester/Wright property but then realized it was on the Patterson property. She emailed Mr. Patterson and asked him if he knew about a tree on his property that had some limbs cut. She received a reply from Mr. Patterson saying he had cut some limbs from a tree on his land. Ms. DeProspero then sent him a letter informing him the cutting was in violation of Town by-law 8.5. Ms. DeProspero received a letter from Mr. Patterson signed by Mr. Hill, who cuts trees for a living, saying the limbs in question appeared to be a danger as proof that the limbs he cut were dangerous. Upon questioning, Mr. Hill admitted he did not read the letter, although he signed it. He also stated Mr. Patterson cut the limbs.

Ms. Woodruff then asked for a copy of the violation letter Ms. DeProspero sent to Mr. Patterson and entered it as Town exhibit #1. Mr. Patterson agreed that it was the letter that was sent to him after hearing the date, address and certification number. Ms. DeProspero went on with her testimony, using by-law 8.5 which she said Mr. Patterson violated. She cited the fact that the limbs did not present a danger to people’s safety because the limbs that were cut were above a person’s height, there was no undergrowth around the tree, and the lost shade would harm the habitat that fish and other water creatures used. She did not think that Mr. Patterson proved the limbs were cut because they presented a danger. She felt the photographs Mr. Patterson sent did not show there was a danger from the limbs as the dock pieces beneath them were not being used and the photos were taken from the land and did not show the effect from the dock or water side.

In summary, Ms. DeProspero felt Mr. Patterson did not prove he cut the limbs because they posed a danger. In the letter Mr. Patterson stated that he was concerned about the danger the limbs posed. She felt being concerned was not a fact, but an opinion. The limbs that were cut were too high to pose a danger to people on the dock and were more than 1/3 of the way up the tree which the State regulations allow. She went on to say the last paragraph of his letter was hearsay. She felt that cutting the limbs opened the shoreline to sun and would damage the habitat of the lake creatures that may live there. She found no safety hazard posed by the limbs and Mr. Patterson did not prove there was one.

Ms. Woodruff asked each of the Board members if they had any questions of Audrey. One question was asked. Ms. Woodruff wanted to know why Ms. DeProspero didn’t think 8.6 applied to this situation. Ms. DeProspero replied that she responded to Mr. Patterson who said he cut the limbs because they were unsafe. (by-law 8.5) Ms. Woodruff stated that by-law 8.6 seems to say you can prune without a zoning permit. Ms. Woodruff asked if Mr. Patterson had any questions of Ms. DeProspero. He stated that in the letter Mr. Hill signed, he confirmed that the tree and its limbs posed a potential danger and could be trimmed without endangering the tree itself which seemed to be in good health. Ms. DeProspero rebutted that Mr. Hill stated that he did not read the letter so that statement cannot be relied on.

Ms. Woodruff then asked for Mr. Patterson’s testimony.

Mr. Patterson began by stating that in July of 2019, Mr. Mutrux had just completed a survey of their property and told them a good portion of the Boester/Wright dock was on the Patterson property. That made Mr. Patterson wonder if they would be liable if something happened and someone was injured on the part of the dock that is on his property. He talked to Mr. Hill on July 4 and they looked at the trees by the dock. He had Mr. Brigham present the Board with a picture of the dock and the uncut tree near it. (Patterson exhibit #1) Mr. Patterson also had Mr. Brigham show the Board another picture of the tree taken in the winter and other pictures of the tree from other angles. Mr. Hill told Mr. Patterson he should cut it, but Mr. Patterson didn’t because they were in mediation with the Boester/Wrights and didn’t want to antagonize them. Mr. Patterson did cut the limbs in mid-September because he thought the Boester/Wrights were gone for the winter and it wouldn’t upset them.

Mr. Patterson then addressed the letter Mr. Hill signed. Mr. Patterson said he took letter over to Mr. Hill and told him what it said before Mr. Hill signed it. Mr. Patterson agreed that Mr. Hill did not write it or read it, but he knew what was in it because Mr. Patterson told him what it was about.

Mr. Patterson asked Mr. Brigham to show the Board a picture of the Boester/Wrights on the floating portion of their dock, saying it showed that if either of them stood under the branches, they would hit their heads. Ms. Patterson said the issue with the branches was that they did not come out straight from where they attached to the tree. They hung down and some were sharp, not green and soft. Mr. Patterson continued by saying the limbs would not affect erosion on the shore because they were over the dock, not land. There are other trees near the tree from which the branches were cut and those branches will take the place of the branches that were cut. The pictures Mr. Patterson referenced in his testimony in tabs 3, 5, & 6 and the first page of tab 4 in the binder, were entered as Patterson exhibit #2.

The Board had no questions.

Summations:

Ms. Deprospero: The limbs that were already cut on the lower 1/3 of the tree were not in question. It was the limbs they cut above that that was in violation of the by-laws.

Fallen trees are supposed to be left in the water.

Runoff from rooftops is saved by the limbs of the trees.

Safety issues are subjective. She based her ruling on the information she had and was trying to save the lake and uphold the by-laws.

Mr. Patterson: Waived his right to a summation.

The hearing ended at 8:15 PM. The Board went into deliberative session at 8:21 PM and came back into public session to announce their decision at 9:00 PM.

**Findings of Fact:**

The appeal references bylaws 8.5 A - C and 8.6 A – C

**8.5 Removal of Unsafe Trees and Limbs in the Shoreland Buffer Resource Zone** (paraphrased)

A Trees, saplings, and limbs that threaten personal safety or structures or where removal is necessary for the maintenance of surrounding trees and shrubs may be removed.

B In any enforcement action, the burden of proof that the trees and limbs removed were unsafe shall be on the owner.

C Proof shall include: photographs showing the unsafe trees and limbs, written certification signed by a person with knowledge and experience in assessing tree health that the trees and limbs were unsafe.

**8.6 Clearing Limitations in the Shoreland Buffer Zone** (paraphrased)

A Within the Shoreland Buffer Resource Zone existing healthy trees, saplings, shrubs, and ground cover may be maintained and enhanced by selective cutting and pruning.

B Dead or dangerous trees may be removed without a permit. Stumps must be left in the ground.

C All cutting and removal shall be conducted so as to: prevent damage to surrounding trees, minimize damage to ground cover, prevent soil erosion to the lake and leave stumps

Based on the testimony heard, the Development Review Board makes the following findings and decision:

**Findings:**

* By-laws 8.5 and 8.6 are contradictory. If there’s any contradiction, the benefit goes to the landowner.
* Landowners have to make decisions about safety all the time.
* The Board needs to deal with local regulations, not State regulations.
* Under by-law 8.5 A, Mr. Patterson’s rationale about the safety of the people using the dock was credible.
* Under 8.5 B, A landowner has the right to say what is unsafe or dangerous, within reason.
* Although Mr. Patterson did not use by-law 8.6, the Board feels that by-law gives a landowner the ability to maintain and enhance trees, saplings, shrubs and ground cover by cutting, pruning, and removing excess brush.

**Decision**

Based upon these findings, the Development Review Board voted unanimously (7 – 0) to sustain Mr. Patterson’s action of cutting limbs from the cedar tree on his property and reverse the Zoning Administrator's decision that it violated the Town's by-laws.

(Alternates vote in the absence of Board members.)

Signed:

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, chair \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, clerk

Jane Woodruff Janet Travers

date\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ date \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**NOTICE:**

This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding (in person or in writing) before the Development Review Board. Such appeal must be made within 30 days of the date of this decision, pursuant to 24 V.S.A. #4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.