

**Kennebunkport Zoning Board of Appeals  
32 North Street, Village Fire Station  
December 12, 2016 @ 7:00 P.M.**

A meeting of the Kennebunkport Zoning Board of Appeals was held on Monday, December 12, 2016. The meeting convened at 7:00 p.m. in the North Street Fire Station.

Members Present: Mr. Wayne Fessenden (Acting Chair), Gordon Ayer, Jean Conaty, April Dufoe, Karen Schlegel

Others Present: Werner Gilliam, Town Planner

*1. Attendance*

The Zoning Board of Appeals members performed a roll call.

*2. Approval of any minutes not previously approved.*

For the May 18, 2015 minutes, Mr. Fessenden, Ms. Schlegel and Mr. Ayer have voting privileges. Ms. Schlegel made a motion to approve the minutes from the May 15, 2015 Zoning Board of Appeals meeting. Mr. Fessenden seconded the motion and the vote was unanimous.

For the December 14, 2015 meeting Mr. Ayer, Ms. Schlegel and Ms. Conaty have voting privileges. Ms. Schlegel made a motion to approve the minutes from the December 14, 2015 meeting. Ms. Conaty seconded the motion and the vote was unanimous.

*3. **Nancy Murray / Margaret Murray** - The Applicant is seeking approval for a home occupation, which would involve the preparation of baked goods. The Application is available for review in the Code Enforcement Office at the Kennebunkport Town Hall. The property location is 56 Abenaki Way, Tax Map 43, Block 001, Lot 05 in the Goose Rocks Zone.*

Mr. Fessenden introduced the Agenda item stating this Application was very thorough and noted the Applicant is Nancy Murray but the owner of the property for which the home occupation is being requested is Margaret Murray, Nancy's mother.

Ms. Nancy Murray addressed the Board and gave a brief summary of her Application stating she will be making baked goods at her mother's house for sale at other locations such as fairs and store fronts. Ms. Murray also stated she has been inspected and approved by the Board of Agriculture and received her Victualer's License.

Ms. Schlegel commented that the issue is if there are deed restrictions from the subdivision rules and asked if this could be classified as a business office.

Mr. Ayer questioned the validity of the homeowners amending their subdivision rules and covenants since those deed restrictions were approved by the Planning Board when the subdivision was first approved. Mr. Ayer also noted in reading the residential subdivision regulations there are deed restrictions on a variety of items, specifically barring a business enterprise within the subdivision. Ms. Murray responded the homeowner's subdivision regulations can be amended with the approval of any 10 signatures of the property owners. Ms. Murray added she has obtained the approval of all 13 homeowners thus amending items #17 and #7 of the deed restrictions.

Mr. Ayer expressed his opinion that a homeowner cannot waive a deed restriction imposed by the Planning Board.

In reference to Mr. Ayer's comment, Ms. Schlegel offered that the deed covenants are part of the (Site Plan) approval process and would be part of the standard deed restrictions. However, the Planning Board did not specifically impose any extra restrictions on the property, Ms. Schlegel added.

Mr. Ayer restated his opinion that an owner of a lot cannot waive a deed restriction imposed by the Planning Board.

Ms. Schlegel asked if the homeowners have taken a vote to amend their covenants doesn't that count? Mr. Ayer responded that it doesn't overrule the Planning Board's approval of those restrictions.

Ms. Murray argued that the homeowner's covenants state a change can be made with the approval of 10 signatures along with all of the required licenses and approvals.

Ms. Dufoe asked Mr. Gilliam if he had any issue with the homeowners agreeing to allow Ms. Murray this request? Mr. Gilliam replied, in his opinion this situation is typical of other homeowner's associations whereby they have the authority to amend their own covenants with the required number of signatures. Mr. Gilliam also added he does not believe there is any expectation that any amendments to the homeowner's association would require Planning Board approval.

Mr. Ayer disagreed with Mr. Gilliam's statements arguing that the Homeowner's Covenants do not say one can have a bakery but rather a professional office. Ms. Dufoe responded the Applicant isn't opening a bakery but rather she is baking items in the home and selling them elsewhere. Customers are not coming to the home, Ms. Dufoe added.

Mr. Ayer argued the definition of Home Occupation is very explicit, which states: "An occupation or profession which is customarily conducted on or in a residential structure or property and which is 1): clearly incidental to and compatible with the residential use of the property and surrounding residential uses; and 2): which employs no more than two (2) persons other than family members residing in the home."

Mr. Gilliam commented that the definition Mr. Ayer is referring to is tied more to the use; adding that the Board needs to decide if this activity is customarily carried on in the dwelling unit.

Mr. Ayer reiterated his point that the Zoning Board does not have the authority to amend a deed restriction.

Ms. Schlegel asked the Applicant if there will be delivery trucks coming to the premises. Ms. Murray replied she doesn't foresee the need for any deliveries or tractor trailers to be coming to the house.

Mr. Ayer cited Article 2.12 of the Land Use Ordinance which provides the definition of Home Occupation, adding it does not mention allowing a bakery. Ms. Murray argued she is not creating a bakery.

Referring to Article 7.6 of the Land Use Ordinance, Ms. Dufoe stated baking in the home and selling those goods elsewhere fits into the Land Use Ordinance's conditions of a Home Occupation.

Mr. Fessenden read a letter from Margaret Murray into the record, granting her daughter, Nancy Murray, permission to bake at her house. Mr. Fessenden asked since this letter is an informal agreement, who is the responsible party if there is an issue with the home occupation? Mr. Gilliam replied that "typically the property owner is responsible for what happens on the property".

The Board members were in unanimous agreement Margaret Murray's letter is sufficient evidence of Nancy Murray's authorization to use the premises.

Ms. Schlegel noted item #17 of the Indian Ridge Homeowners Association states the provisions can be amended by any lot owner with no less than 10 signatures, which the Applicant has acquired.

The Board members had a brief discussion on the interpretation of definitions of professional and business offices, and home occupation in accordance with the Land Use Ordinance.

Mr. Fessenden made a motion the Applicant meets the definition of Home Occupation in Article 7.6.A.1 in the Land Use Ordinance, which states: "Any home occupation or profession which is accessory to and compatible with a residential use may be permitted as a conditional use by the Board of Appeals provided that: 1) It is customarily carried on in a dwelling unit or in a structure customarily accessory to a dwelling unit." Ms. Dufoe seconded the motion. The motion passed with a vote of 4 to 1. Mr. Ayer opposed the motion.

Ms. Schlegel made a motion the Application is in accordance with Article 7.6.A.2 in the Land Use Ordinance, which states: "2) It is carried on primarily by a member or members of the family residing in the dwelling unit." Mr. Fessenden seconded the motion and the vote was unanimous.

Mr. Fessenden made a motion the Application complies with Article 7.6.A.3 of the Land Use Ordinance, which states: "3) It does not materially injure the character or usefulness of the dwelling unit or accessory structure for normal residential purposes." Ms. Conaty seconded the motion and the vote was unanimous.

Ms. Dufoe read all the conditions listed in Article 7.6.B.1 through 9 of the Land Use Ordinance. Mr. Fessenden made a motion the Applicant complies with all of the above read conditions. Ms. Schlegel seconded the motion and the vote was unanimous.

Mr. Fessenden asked the Board members if the Homeowner's Association Covenants did not include a clause that allows amendments would that change your opinion. Ms. Schlegel replied since no dimensions of the subdivision are being changed including lot lines, she does not view this as requiring Planning Board approval. Ms. Dufoe agreed with Mr. Gilliam's previous statements that the Planning Board would have placed a condition on the initial approval if they did not agree with the Homeowner's Association Covenants. Mr. Ayer disagreed with Ms. Schlegel and Ms. Dufoe's opinions adding it was a mistake on the Planning Board when this subdivision was first approved.

Mr. Fessenden noted it is an important component of this Application to have a copy of the Homeowner's Association documents that allows amendments to be made by the members of the homeowners' association.

Mr. Gilliam pointed out to the Board members that there are most likely a good number of homeowners' associations that have modified their own covenants that the town is not made aware of; adding the key distinction here is the difference between being presented to the Planning Board and being a part of the Application.

Ms. Dufoe made a motion that Item #17 of the Homeowner's Association restrictions grants the homeowners permission to change their deed restrictions to allow a home occupation. Ms. Schlegel amended Ms. Dufoe's motion to include the effective date of said amendment of January 2006. Ms. Schlegel seconded the motion. As further explanation, Mr. Fessenden noted the Zoning Board is using the amended Homeowner's Covenants of January 2006 to base their opinion on. The motion passed with a vote of 5-0 in favor of the motion.

Mr. Fessenden made a motion the Application of Nancy Murray is complete and the Zoning Board approves the Application for a home occupation. Ms. Schlegel seconded the motion and the vote was 5-0 in favor of the motion.

Mr. Ayer made a motion to authorize the Chairman to prepare a Findings of Fact on this approved Application and sign said Findings on behalf of the Zoning Board of Appeals. Ms. Schlegel seconded the motion and the vote was unanimous.

**Adjournment:** A motion was made to adjourn; it was seconded and the vote was unanimous.

**Submitted by:** Patricia Saunders, Recording Secretary