

Zoning Board of Adjustment
December 18, 2006
Approved February 12, 2007

Members Present: Thomas Vannatta (Chair); Betsy Soper (Vice Chair); Elizabeth Ashworth; Katheryn Holmes; Helen Wright (Alternate).

Mr. Vannatta called the meeting to order at 7:15 p.m.

The Board reviewed the minutes of November 28, 2006.

Ms. Holmes made a motion to approve the minutes as submitted. Ms. Soper seconded the motion. All in favor.

ROGER HARDY, South Road

Mr. Vannatta informed the Board that he has received notice that Dennis Pavlicek, Town Administrator sent a message to Mr. Hardy from the Board of Selectmen dated December 7, 2006 that it appears there is site work in progress on his property on South Road. Since the application is still in Hearing process, all work must cease and desist. The cease and desist will be lifted when the Board of Selectmen receives notices of approval from the Zoning Board of Adjustment and the Planning Board.

Mr. Vannatta handed out copies of proposed zoning amendments and informed the Board that on January 10, 2007 at 7:00 p.m. the Planning Board will hold a public hearing for input on amendments. He asked that the Board members review the amendments and plan to attend the hearing to provide input.

Also, on January 11, 2007 at 7:00 p.m. there will be a Joint Board Meeting between the Zoning Board of Adjustment, Planning Board and Board of Selectmen.

Ms. Holmes mentioned that she would like to correct implications made at the November 6, 2007 Zoning Board of Adjustment meeting when Chalk Pond was referenced as not being a great pond. Chalk Pond is considered a Great Pond under the Shoreland Protection Act. Therefore, in order for any building to be done around the pond, the developer/building will need to receive a permit from D.E.S. Arlene Allen, Outreach Coordinator from D.E.S. for the Shoreland Protection Act, has a power point presentation on the Shoreland Protection Act that would be a great educational tool for the land use boards in Newbury.

Mrs. Soper suggested that Ms. Allen be invited to the meeting on January 11, 2007 or in a couple of months when the Boards are reelected for the benefit of all land use boards.

ZONING AMENDMENTS

Mr. Vannatta commented that an issue that needs to be addressed is accessory apartments. As the regulations are now written, accessory apartments cannot be added until a house is more than five years old. Historically, the Zoning Board of Adjustment

has been supporting accessory apartments through the special exception process as a way to bypass the five-year rule.

Mr. Vannatta brought to the Board's attention that adjoining right of way, Article 5.9.1 also needs to be changed. The word 'adjoining' is subject to interpretation and creates confusion. The Board discussed different ways to word the phrase without losing the intent of the regulation and agreed that removing the word 'adjoining' and replacing it with 'deeded' would resolve the confusion. Deeded means it is written down somewhere and usually recorded at the registry of deeds. The definition became muddled during the discussion of the Matte's appeal on Alsubet Court. This change would clarify the intent and not leave it up to random interpretation, which would facilitate the rebuilding of their shed as long as it had the same footprint and dimensions as the old one.

Mr. Vannatta emphasized that if any of the Board members have any thoughts of any other zoning changes, they should get them to the Planning Board at the January 11, 2007 meeting for consideration.

Mr. Vannatta informed the Board Members that there will be a Holiday Party for all Board members, employees and affiliates on December 19, 2006 from 12:00 pm – 2:00 pm.

Richard and Suzanne Rothstein, for property located at 46 Brats Cove Road, Newbury, NH will seek a Variance as provided in Paragraph 7.3.2 of the Newbury Zoning Ordinance to permit the following: to replace and expand an existing home within the 75 ft. setback from the lake. Newbury Tax Map 017-639-294. Copies of the above application are available for review during regular business hours at the Newbury Town Office Building.

Ms. Plunkett read the above notice.

Present were Richard and Suzanne Rothstein, Applicants; Deidre Sheerr-Gross, AIA; Greg Grigsby of Sheerr & White Architects; George Pellettieri of Pellettieri Associates.

Mr. Vannatta appointed Mrs. Wright as a voting member and outlined the procedure for conducting the hearing.

Mr. Rothstein stated that at the last meeting, it was suggested to the applicants to listen to the concerns of the Board and return with an alternative proposal. 'In order for us to realize our dream, we need a safe entry while addressing the concerns of the Town. As a result, we have removed the garage to behind the 75 ft. setback and propose a modest entrance that is proposed to be built on an area that is already a non-permeable surface. The building and alteration of the house has been presented and approved by the State. In order to accomplish the stairway entrance, we need a variance.'

Ms. Sheerr-Gross commented that they realize that even though the State has approved the proposed project, it is still under the purview of the Zoning Board of Adjustment to

grant or deny the request for variance in order to access the main level of the house. At the previous meeting, the Rothsteins were proposing to move the house back from the lake by five feet. The difference in this proposal is to keep the house in the same footprint, but they still need to get down safely to the house.

Ms. Sheerr-Gross presented a drawing of the existing house plan. The 24 ft. x 26 ft. garage is already under construction and has been pulled back behind the 75 ft setback so that it complies with the current zoning regulations.

Mrs. Wright asked how big the proposed stair way is compared to the house.

Ms. Sheerr-Gross commented that the square footage of the proposed stairway is 23% of the square footage of the house. She went on to explain that there were four trees that were proposed to be cut in order to accommodate the construction. Now there are only two trees very near the house that need to come down for safety reasons. Currently, there is nothing in place or in the planning stages to connect the garage to the stairway. That may be something that could be considered at a later date.

Mr. Vannatta asked what the height of the stairway is to the peak of the roof.

Ms. Sheerr-Gross said that it is 23 ft to the peak. In order to keep the roofline over the stairs to a minimum height, there have been dormers strategically placed along the way. She explained that there is a proposed outside stairway to get down to the water that will not be used in the winter months. The stairs inside are 42" to 48" wide. The enclosed stairway will be heated in order to prevent the stairs from freezing. There is a 3 ft. 6 in. vertical drop from the top of the stairs to the bottom of the upper level. From there, they continue down a 9.5 ft. to 10 ft. drop to the entrance level.

Mr. Vannatta asked Ms. Sheerr-Gross to address concerns regarding the environment around the outside of the proposed addition and any potential excavating.

Ms. Sheerr-Gross explained that there will be some excavating. The land has already been disturbed by activities by the prior owner. This proposed new construction is not an attempt to increase living area.

Mrs. Holmes asked Mrs. Sheerr-Gross how close the house is to the lake.

Ms. Sheerr-Gross said that it is just about 50 ft. The proposed stairway structure is trying to make up for the land that drops off so dramatically and gain a safe entrance into the house.

Ms. Sheerr-Gross continued with the 16.7 and read the variance criteria as submitted in the application. The variance will not be contrary to the public interest because the granting of the variance will correct an unsafe condition. Denial of the variance will result in unnecessary hardship to the applicant because the topography of the lot restricts safe access; the shape of the lot dictates a long thin straight driveway limiting

maneuverability; and the benefit sought by the applicant cannot be achieved by another method. Granting the variance will not be contrary to the spirit of the ordinance because it will not change the use of property. By granting the variance, substantial justice would be done because it would provide a safer access. The proposed use will not diminish the surrounding property values because it is consistent with those on adjacent properties.

Mr. Vannatta asked Ms. Sheerr-Gross about changes in the roof area.

Sheerr-Gross stated that there is no change in the roof area of the home. The additional roof area for the stair way is approximately 298 sq. ft.

Mr. Vannatta commented that he is not so sure that emergency personnel would find the proposed stairway easier to wind their way down a stairway.

Ms. Sheerr-Gross explained that is the reason why this is proposed as a generous stairwell. The outside tread and rise are designed to accommodate the needs of safety personnel carrying equipment wearing cumbersome foot gear.

Mrs. Wright asked Ms. Sheerr-Gross if the Newbury Safety personnel were consulted when designing these stairways.

Ms. Sheerr-Gross said not specifically. She does have a family member who serves in safety services and is aware and sensitive to their needs when accessing buildings.

Mrs. Rothstein commented that this is only one prong of the variance. Because the house is completely in the 50' setback, there is no possible way to connect the house to higher ground without a variance. The outside stairway allows direct access to the water for company and/or maintenance workers without having to tromp through the house. Because of the topography, the stairway actually becomes the path around the house.

Ms. Sheerr-Gross presented plans for erosion control.

Mr. Grigsby explained the erosion control plan. The set of steps to the front door have silt fence surrounding them and down the slope side of any activity area. The silt fencing is located to minimize impact on the root zones of nearby trees. If the fencing passes near a tree, instead of being dug into the ground is it laid down and anchored with stone. In some more sensitive areas, erosion control socks (tubes filled with biodegradable plant mulch) will be used. The silt fence runs over an area of property that is already disturbed and impervious.

Mr. Rothstein commented that there are currently no problems with runoff as the conditions exist.

Mrs. Holmes asked what kind of permanent erosion control measures are going to be taken.

Mr. Grigsby explained that those plans are not yet prepared. They did not want to go to the time and expense of preparing them if the variance was not going to be granted. We would ask for that to be a condition of approval.

Mr. Vannatta commented that erosion control will be required anyway without it being a condition of approval.

Mrs. Holmes asked if there were any plans for boat storage.

Ms. Sheerr-Gross stated that the previously proposed boat storage for under the garage has been dropped.

Mr. Vannatta opened this portion of the hearing to the public.

Robert Mills, abutter, commented that this is a significantly better plan than before. He stated that he received an email from the Town Assessor at the time of the first application that indicated that the denial of the variance would have a good influence on his own assessment. He stated that he thought it there is still a large footprint being added onto the house and other options should be considered. Mr. Mills asked what future plans there may be to connect the garage and the stairway.

Mr. Vannatta commented that connection of the garage and stairway is not an issue at this meeting.

Peter White commented that the stairway cannot go back any further. Because of the topography, the length is needed to meet safety codes.

Mr. Vannatta closed the public input session of the hearing, and the Board went into deliberation. He stated that the Board needs to discuss if all of the information submitted with this application addresses the variance criteria.

Ms. Soper commented that after a site review, this application is considerably more in keeping with that section of the lake and with the existing properties. She commented that she was impressed with the way the safety aspects were addressed.

Ms. Holmes commented that as she looked the application over, there is a huge roof structure in the 75 ft. setback. However, the present access is not safe. It is nice in the summer, but the applicants need to have some kind of maneuverability all year. I am satisfied with the proposal. I do not like to vote yes to building in the 75 ft. setback along the lake. In this particular case, the applicant has worked extremely hard to work this out in the safest possible way, aesthetically and environmentally.

Mrs. Wright commented that she is apprehensive about granting this application. The 75 ft. setback is in place for a reason. Even though the State has approved the proposal, the Spirit of the Ordinance may not be supported by granting this request. As for the safety issue, Mrs. Wright did not agree because the applicant did not consult with Newbury

Safety Services personnel. The applicant can re-build in the footprint of the existing house, but I am doubtful that they meet the criteria for a variance. Mrs. Wright expressed concern for setting a precedent.

Ms. Ashworth commented that she applauds the applicant for a more conservative design even with the large stairway because safety is an issue, especially in the winter.

Mr. Vannatta commented that one of the things he does appreciate is the fact that the applicants did listen to the suggestions of the Zoning Board in the first meeting. The Spirit of the Ordinance also gives the Zoning Board of Adjustment some latitude to make exceptions to the rules as it is extremely subjective. The Board began this meeting discussing potential changes to the ordinances that reflect the thoughts of the people who wrote them. Looking at all of the criteria for a variance, it appears the applicant met all of them. He stated that he is supportive of this request.

Mrs. Holmes commented that she understands Mrs. Wright's concerns, but considering all factors such as the weather, safety and year 'round living, this application becomes quite necessary. The Board also has to take each case individually and look at all components and be responsible. She commented that Mr. Pellettier has a reputation of doing good work with landscaping while being protective of the shoreland.

Mrs. Holmes made a motion that the Board vote on the Rothstein's application for variance conditional upon a final erosion control plan submitted to and approved by the building inspector and that the construction of this property take place as presented in this plan this evening. Ms. Soper seconded the motion.

VOTE: Mrs. Holmes to Grant

Mrs. Soper to Grant

Ms. Ashworth to Grant

Mrs. Wright abstained

Mr. Vannatta to Grant

ROGER HARDY CONSTRUCTION, LLC – continued, for property located at 176 South Road, Newbury, NH, will seek a Variance as provided in Paragraph 5.10 of the Newbury Zoning Ordinance to permit the following: to allow for a 3 lot subdivision with one of the lots being non conforming as it would contain less than one contiguous acre. Newbury Tax Map 044-562-348. Copies of the above application are available for review during regular business hours at the Newbury Town Office Building.

Ms. Plunkett read the above notice.

Mr. Vannatta explained that this hearing is continued from November 28, 2006 when Mr. Hardy elected to continue his hearing to this evening in the hopes of having a greater majority of Board members present.

Present were Mr. Hardy; Ari Pollack, Legal Counsel; Art Siciliano, Surveyor

Mr. Vannatta appointed Mrs. Wright as a voting member and outlined the procedure for conducting the hearing.

Mr. Vannatta asked Mr. Hardy to respond to the cease and desist notice he had received from the Selectmen's Office.

Mr. Hardy commented that he received the cease and desist notice after all of the work had been done. The work only consisted of building a driveway.

Mr. Vannatta pointed out to Mr. Hardy that the driveway he just finished constructing was for a two lot subdivision. If he is granted a three lot subdivision, then the approval for the driveway which was just constructed goes away because the driveway was granted for a two lot subdivision. If the variance is granted tonight, then the approval goes to the Planning Board with an application for three lots.

Mr. Pollack commented that he is somewhat confused about the process. He explained that they are in front of the Zoning Board of Adjustment at the suggestion of the Planning Board for relief for a relatively new zoning provision and that he is advocating for both a variance to the building envelope and an appeal from a Planning Board interpretation but only asking for one approval.

Mr. Vannatta explained that Mr. Hardy had presented the Board with a request for a hearing on that topic, but he is trying to appeal a Planning Board decision that has not been made.

Mr. Pollack apologized for having to do some catching up, but he commented that he interpreted from the September 19, 2006 Planning Board minutes that a decision had been made per the following excerpt:

Mr. McWilliams said that they also need a variance to create a lot that did not have one contiguous acre for a building envelope. He said that they could also appeal the Planning Board's interpretation.

Mrs. Cluff asked if they needed a denial in order to appeal the Planning Board's interpretation.

Mrs. Freeman asked for a vote on the interpretation. One was not in favor of the subdivision not complying with the requirement of each lot having one contiguous acre of buildable area in the subdivision regulations. The rest were in favor.

Mr. Pollack stated that is why Mr. Hardy has applied for a variance and appeal to the interpretation of the Planning Board's decision on September 19, 2006. He apologized if the timing on the procedure for appeal was not corrected and commented that he does not want to miss the opportunity to address the misinterpretation in the event that the variance is denied.

Mr. Vannatta stated that the Board understands his concerns, but one may resolve the other. The issue on the agenda for this evening is a variance.

Mr. Pollack explained to the Board that Mr. Hardy owns and is trying to develop 23.5 acres on South Road. In order to do as much construction as possible before the building season gets too cold, Mr. Hardy began the building process on the proposed lot one.

Mrs. Holmes asked how many lots comprise the property Mr. Hardy currently owns on South Road.

Mr. Pollack explained that there is currently one lot, and he is going for a subdivision in front of the Planning Board tomorrow night. Mr. Hardy has run into difficulty with Section 5.10 in reference to building envelopes. There is a disagreement in the interpretation in the case where new lots are subdivided. The problem is that Mr. Hardy has built a house on a section of the main lot where the existing house does not have a sufficient full acre of contiguous land to satisfy the building envelope requirement in 5.10.

Mrs. Soper asked why the proposed Lot 1 lot line cannot be moved in an easterly direction.

Mr. Pollack explained that the lot line setback is not the problem. The problem is not the amount of land in the lot, the problem is the building envelope.

Mr. Vannatta asked when the building permit for the existing house was issued.

Mr. Hardy explained that a wetland board permit approval was needed in order to get the driveways in.

Mr. Siciliano stated that there is a state approved septic approval dated May 15, 2006. Therefore, the building permit would have been issued shortly after that date.

Mr. Vannatta commented that at the time of the building permit application, the parcel would have been considered a grandfathered lot from the one-acre of contiguous land building envelope. One house on the parcel does not require a subdivision. Proposed house lot 2 and house lot 3 can meet the one-acre of contiguous land building envelope requirement.

Mr. Pollack explained that he is focusing on the “new lot to be subdivided” language in the regulations. The “new lots...” are to be for house 2 and house 3. He continued his presentation with the variance criteria. This use would preserve the status quo of the neighborhood and allow two new houses in a location that would allow them to comply with the zoning ordinance. Public interest would be maintained. There is nothing in this request that is contrary to public interest. There is a hardship due to the special conditions on this property. The ordinance looks to the existing house. We have a hardship in that what Mr. Hardy legally built, cannot comply to the ordinance as they are written. The result is that we cannot achieve what we are looking for by any other reasonable means. This request is not contrary to the Spirit of the Ordinance since we are respecting the buildable envelope in the new lots to be subdivided. There is substantial justice to be

done with this subdivision because the remaining house lots are oversized and comply with the desire for open space and wetlands protection. The effect on adjacent property values are obviously not a concern for the abutters since none of them have attended the hearing. If people thought they would be in danger, they would be here tonight. There will be no diminution of value to the neighborhood since it is already a residential neighborhood. There are some more intensive uses that could have been considered for this parcel such as cluster development, timber harvesting, multi family housing or home occupations. Mr. Hardy is simply seeking a little three-lot subdivision and is now caught in a definition vortex.

Ms. Holmes asked who owns the property on the westerly side of existing house, and is there any chance of purchasing land to increase the amount of buildable land in the envelope.

Mr. Pollack informed the Board that Mr. David Kinsman owns the land to the west, and it also is very wet; and therefore would not help this matter.

Mrs. Holmes asked Mr. Hardy if this existing house was built without the thoughts of a future subdivision.

Mr. Hardy explained that he was hoping for three lots from the very beginning. He did not realize the regulations had changed in the spring. He assumed they were the same as they were a couple of years ago when he subdivided and built houses on Old Post Road.

Mrs. Holmes surmised the Mr. Hardy built this first house in good faith.

Ms. Ashworth asked why, if someone wanted to subdivide 23 acres, wouldn't you subdivide the land *before* building the house?

Mr. Pollack explained considering the timely process to get subdivision approval, Mr. Hardy wanted to get a house built before the weather changed. He reiterated that he was reading the regulations as if they applied to the new lots, ie., for house 2 and house 3.

Mrs. Holmes asked Mr. Hardy if when he got his building permit, was anything said about building more houses.

Mr. Hardy said that the building inspector knew he was going to put more lots in there.

Mr. Vannatta reiterated that the building inspector can only work with what is in front of him at the time of application. He cannot approve or deny a building permit based on speculation of future plans.

Ms. Ashworth commented that the house is new and was built with the intention that more would be built.

Mr. Siciliano stated that the Town's regulations allowed Mr. Hardy to get into this situation, and he is only asking for what he is entitled to. He suggested that perhaps the ordinances need to be changed to prevent future confusion.

Mrs. Holmes thought back to the Bullis case on Cheney Road and recognized that there is a certain weakness in the regulations.

Mrs. Soper asked Mr. Hardy if he had any buyers in mind for the remaining property.

Mr. Hardy said no.

Mrs. Soper asked if Mr. Hardy lives in the existing house.

Mr. Hardy said no.

Mrs. Soper asked Mr. Hardy if he pays property taxes on the house.

Mr. Hardy said not at this time. All of the land is in current use at this time and he will pay ad valorem tax when the house is assessed. He explained that he had the house sold, but the sale fell through because he could not legally sell it until he completed this process.

Mr. Vannatta opened the meeting to the public. Since there were none present, he closed the public session and the Board began deliberation.

Ms. Ashworth commented that it is really clear to her that Mr. Hardy's intention was to subdivide, and this house was not built deceitfully. Maybe the Newbury regulations need to be changed. If the Zoning Board doesn't grant this request for variance, Mr. Hardy has only one house on 23 acres, and he is done. Frankly, if he had applied for the subdivision in the first place, this would not have happened.

Mrs. Holmes commented that if Mr. Hardy's intent was to subdivide in the very beginning, then the person who gave the building permit was not acquainted with Article 5.1.

Mr. Vannatta interjected that that doesn't matter. The building inspector rightfully granted the building permit on the existing conditions that were in front of him at the time of application.

Mrs. Holmes commented that if Mr. Hardy's intent was to get started, somewhere someone along the way should have alerted him that the subdivision rules have changed. Somewhere there is some miscommunication among us. If I understand it, the Planning Board cannot look at this as a subdivision because the building is already built here. The Zoning Board of Adjustment has to decide if it can relieve Mr. Hardy of the contiguous acre requirement.

Mr. Vannatta cautioned that the Planning Board could also deny the remaining two lots even with a variance on proposed lot 1.

Ms. Ashworth commented that she is concerned that the Zoning Board of Adjustment would be setting a precedence for someone else coming in to play the odds to see if they can get more lots out.

Mrs. Holmes commented that if the Zoning Board of Adjustment takes it case by case, that should not happen. The Board is trying to correct something that it did not create.

Mrs. Wright commented that she agrees with Ms. Ashworth. Mr. Hardy should have been alerted. Everyone knows Mr. Hardy is a developer, and questions should have been asked. The information should be made more prominent to the public when there are regulation changes. Mrs. Wright recognized that proposed house 2 and house 3 do comply with the one acre building envelope.

Mr. Vannatta commented that Mr. Hardy should have taken the responsibility to know that the regulations had changed; and the building inspector was presented with a building permit application for one house on one lot. The process was not well thought out nor well developed.

Mr. Vannatta commented that he believes the hardship was self created, and therefore, would not support a variance. He suggested that Mr. Hardy go back to the Planning Board and seek some other kind of relief.

Ms. Ashworth commented that this case is muddy enough to warrant consideration for a variance.

Mr. Vannatta commented that it also appears that the Planning Board felt that their interpretation was correct. Those are the individuals who wrote the regulations, they are reflecting on their own intent.

Mrs. Holmes stated that she does not understand why the Planning Board sent Mr. Hardy to the Zoning Board of Adjustment.

Mr. Vannatta commented that he thinks there has been a review by the Planning Board and their recommendation was to see if the Zoning Board of Adjustment will support Mr. Hardy's arguments even though the Planning Board finds that he cannot get three lots because of the building envelope restrictions. Mr. Hardy did all this after the ordinances were in place. He should have gotten subdivision approval before building the house. There is a sequence of events that should be followed, and this case is out of sequence. The building permit was applied for on the whole lot. The Building Inspector has to look at what is presented to him at the time of the building permit application. The Zoning Board of Adjustment's decision needs to be based on the whether or not the criteria for variance is being met, not whether or not Mr. Hardy got bad advice or if we are out of sequence. Is The Criteria Being Met?

Ms. Ashworth referred back to 5.1.4 – Pre-existing Lots. The Board took a few minutes and studied the language in relative sections of the zoning ordinance.

Mr. Vannatta commented that the existing home was built on the requirements laid out in 5.9 of the zoning ordinance, therefore Mr. Hardy needs to comply with envelope requirements.

Mrs. Soper commented that in her perspective, Mr. Hardy got a building permit for one building on the whole piece, then decides to subdivide two lots off the whole piece. Therefore the two subdivided lots become the new lots and those two lots have to comply with the building envelope, not the original house lot.

Mr. Vannatta stated that he disagrees with that interpretation. He reiterated that the house was built *after* the change in the regulations. He commented that he feels this is a self imposed hardship, very similar to the Bullis case on Cheney Road.

Mr. Vannatta said that he will entertain a motion to vote on this application for variance.

Mrs. Holmes made a motion that the Zoning Board of Adjustment vote on Mr. Hardy's application for a Variance. Ms. Soper seconded the motion.

Ms. Ashworth to Grant

Ms. Soper to Grant

Mrs. Holmes to Grant

Mrs. Wright to Deny – criteria was not met

Mr. Vannatta to Deny – criteria was not met

Mr. Pollack commended the Board for taking the time to look at what the regulations actually say; and whether someone actually gets the relief or not. There are some bugs in the regulations that need to be worked out.

Mr. Vannatta informed Mr. Hardy that there is a 30 day appeal process. No development activity should be done until the 30 days is over.

Mrs. Holmes made a motion to adjourn. Mrs. Soper seconded the motion. All in favor. Meeting adjourned at 10:15 p.m.

Respectfully submitted,

Linda Plunkett
Recording Secretary