

City of Keene
New Hampshire

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES

Monday, July 06, 2015

6:30 PM

City Hall, Second Floor Committee Room

Board Members Present

Chair Louise Zerba
Nathaniel Stout
Jeff Stevens
Joseph Hoppock
David Curran
Steve Bragdon

Staff Present

Mr. Gary Schneider, Plans Examiner
Mr. Thomas Mullins, City Attorney

Board Members not present

Others Present

I. Introduction of Board Members

Chair Zerba called the meeting to order at 6:35 PM and introduced the Board members.

II. Minutes of the Previous Meeting: June 1, 2015

Mr. Curran made a motion to approve the meeting minutes of June 1, 2015. Mr. Hoppock seconded the motion which passes unanimously as amended. Mr. Stevens stated that the date should read June 1, 2015 at the top of the agenda. Chair Zerba stated that Louis should instead read Louis under Board Members. She continued, stating that under Staff Present it should read Gary Schneider instead of Schneider Schneider. Chair Zerba stated that on pg. 8 Tochtennan should instead read, Tochterman.

III. Unfinished business

None at this time

Hearings:

Continued ZBA 14-12/: Leah LaRock requests a variance for property located at 0 Daniels Hill Rd, which is located in the Rural Zone. The Petitioner is requesting to build and occupy a single family dwelling on a lot with 1.76 acres where a five (5) acre

minimum lot size is required per Table 102-791 Basic Zone Dimensional Requirements of the Zoning Code.

Mr. Hoppock recused himself from this variance request due to a conflict. Mr. Steve Bragdon sits in as an alternate for this petition. Attorney Hanna of 41 School Street, Keene, New Hampshire approached the Board and represents Leah LaRock. Mr. Hanna stated that this petition is a rehearing as opposed to a continued hearing. He continued, stating that the variance was previously denied and became involved with the case after this decision. Attorney Hanna stated that the petition was denied by a vote of 3-2. He continued, stating that he recognizes that some Board members may be aware of the petition.

Mr. Bragdon asked if this is a hearing with new testimony. Attorney Hanna replied, yes. He continued stating that the lot in question predates the minimum 5 acre lot size enactment. Attorney Hanna stated that he does not know of many municipalities that do not have a Lot Record Provision which deals with substandard lots predating ordinances. He continued, stating that Keene has a minimum width line. Attorney Hanna stated that in Keene any lot smaller than 5 acres requires a full variance and the Zoning Board of Adjustment has routinely granted these variances. He continued, stating that the night this variance was denied, a lot on Chapman Road was granted. Attorney Hanna stated that the lot in discussion has 1.76 acres with 212 feet of frontage. He continued, stating that it is not a contorted lot as seen in the map before the Board.

Attorney Hanna stated that the west line is 366 feet, the north line is 294 feet, the east line is 294 feet, and the south line is 212 feet. Attorney Hanna stated that all sides are roughly the size of a football field. He continued, stating that there is vegetation on all sides and the owner is willing to retain vegetation on the roadside. Attorney Hanna stated that the lot is relatively flat and the slopes are not steep until the abutting properties. He continued, stating that this is evident from photographs given to the Board members. Attorney Hanna stated that Mr. Tom Forest prepared a septic design and guarantees that the septic system will be approved. Attorney Hanna stated that Mr. Forest believes that lot is in excellent condition for a septic system. He continued, stating that the lot has no wetlands according to Mr. Forest. Attorney Hanna stated that Mr. Forest proposed a well with plenty of room on the lot.

Attorney Hanna stated that storm water runoff is why a site visit was necessary. He continued, stating that Mr. Rob Hitchcock submitted a letter as well providing expert testimony. Attorney Hanna stated that Mr. Warren Stevens would have also provided testimony but he could not be here due to retirement. He continued, stating that both Mr. Hitchcock and Mr. Stevens reached the same conclusion in that there is no runoff flowing onto the abutting site and there will not be any runoff with further development. Attorney Hanna stated that prior assertions about runoff were not valid. He continued, stating that both he and the Board members had the opportunity to meet the abutting owners, the Budds. Attorney Hanna stated that these abutters would like to have an additional berm on Woods

Road. He continued, stating that this property would then have a berm along the entire east line. This would include the natural berm as well. Attorney Hanna stated that these conditions have been written but does not include the berm over the first area because it is not necessary. He continued, stating that if the abutters want this additional berm, then they are willing to add it to the conditions.

Attorney Hanna stated that there will be no adverse impact on the Budd's property from this improvement. He continued, stating that Mrs. Budd's primary concern is the spring. Attorney Hanna stated that one Board member questioned if the level of the water varied and Mrs. Budd replied that it is constant. Attorney Hanna stated that this shows that the water level is not affected by rain and ground water.

Attorney Hanna discusses the Findings of Fact:

1. *Granting the variance would not be contrary to the public interest.*

Attorney Hanna stated that the underlying Zoning Ordinance allows single family housings units and the lot will therefore not alter the character of the neighborhood. He continued, stating that there are few homes in the area and the one to the east is also undersized at 2.5 acres. Attorney Hanna stated that the variance will not threaten any basic objectives of zoning including health, safety, and welfare.

2. *If the variance were granted, the spirit of the ordinance would be observed.*

Attorney Hanna stated that this is virtually identical to the previous objective and restates that the variance is consistent with all zoning ordinances.

3. *Granting the variance would do substantial justice.*

Attorney Hanna stated that this is a balancing test and if the loss to the owner is greater than any gain to the City then the balance will be granted to the landowner. He continued, stating that there is no particular gain to the public by denying the variance.

4. *If the variance were granted, the values of the surrounding properties would not be diminished.*

Attorney Hanna stated that the abutter's concern with this variance was storm water runoff. He continued, stating that this concern has been adequately addressed and it is a well-protected lot. Attorney Hanna stated that the only other property abutting this lot is a parking lot.

4. *Unnecessary Hardship:*

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.

Attorney Hanna stated that there is no fair or substantial relationship. He continued, stating that this is a special condition and was created by the taking and with conservation land across the road. Attorney Hanna stated that according to the abutting property owners, the Budds, this lot used to be a borrow pit used by the City several decades ago.

ii. The proposed use is a reasonable one.

Attorney Hanna stated that there is no reasonable use of the property other than housing. He continued, stating that it could be a parking lot but no one has made an offer and this would be less valuable.

Chair Zerba asked if other homes in the area are less than 5 acres. Attorney Hanna replied yes, one lot directly to the east. Attorney Hanna gave the Board a Proposed Conditions of Approval from Leah LaRock. This proposal focuses on installing a 6 inch to 1 foot berm near the Daniels Hill Road which will extend the existing berm and maintaining a vegetation buffer of approximately 20 feet. Chair Zerba asked about a possible culvert. Attorney Hanna stated that this is not under approval at the moment because it may not be the best alternative. He continued, stating that this should be discussed in further detail with Mr. Hitchcock. Attorney Hanna stated that vegetative buffer does not have to be opaque. He continued, stating that it would be protecting individuals going up and down the road. Attorney Hanna stated that the consistency will be about the same size of the vegetation now. The Board did not ask any questions.

Mr. Rob Hitchcock of SVE Associates approached the Board. Mr. Hitchcock stated that berms would be efficient and there are two options for culverts. He continued, stating that a culvert at the driveway entrance is one possibility allowing drainage from Daniels Hill Road stays there until dropped inlet. Mr. Hitchcock stated that the other option is letting the drainage come onto the driveway which can be shaped to allow runoff into the Route 9 drainage system. Chair Zerba stated that she is worried that if a culvert is not put into place it may go into Woods Road.

Mr. Bragdon asked about the size of the culvert. Mr. Hitchcock stated that it would be about 12 inches but would be up to Public Works. Attorney Hanna asked if there is a price difference. Mr. Hitchcock stated that it is more expensive to put the culvert in then warp the driveway. Chair Zerba asked who would determine if another culvert is needed. Mr. Hitchcock stated a site contractor will be educated enough to know what to do. Chair Zerba asked how the Board can be assured that this will be done appropriately without possible runoff. Mr. Hitchcock stated that the berms will take care of these worries. He continued, stating that a condition can be added allowing him to view the culvert afterward installation. Mr. Bragdon asked if the Highway Department needs to decide if a culvert is needed and if the driveway is already approved. Mr. Hitchcock stated that the driveway has not been approved yet. Mr. Bragdon stated that the

Highway Department would determine if a culvert was necessary but not the shape of the driveway. Mr. Hitchcock agreed and stated that the contractor would work it out with the Public Works Department.

Mr. Bragdon stated that the Board is concerned about who will deal with the water coming off the road and if either the culvert or the driveway is suitable it needs to be dealt with accordingly. Mr. Hitchcock stated that either alternative would work adequately or a condition can be made for him to review the finished product.

Ms. Nancy Budd of 15 Daniels Hill Road approached the Board. Ms. Budd stated that with the guarantee of installing a berm and controlling the runoff, there are no other concerns. She continued, stating that an additional home would increase the safety and so all concerns have been addressed. Mr. Curran stated that reviewing the spring in the area answered a lot of questions. Mr. Stevens stated that one berm is written in the conditions and wonders how this fits in with the additional berm. Attorney Hanna stated that the condition only includes one berm and suggested an additional condition be created to include an additional berm or add to the current conditions. He continued, stating that there will be two separate berms.

Chair Zerba closed the public hearing.

Chair Zerba went over the Findings of Fact:

1. *Granting the variance would not be contrary to the public interest.*

Mr. Stout stated that the Board has heard from the abutter and the site visit did not show any conditions against the public interest. Chair Zerba agreed that another residential lot is in conformance.

2. *If the variance were granted, the spirit of the ordinance would be observed.*

Mr. Stevens agreed that this is in relation to the first objective. Mr. Bragdon stated that it is a substantial variance but does not defeat it. Mr. Stout stated that the lot predated the zoning in the area.

3. *Granting the variance would do substantial justice.*

Chair Zerba agreed that substantial justice is done. Mr. Stevens agreed and that the lot would be worth very little without residential development. Mr. Bragdon reiterates that it was an existing lot.

4. *If the variance were granted, the values of the surrounding properties would not be diminished.*

Chair Zerba and Mr. Curran stated that this variance would not diminish properties. Mr. Stout stated that a great deal of effort went into the variance to ensure that surrounding properties would not be negatively affected.

5. *Unnecessary Hardship:*

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.

The Board agreed. Mr. Stevens stated that literal enforcement would not allow a house to be built. Mr. Stout stated that there is no difference to the neighborhood especially because a vegetative buffer has been addressed.

ii. The proposed use is a reasonable one.

Mr. Stout stated that there are proposed conditions with the motion and asked how to proceed. Mr. Bragdon asked if the driveway runoff should be discussed and addressed. He continued, stating that the berms would address this but there has been discussion whether additional precautions should be added. Chair Zerba asked who would be the appropriate City staff to ensure that drainage is appropriated. Mr. Schneider stated that the condition is slightly different which prevents water from the property flowing onto the street not vice versa. Chair Zerba stated concern about the runoff reaching the stream. Mr. Schneider stated that Mr. Hitchcock will be able to make a judgement when the development is finished. Chair Zerba asked if this would be at the expense of the property owner. Attorney Hanna replied, yes. Mr. Stevens stated that the berms will most likely be sufficient after seeing the property. Chair Zerba asked if something occurred would the abutter be able to contact the City. Mr. Schneider stated that the abutters could contact the City but outside services would then have to be hired.

Chair Zerba stated that she would like to make some kind of condition. Mr. Bragdon asked if Chair Zerba would like a condition stating that Mr. Hitchcock will verify the development plans of the property to ensure that additional runoff does not affect the abutting property to the east. Mr. Stout stated that he was under the impression that Mr. Hitchcock would go out to the site during and after construction. Mr. Bragdon stated that costs should be kept to a minimum and assuring plans are efficient should cover this.

Mr. Bragdon made a motion to approve ZBA 14-12 subject to the following conditions:

1. Prior to the granting of a building permit, the owner shall install a 6 inch to one foot berm across the first Woods Road near the Daniel Hills Road in addition to the Woods Road located northeasterly of the open area. The berm located in the northeastern area shall serve to extend the existing berm on the lot.
2. The owner maintains a vegetative buffer of approximately 20 feet along the road frontage westerly of the driveway. The buffer does not have to be opaque but shall have a density similar to the existing vegetation. This buffer may include new trees or the existing trees.
3. Mr. Robert Hitchcock of SVE Associates will verify the development of the property does not increase the runoff onto the abutting property to the East.

Mr. Curran seconded the motion.

On a unanimous vote the Zoning Board of Adjustment approve ZBA 14-12.

Mr. Joseph Hoppock returned to the Board for the remaining petitions, relieving Mr. Bragdon.

Continued ZBA 15-07/: Petitioner, Gene & Julie Garcia, of 98 Ridge St., Arlington, MA, requests a variance for property located at 0 Nims Rd., Keene, which is in the Rural Zone. The Petitioner requests the construction of a single family home on a 77.9 acre lot with no frontage on a Class VI or Class V road where 50 foot frontage is required per Table 102-791 Basic Zone Dimensional Requirements of the Zoning Code.

Mr. Schneider stated that the petitioners Gene and Julie Garcia are now living on Peg Shop Road in Keene, New Hampshire. Mr. Hoppock stated that jurisdiction was previously in question for this petition and the Board will be denying this variance because of jurisdiction. He continued, stating that the Board cannot act on this petition.

Mr. Hoppock made a motion that the Zoning Board of Adjustment lacks jurisdiction under RSA 674:41, III, to grant a variance to allow construction of a single family residence on a Class VI Road where the City Council prohibits the issuance of a building permit for a lot having frontage and access only on a Class VI Road, and the application for the variance is therefore denied. Mr. Stevens seconded the motion which carried unanimously.

Mr. Gene Garcia of 156 Peg Shop Road in Keene approached the Board. Mr. Garcia stated that under Title LXIV Planning and Zoning, Chapter 674:41, C allows building on a Class VI Highway provided that “ (1)The local governing body after review and comment by the planning board has voted to authorize the issuance of building permits for the erection of buildings on said Class VI highway or a portion thereof; and (2) The municipality neither assumes responsibility for maintenance of said Class VI highway nor liability for any damages resulting from the use thereof; and(3) Prior to the issuance of a building permit, the applicant shall produce evidence that notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds.”

Mr. Garcia stated that this section supersedes sub-section three allowing the municipality to have authority to issue a building permit on Class VI Roads. He continued, stating that the current version of the Driveway Permit Standard, Section 70-137, does not mention Class VI roads. He continued, stating that these facts provide evidence that the Board has the authority to consider this variance request.

Mr. Garcia stated that because the existing road is already in a good condition there will be minimal changes. Chair Zerba asked if the issue is that something should be requested in writing to the City Engineer who would then make a recommendation to City Council. Mr. Garcia replied, yes. He continued, stating that this is about a waiver to the Dead End Street Standard which is a separate issue to building on a Class VI Road. Mr. Garcia stated that if the Zoning Board of Adjustment gave permission to build on a Class VI Road, then he would approach the Planning Board and get permission to use the dead end road as a driveway. Chair Zerba asked if Mr. Garcia would have to approach the Planning Department before the Zoning Board of Adjustment.

Attorney Hanna approached the Board and stated that the discussion is not about building on a dead end street but a Class VI Highway. He continued, stating that nothing has changed since the 2000 policy. Attorney Hanna stated that this policy was given out in the previous hearing which states that “properties which have frontage and access only from a Class VI Highway shall not be eligible for building or driveway permits.” Attorney Hanna stated that nothing in the City Code has changed that provision; it is still a valid provision. He continued, stating that the dead end street issue deals with Class V highways and these must go through a process but this would not solve the issue at hand.

Mr. Garcia stated that the issue of Class VI Roads is not in the City Code. Attorney Mullins stated that it is not going to be in the City Code it is a policy of the City Council. Chair Zerba stated that it would have to go back to the City Council. Mr. Garcia asked if he can withdraw the application without prejudice. Attorney Hanna objected. Attorney Mullins stated that the Board does not have the jurisdiction or authority to act which is why the Board is denying the petition. Attorney Hanna stated that a Motion for Rehearing must be made and if that is denied, it would go to Superior Court. Attorney Hanna stated that the clock would be ticking with this due to the Board’s decision tonight.

ZBA 15-09/: Petitioner, Toby Tousley of Keene, NH, requests a variance for property located at 510 Washington St., Keene, which is in the Commerce Zone. The Petitioner requests to install electrically activated gas price sign per Section 102-1292 (b).

Mr. Schneider referred to a map in front of the Board showcasing the lot in discussion. Mr. Schneider stated that it is on 510 Washington Street past Woodbury Street. He continued, stating that there was once a pizza and ice-cream shop. Mr. Schneider stated that Mr. Tousley has gone through the proper protocol to receive a permit for the gas station but he wants a free standing

electronic sign similar to T-Bird Gas Station and Cumberland Farms. Mr. Schneider stated that there are conditions on the non-electronic signs concerning the size of the numbers which cannot exceed 9 inches. He continued, stating that the Board restricted other gas stations for allowing milk and other items to be shown on sale.

Mr. Toby Tousley of 499 Washington Street, Keene approached the Board. Mr. Tousley stated that there are signs similar to the one in discussion around Keene. He continued, stating that four out of the eight gas stations have electronic signs along with Granite Bank, Agway, and the Keene Middle School. Mr. Tousley stated that the sign would not be automated or animated. He continued, stating that he is allowed per zoning to have a sign of this size and lit but not electronic. Mr. Tousley stated that he is not asking to advertise any words but gas prices. Mr. Tousley stated that it is a static sign and this variance created before the common use of LED. Mr. Tousley stated that the intent of the Ordinance was to prevent animated flashing signs.

Mr. Schneider stated that the Keene Middle School is exempt from zoning. He continued, stating that there were complaints when it went up. Mr. Schneider stated that the Planning Department is looking into the Agway sign.

Mr. Schneider stated that Mr. Tousley is here specifically for an electronic messaging system. He continued, stating that the height and length of the sign have not been discussed. Mr. Hoppock stated that the petitioner has met all other requirements. Mr. Tousley stated that provided he keeps the sign within standard measurements it would meet requirements.

Chair Zerba went over the Findings of Fact:

1. *Granting the variance would not be contrary to the public interest.*

Mr. Stout stated that these electronic signs assist drivers with gas prices.

2. *If the variance were granted, the spirit of the ordinance would be observed.*

The Board agreed that the spirit of the ordinance is observed.

3. *Granting the variance would do substantial justice.*

The Board agreed that the variance would do substantial justice.

4. *If the variance were granted, the values of the surrounding properties would not be diminished.*

The Board agreed that the surrounding properties would not be diminished.

5. *Unnecessary Hardship:*

- A. *Owing to special conditions of the property that distinguish it from other properties in the*

area, denial of the variance would result in unnecessary hardship because:

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property.

Mr. Stevens stated that the signs would provide a safer alternative.

ii. The proposed use is a reasonable one.

Mr. Hoppock made a motion to approve ZBA 15-09 provided that the numbers do not exceed nine inches in height. Mr. Stevens seconded the motion.

By unanimous vote the Zoning Board of Adjustment approves ZBA 15-09.

IV. Non Public Session (if required)

V. New Business

Chair Zerba requested that Mr. Schneider put together a letter to both alternates, June Jones and John Norton for their many years of service. Chair Zerba stated that she would like to sign the letter thanking them.

VI. Adjournment

Chair Zerba adjourned the meeting at 8:00 PM.

Respectfully submitted by:

Lana C. Bluege, Minute-taker
July 6, 2015