



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

MERRIMACK ZONING BOARD OF ADJUSTMENT APPROVED MINUTES

WEDNESDAY, DECEMBER 27, 2017

Members present: Patrick Dwyer, Richard Conescu, Lynn Christensen, and Alternates Leonard Worster and Kathleen Stroud.

Members absent: Fran L'Heureux and Tony Pellegrino.

Staff present: Planning and Zoning Administrator Robert Price, Assistant Planner Kellie Shamel and Recording Secretary Zina Jordan.

1. Call to Order

Chairman Dwyer called the meeting to order at 7:02 p.m. and designated Leonard Worster and Kathleen Stroud to sit for Fran L'Heureux and Tony Pellegrino, respectively.

2. Roll Call

Patrick Dwyer led the pledge of allegiance and swore in members of the public. Richard Conescu read the preamble.

- 4. Dan Ricker of 12 Merrill Road** – Request for Re-Hearing regarding case # 2017-39, in which the Board voted to grant the Variance under section 3.08.9 of the Zoning Ordinance to permit the existing improvements (barn, shed, home, etc.) to remain within the 100 foot landscape buffer proposed as part of a cluster subdivision. The parcel is located at 6 Watkins Road in the R (Residential) and Aquifer Conservation Districts and Wellhead Protection Area. Tax Map 4C, Lot 449.

This agenda item was discussed before agenda item #3.

Chairman Dwyer read a letter from Dan Ricker, 12 Merrill Road, requesting a rehearing. He disagrees with the applicant's argument that a 100' landscape buffer should provide a separation from a subdivision and commercial/industrial space. He argues instead that it should provide a landscape screen from the proposed development and all current abutters. He also argues that the petitioner has the responsibility to fit the project within the ordinances set forth by the Town of Merrimack. The applicant should explain why another solution cannot be reached.

Lynn Christensen stated that no new information was presented by Mr. Ricker, nor does she feel the ZBA made an error. She stated that one reason the ZBA exists is to provide an exception to the Zoning Ordinance. That is allowable by law and that is what the ZBA did. Leonard Worster said that cluster regulations promote conservation, balance different types of uses, and provide efficient use of land. The alternative to a

cluster is a grid pattern, which would break up the natural environment. Animals travel through the parcel. Open space makes sense by leaving what is there. There would be no public gain in tearing down the barn and moving the house. The ZBA did not make an error. Lynn Christensen opined that, even if there were a one-lot cluster, the barn would still be within the 100' buffer. Reducing the number of lots would not change that. The problem is that the existing house is the entrance to the entire lot. Richard Conescu said there is no new information that the ZBA did not discuss at the November 29, 2017, meeting. Patrick Dwyer said that, when he raised the issue that the "spirit of the Ordinance" criterion was not observed, Attorney Michael disagreed. Patrick Dwyer understands Dan Ricker's position.

The Board voted 4-1-0 to deny a Request for Rehearing, on a motion made by Lynn Christensen and seconded by Kathleen Stroud. Patrick Dwyer voted in opposition.

3. David Paul and Toni Paul (petitioners/owners) - Appeal of Administrative Decision as per the requirements of RSA 674:41. The RSA states that building permits cannot be issued to lots not meeting specific requirements and outlines an appeal process to the Zoning Board of Adjustment. The parcel is located at 312B Baboosic Lake Road in the R (Residential) District. Tax Map 6A- 2, Lot 059-09. Case # 2017-34. **This item is continued from the September 27, 2017 Zoning Board of Adjustment meeting.**

This agenda item was discussed after agenda item #4.

Leonard Worster recused himself from discussing and voting on this item and left the meeting at 7:15 p.m.

Chairman Dwyer explained that, since there were only four ZBA members left, there must be three positive votes to approve the item. The petitioner was also informed that they had the right to continue the meeting to allow for a full Board. The petitioner opted to proceed with a four member Board.

Attorney Joseph Mitchell, 15 Parkhurst Road, said the structure has been on the property since the 1987 building permit was approved for a three-bay garage. He noted there is a living unit and a deck facing the lake on the second floor. The applicant has paid taxes for a residential use since 1987. There would be no change to the exterior. The upstairs living area would be renovated and modernized, a new deck added and a septic field hooked up for the Paul's and abutters Ken and Gretchen Gray. Attorney Mitchell disputed Robert's Price memo of December 20, 2017, claiming it is untrue that "the petitioner seeks to permit the construction of a dwelling unit"; the change would be only to the interior and no dwelling unit would be constructed. He also disputed that the "portion of Jebb Road shown as fronting the subject lot . . . is only a paper street and is not actually constructed". He claimed that Jebb Road services several houses further up from the subject lot. However, a portion of Jebb Road was discontinued in 1997 by the Board of Selectmen. Additionally, he noted a garage owned by the Langer's, presently sits in the middle of the discontinued portion of the right of way.

David Paul, Jr., 312 Baboosic Lake Road, read a statement into the record. The change continues the 1987 plan. In the 1960s each owner was allowed to purchase the

property between the lake and back lots in order to protect it from development. The Town issued a permit to replace his grandparents' cottage and to build a garage. This was prior to the Shoreland Protection Act. An in-law apartment was created in the garage in 1996. It has been occupied and the taxes paid ever since. The Paul's are moving the living space from the old cottage to a living space upstairs in the garage. They are not building anything nor changing any structure. If the applicant did not need a building permit to install a septic system and a deck, he would not have to appear before the ZBA. Most of the neighbors approve. Those who oppose the project never raised concerns until now. In August 2017 the Paul's installed a 10-bedroom septic system between the properties. Engineered plans are completed to reconfigure the driveway to grant an easement for the garage to have its own driveway rather than use the existing right-of-way granted from the Gray's. The goal is to keep the family together and maintain the property and shoreline of Baboosic Lake. It will not set a precedent for building lots in back.

Chairman Dwyer stated that staff does not know why the 1987 building permit was granted. Lynn Christensen said Guter Lane is not a Town road but rather a private driveway. The RSA states that a lot must be on a Class V or better road. This is a landlocked parcel that is not on a street. David Paul said there is an engineered plan to access the lot from the Gray's driveway, via private easement. Attorney Mitchell explained that it is in escrow pending the outcome of this hearing. The cross-easement with the Grays would meet the RSA requirement for a private road. Robert Price explained that this is an isolated instance and would not set a precedent. The applicant originally filed a request for a Variance, but it was withdrawn because State law requires that he must file an Appeal of an Administrative Decision. Lynn Christensen said the potential easement is not a private road because it crosses someone else's property. The application says it is a gravel road and not an easement. Attorney Mitchell countered that a private road can be an easement. Lynn Christensen pointed out that the lot was to remain "unbuildable". Attorney Mitchell claimed that was extinguished when a building permit was approved. Robert Price explained that upgrading the road to meet the RSA requirement for frontage on a road is the only way a building permit could be granted. Attorney Mitchell added that access via Jebb Road was extinguished because there is now a building (Langer garage) in the middle.

Public comment

Joseph & Margaret Schleifer, 25 Jebb Road, and Joel & Ann Bedell, 24 Shore Road, wrote in support, stating that the Paul's have maintained the property, protected the lake environment, their house and buildings are tastefully done, and they are good neighbors who are an asset to the community.

Herbert Langer, 4 Langer Way, a subdivision trustee, wrote in opposition. The appeal violates the intent of the 1978 subdivision plan (on file at the Hillsborough County Registry of Deeds as Plan #12233), which was sold to all lakefront owners as buffer land only and specifically not for residential use.

Carey Demers, 19 Jebb Road, who served on the lake association with David Paul Sr., supports the plan. The plan would not bother the neighbors.

William Wenzel, 37 Scenic Vista Way, supports the plan. The Paul's improved Baboosic Lake and moved the camp back from it. The only change is for a septic system. No harm would be done to anyone.

Attorney Laura Dodge, McLain Middleton, represents the Gray's. She negotiated and drafted the easement agreement, which is in escrow pending the result of this meeting. It would be a legal right-of-way to access the lot from Baboosic Lake Road to Guter Lane.

Chairman Dwyer stated that no public land use board enforces private covenants, unless the Town is a party to them.

Ellen Curelop, 23 Jebb Road, wrote in opposition. She stated that the appeal does not demonstrate that the statute imposes either practical difficulty or unnecessary hardship. The use is contrary to use restrictions in the property owner's deed and on the subdivision plan that created the lot. The deed states that the existing lot shall be considered one lot, that no lot may be used for any temporary or permanent residence, and that the covenants are binding on all owners and may not be waived by variance. As to hardship, there is nothing unique about this property. All were sold under the same set of equitable restrictive covenants and all parties understood the restrictions. Each back lot has the same problem of no frontage on a public way, which is required for owner access and emergency vehicles. The Town does not want homes built on lots where access is a problem. The restrictions do not allow residential use, which is not a reasonable use. Because the frontage requirement cannot be met, it cannot be used for residential purposes. There is no hardship or practical difficulty because the restrictive covenants on the deed were acknowledged by the owner. The owner has already obtained a use by building a garage. This is equal to putting a second home on a single family lot.

Chairman Dwyer read a letter from Lynn Langer, 4 Langer Way, who wrote in opposition because it would set a precedent for other lots in this subdivision to be developed the same way and would compromise property values and quality of life.

Robert Price said that Ellen Curelop partially referenced variance criteria, which do not apply in this case. Chairman Dwyer added that means that hardship cannot be considered. The ZBA must consider whether to overturn the Building Official's decision to not issue a building permit.

Attorney Morgan Hollis, 39 East Pearl Street, Nashua, represents Ellen Curelop. He stated that the applicant can appeal lack of frontage if the criteria of practical difficulty or unnecessary hardship are met. Otherwise the ZBA must side with the Building Official. Hardship is therefore relevant and important. Ellen Curelop's letter addresses those criteria. If there is no other use for the property, relief must be granted. In 1987, the applicant was permitted to build a 36'x48' gambrel barn with no windows. It was to be only a garage and not house a family. No residence is mentioned in the building permit paperwork on file with the Town. On August 19, 2017, David and Tony Paul requested a variance for a one-bedroom apartment in the existing garage with paper access to Jebb Road. That is different from what David Paul stated at this meeting, which is that the apartment was always there. If the Paul's lived there, they did so without an

Occupancy Permit or any other permits. Robert Price determined that there is no building permit for a house, only for a barn. There never was a homeowners association. Every owner has a plan, which lays out a private way. Willard Jebb created the lots and sold them to Herbert Langer, who conveyed them to the owners. The plan shows that they are all connected, so they are really one lot. The Planning Board approved the plan with conditions: the lot would be divided into 10 non-buildable lots each is conveyed only to the owner, no lot can be used for permanent residence, the 10 lots have no access, and "may not be waived by variance, exception or otherwise".

This is not a separate or buildable lot. Two houses should not be created on one lot. There is no hardship because the owner acknowledged the deed/plan and has a reasonable return on his investment. The Zoning Board must uphold the Administrative Decision because no hardship can be proven. The applicant wants to change the purpose of the lot. The statute also states that no owner can replace the road. The applicant has a reasonable use: the garage. The Paul's knew when they bought the lot that State statute limits the use. They can use the property for nothing else but a barn or garage. They must show why they deserve relief from the decision not to issue a building permit. To say that the family wants generations to stay and that there are no other options is unrealistic. The ZBA should not allow two houses. If someone else buys, it would be a subdivision. That is what the restrictions are trying to prevent. Chairman Dwyer explained that the Board makes its decision based on the present and not what could happen in the future.

Jeff Curelop, 23 Jebb Road, said that his grandfather, Willard Jebb, received subdivision approval in 1978 for a number of lots along Baboosic Lake, with additional lots behind them across from Jebb Road. Those lots across from Jebb Road were deeded to the people who bought the lakefront lots and were intended to be unbuildable so as to protect the watershed. They were not for permanent dwellings. Contrary to David Paul's statement to the Board, Attorney Hollis just proved that the permit was for a garage rather than a residence.

Jan Langer, 4 Langer Way, spoke in opposition. This should not be a residential property because Willard Jebb gave abutters the property as a buffer. There is no room for a septic system. The Paul's want to install one because they built on their land. No abutters challenged the barn years ago, but they should have. It is offensive to turn it into a residence that could be sold later.

Attorney Mitchell stated that the Paul's gave up access to Jebb Road so Jan Langer could build her own garage. These are separate lots that the Town taxes and that have separate deeds. They are not joined by covenants enforced by the Town. The criterion of unnecessary hardship has been met because there is no other access to the road because of the Langer's garage. There is a long history of residential use. The ZBA should continue a use that has existed since 1997. Attorney Mitchell noted that the variance application states that the "upper floor is finished".

David Paul said the main house has an easement through Guter Lane. The new driveway would make it safer. The old cottage had a garage, which was built with the intent to have an apartment later. All the neighbors have variances for a septic tank.

David Paul just wants to improve the septic system. He has paid taxes on a living space since 1997. The dwelling has been used for family and is sometimes rented to tenants.

Chairman Dwyer stated that David Paul built a residence even though the permit was only for a garage. Robert Price stated that there is a permit on file from 1987 only for a garage, as Attorney Hollis stated.

Attorney Hollis claimed that the Paul's made their own hardship by giving up a piece of their land. They stated on the variance application that they would build a house, not renovate it. There is a "credibility factor": Tonight David Paul stated that a house has been there for years. The Town did not permit that use nor legitimize it by levying taxes.

Lynn Christensen said that, because the RSA 674:41(III) states that there cannot be a private road or easement, the ZBA has no choice. An easement is not a street. There is no frontage on any street, just an easement across the adjacent lot. David Paul is asking to build a residence on a lot without frontage on a street. The RSA states that building permits cannot be issued to lots not meeting specific requirements.

A motion to deny the appeal failed, 2-2-0, on a motion made by Lynn Christensen and seconded by Richard Conescu. Patrick Dwyer and Kathleen Stroud voted in opposition.

****Staff note: Due to the Board not taking any formal action by an affirmative vote of at least 3 members, this petition will be back on the Board's January 31, 2018, Agenda.****

Chairman Dwyer called a five-minute recess at 8:45 p.m.

5. Discussion/possible action regarding other items of concern

Chairman Dwyer welcomed Alternate Kathleen Stroud to the Board.

6. Approval of Minutes — November 29, 2017

The minutes of November 29, 2017, were approved as submitted, by a vote of 4-0-0, on a motion made by Richard Conescu and seconded by Lynn Christensen.

7. Adjourn

The meeting was adjourned at 8:50 p.m., by a vote of 4-0-0, on a motion made by Richard Conescu and seconded by Lynn Christensen.