

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

**Call to Order:** Chair Matt Morton called the September 29, 2014 meeting at 6:30 PM.

**Present:** Matt Morton, Chair; Ted Connors; Ralph Estes; John Frink; Jim Weiner; Planning Board Representative, Justin Richardson; Town Planner, Tom Morgan; and Jane Kendall, Recorder

**Absent:**

**Public Guests:** Attorney John Bosen; Attorney Christopher Mulligan; Doug LaRosa with TriTech Engineering; Denis Hebert, Madeline Mills; Ms. Mathes; Lorna Watson; William Gregsak with Gregsak Engineering; John Bernier with Bernier Corporation;

**Minutes:** Town Planner, Tom Morgan informed Chairman Morton that there were several outstanding minutes from May, June, July and September 15, 2014 that had not been approved. Chairman Morton said he wanted to postpone approval of the minutes until Board members had the opportunity to catch up on reading them.

***Ted Connor moved to table approval of the minutes until the next meeting. Ralph Estes seconded the motion and all were in favor.***

**1) Public Hearings:**

**A) In regards to property situated at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2:**

1) An administrative appeal by **Bruce Belanger** regarding the Planning Board's interpretation of Article X, Sections 4B(6) and 4C of the Zoning Ordinance on August 11, 2014.

Chairman Morton informed Board member, Jim Weiner that he had to recuse himself on this first item because he served on the Conservation Commission and made the motion not to recommend the request. Chairman Morton also advised Planning Board Representative, Justin Richardson that he also should recuse himself from the administrative appeal of the Planning Board's decision. Mr. Richardson agreed, but said he thought he could sit in on the Special Exception request. Attorney Chris Mulligan,

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

representing the applicant, Mr. Bruce Belanger agreed to allow Mr. Richardson to sit in on the request for a Special Exception.

Attorney Mulligan said they believed the Planning Board's interpretation of Section 4B, page 30 and their decision that a Special Exception to allow a driveway to cross the wetlands was erroneous. He said the Planning Board determination that a Special Exception was required was based on State statute that said they were to follow the more stringent rules when there were conflicting ordinances, but this was a case of different paragraphs in the same ordinance. He added that Section 4B of the Zoning Ordinance permitted driveways to cross wetlands to access upland lots without a Special Exception so long as there were proper drainage and erosion provisions under Section B6, which the Planning Board would require. He said Altus Engineering, the Town's engineering consultant said the three proposed lots were suited for residential development. He said the Department of Environmental Services (DES) indicated that the subdivision of the property was appropriate and they were waiting for finalization of the wetlands permits.

Board member, John Frink asked if a Dredge and Fill application had been submitted to DES. Attorney Mulligan said they submitted a Dredge and Fill application, but still needed a recommendation from the Conservation Commission before DES approved the application. Mr. Frink asked if the Planning Board was concerned that they wouldn't receive approval from DES. Mr. LaRosa with TriTech Engineering said the Dredge and Fill permit included erosion and sediment drainage controls and the Town had hired an outside engineering consultant to be sure his work met drainage, erosion and sediment control standards, but the DES issue was separate from this issue. Attorney Mulligan said even the Planning Board had the authority to require that drainage and erosion controls be incorporated into the project, but that provision shouldn't require a Special Exception for a driveway.

Mr. Richardson of Post Road asked if the Special Exception would require permits in hand and Attorney Mulligan said it would, but they had not yet determined if the Special Exception was required. Mr. Richardson said if the Board upheld the Planning Board's decision, they wouldn't be able to grant the Special Exception because they didn't have the permits in hand. Attorney Mulligan said the problem with the DES permit was a question of which came first, the chicken or the egg.

Mr. LaRosa said they had submitted a permit to DES and they went before the Conservation Commission, but did not receive a recommendation. He said they only had 30 days and had requested an extension.

Attorney Mulligan said a condition of the Board's approval for the Special Exception was to receive a recommendation from the Conservation Commission. Mr. Morgan said they needed to address this issue first and Chairman Morton agreed that they would address the Special Exception next if this appeal did not pass.

Conservation Commissioner, Jim Weiner said the property was originally a single dwelling lot and the issue with the application was the unnecessary crossing of wetlands for three lots when there were other alternatives, which the Commission could not recommend to DES. He said the applicant returned for a second time, but there were not changes to the wetlands crossings and the Commission considered the

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

recommendations by DES and did not recommend approval for the Special Exception for the driveways crossings.

Mr. LaRosa presented the history of their plans, noting that Mr. Mathes who sold the lot to the applicant was not willing to put a note on his original plan that they could not subdivide it. He said they originally proposed a shared driveway that did not have the wetlands crossings, but had to abandon that proposal for this one due to the ordinance eliminating shared driveways so they then proposed the least impact to the wetlands to access the lots, although it would require a wetlands crossing permit from DES, though they did not believe they needed a Special Exception.

Chairman Morton asked if each lot had 200' frontage and Mr. LaRosa said they did and they also met the upland soil requirements.

Chairman Morton asked if Mr. Belanger had always intended to subdivide the lot and if he had purchased the lot to build a residence for himself as well. Mr. LaRosa said Mr. Belanger always intended to subdivide and he might also build a home on one of the lots to protect his assets because Newington had the third lowest tax rate in the State.

Board member, Ralph Estes asked Mr. Weiner why the Conservation Commission rejected the application and Mr. Weiner said there was evidence of wetlands and valuable vernal pools as indicated by spring peepers each spring. He said it would be fine if they wanted to subdivide the lot without wetlands crossings, but even after they changed their plans, the middle lot crossed wetlands twice.

Mr. Estes asked if Mr. Morgan had told the applicant that the lot could be subdivided. Mr. LaRosa said Mr. Morgan said he only advised the Planning Board and did not make the decisions, but he did not say it could not be subdivided. Mr. Morgan noted that shared driveways were allowed when he first saw the plan in October 2013.

Attorney Mulligan said both Altus Engineering, the Town's engineering consultant and the State had said the size and other characteristics of the lot were appropriate for subdivision and residential development. He said they would comply with State subdivision regulations and despite the Conservation Commission's recommendations against the wetlands crossings for three lots, wetlands crossings to access upland lots were a permitted use in the Town's Zoning Ordinance. Chairman Morton said the use was only permitted with the Special Exception, which required the Conservation Commission's recommendation. Attorney Mulligan reiterated that he believed the Planning Board's interpretation of the Special Exception requirement was not accurate and it was not required.

Mr. Richardson said the letter from Altus did agree that the lot was suitable for residential use, but also said the three driveways did not meet the criteria for wetlands approval because the lots could be approached by a single access. Mr. Richardson said in looking at the zoning ordinance which defined a lot as having frontage on a public street, the lots could be still be accessed from a private road with Town road specifications, which would address the ordinance change prohibiting a shared driveway even though it would require a variance to construct.

Mr. Richardson said he believed the Special Exception provision was not written to only mean access pathways across wetlands so that driveways would be permitted to

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

bury wetlands. He said he believed the Planning Board's decision was reasonable, and the appeal should be denied and the Conservation Commission's recommendations evaluated before making a decision on the Special Exception. Attorney Mulligan pointed out that items identified in the Special Exception section also included roads and utility lines, but did not define access ways and he didn't think it made sense that boardwalks and pathways would be held to a higher standard. He said the Planning Board assumed that access ways absorbed the entire realm, including road, but stated that they should go with the more specific term of driveways over the more general terms. Chairman Morton said the Special Exception was for the construction of roads, which shall be granted by the ZBA after considering the Conservation Commission's recommendations. Attorney Mulligan said only if they decided that driveways required a Special Exception, which he argued they didn't because they were dealt with more specifically in the Permitted Use section above.

Chairman Morton asked if there were any abutters that wished to speak and Ms. Madeline Mills of Post Road said she was a direct abutter behind the applicant's property and agreed with Mr. Weiner's comments that the wetlands crossings were unnecessary. Ms. Mills also commented that she saw Board member, Ted Connors shaking hands with the applicant's counsel, Attorney John Bosen and hoped there was no conflict of interest with board members. Mr. Connors said he and Attorney Bosen's mother attended school together. Chairman Morton noted that they knew one another in a small State where many people knew one another, but he was assured there was no conflict of interest. Mr. Weiner said he had to recuse from the Board himself because of conflict of interest in serving on the Conservation Commission.

Mr. Morgan said abutters, Alan and Lillian Wilson of 224 Nimble Hill Road were not able to attend, but had submitted a letter.

Ms. Lorna Watson of Fox Point Road said she didn't believe the Wilson's liked the driveway proposal near their house. She said Nimble Hill Road was a very busy road and should be considered as well.

Mr. Frink said he read through Altus Engineering's letter regarding site distances and wetlands impacts, but thought the discussions were getting a field and thought they should stick to Section 4 and B6. He said he knew the Planning Board, DES and Conservation Commission had the Town's best interests in mind, but the way he read the ordinance that listed accessways as permitted uses in wetlands, he had to agree with the applicant's attorney. Mr. Estes commented that Section 6 listed access to residential buildings and Section "C" listed access ways, which was confusing.

Mr. Richardson said the Planning Board had discussed short driveways for individual homes and longer access ways were intended for the section of the Town that was industrial or commercial and fell within the general definitions to include both. He agreed that the ambiguity in the ordinance should be changed to clarify the reference to permitted use and the Special Exception required for driveways crossing wetlands, but said there was no need to minimize the criteria for the Special Exception under permitted uses and they should go through the analysis to determine if there was a minimal impact.

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

Mr. Frink said even if they were required to obtain a permit from DES, it was still a permitted use to cross wetlands and he was afraid that the Town had further antagonized the issue by not allowing shared drives. Mr. Richardson said shared drive statutes weren't legal anyhow and had to be designed to meet the same criteria as streets. Mr. Frink asked about the shared driveway through the Mazeau's development on Fox Point Road and Mr. Richardson said the Mazeau development was approved and built, but it was an example of what happens when a town lets there guard down. He added that RSA 674:41 said driveway easements to cross other people's properties to access a lot were not allowed. He said it was up to the ZBA and it was a hard decision, but they needed to be careful.

Chairman Morton said it was not in the ZBA's purview to discuss shared driveways and he didn't think the applicant got short changed and they should go on to the Special Exception, which the Conservation Commission made a recommendation against. Mr. Frink agreed, noting that the Conservation Commission might have some sway with DES, but it was up to the ZBA to interpret the Zoning Ordinance.

Mr. Morgan said the motion would be to uphold or overturn the Planning Board's decision.

*John Frink moved to **overturn** the Planning Board's interpretation of Article X, Sections 4B(6) and 4C of the Zoning Ordinance on August 11, 2014 in regards to Bruce Belanger's property situated at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2. Ted Connors seconded the motion.*

Mr. Estes said he still had a problem with the requirements for access and the Special Exception and agreed that the ordinance was poorly written. Mr. Frink said the Board members could freely disagree with his motion.

Chairman Morton said ordinarily there were five voting members of the Board, but two members had to recuse themselves so there were only four voting members including himself in this case. Mr. Morgan said the majority vote would prevail. Attorney Mulligan asked what would happen if they reached a deadlock and Mr. Morgan said the motion would still fail. Ms. Mills said she didn't think the vote would be fair to the town or the abutters and they should wait until there was a fifth person on the Board. Chairman Morton said could they could table the motion if he so chose, but it might be some time before they found a another Board member. Attorney Mulligan agreed to move ahead with the motion.

*The motion **failed** to pass 1-3 with Mr. Frink in favor, Mr. Estes, Mr. Connors and Chairman Morton opposing.*

2) Request by **Bruce Belanger** for a Special Exception pursuant to Article X Section 4C of the Zoning Ordinance.

Mr. Weiner remained recused and Mr. Richardson offered to return to his seat. Attorney Mulligan asked if Mr. Richardson would return back to the Planning Board seat

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

and Mr. Richardson said they were in uncharted territory. Attorney Mulligan said he would rather that Mr. Richardson recuse himself. Chairman Morton said the ZBA's counsel discussed Mr. Weiner's recusal and also agree that Mr. Richardson should reuse as well. Mr. Richardson said he would discuss whether he could speak at the Planning Board with their counsel.

Mr. LaRosa reviewed statements by their wetlands scientist, Mike Mariano in October 2013 that were reviewed by the Town's consultant, West Environmental and both agreed that there were no egg masses to indicate vernal pools. He said they reviewed the site three more times and confirmed the wetlands delineation in July 2014. Mr. Estes asked if the Town had reports and Mr. LaRosa said Mr. Morgan said they did but he didn't recall any discussion of amphibian breeding vernal pools.

Mr. LaRosa said they listened to the Planning Board and their consultant, Altus Engineering and they presented a plan with the least impact to wetlands. He said they met with the abutting property owner Mr. Mathes about accessing the lot through his property and he would not agree. He said they looked at access from Fox Point Road and found there was a greater impact than if they accessed from Nimble Hill Road. He said they still hadn't provided a formal traffic study, but they looked at site distance and believed they met driveway standards.

Mr. Morgan said there was a procedural issue under the criteria in the Zoning Ordinance for the Special Exception that required that an approved permit from DES be submitted in advance. Mr. LaRosa said driveways called for variances and Mr. Morgan said they had advertised for a Special Exception, but not a variance. Attorney Mulligan suggested they address the Special Exception and make the issuance of the Special Exception conditional on obtaining the wetlands permit from DES. Mr. Morgan said he would ordinarily if there was wiggle room, but unusual the language specified that the permit "shall" be submitted in advance. He said they could have requested a variance, but they hadn't as yet and no notice went out to the abutters.

*Ted Connors moved to table the request by Bruce Belanger for a Special Exception pursuant to Article X Section 4C of the Zoning Ordinance in regards to property situated at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2. Ralph Estes seconded the motion and all were in favor.*

Attorney Mulligan said DES wanted to see a plan, but they needed to determine if the Special Exception for drives was necessary or not first. Chairman Morton asked how long it would take to get permits. Attorney Mulligan asked they needed to re-advertise. Mr. Morgan said they should re-advertise to be sure have quorum and they would not need to make decision till tonight. Chairman Morton asked if they needed to set a date and Mr. Morgan said they did not.

Planning Board Chair, Denis Hebert said the Planning Board was looking at the ordinances that needed updating and encouraged members of the ZBA to participate with process. Mr. Morgan said they were looking at **October 22, 2014** for a work session.

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

B) Request by **Wilcox Industries LLC at 25 Piscataqua Drive** for a variance to allow a 2-foot rear yard setback where Article VI of the Zoning Ordinance requires a 50-foot setback at 25 Piscataqua Drive, Tax Map 27, Lot 22.

Mr. Bill Gregsak with Gregsak Engineering and Mr. John Bernier with the Bernier Corporation said Mr. Jim Teetzle was traveling abroad and could not attend so they were representing Wilcox Industries for him.

Mr. Gregsak said they were requesting a variance for the construction of a parking area with a retaining wall within 2' of the abutting lot line where a 30' setback was required. He said they were relocating the entrance off the new extension of Shattuck Way. Mr. Frink asked who was building the new extension of Shattuck Way and Mr. Morgan said it was being built in conjunction with the Planning Board.

Mr. Gregsak said high tension lines were on the abutting property owned by PSNH and there would be no diminution to the value of surrounding property. Mr. Frink asked if they had a letter from PSNH and Mr. Gregsak said they did not, but PSNH had been notified.

Mr. Gregsak said the relocation of the access would provide improved security for the facility and granting the request would benefit the public interests. He said they recently purchased a 50' strip from PSNH to meet the 50' setback and the facility would be more secure with the extension of Shattuck Way and they would also create an access to the Town wastewater plant.

Mr. Gregsak said denying the request would result in an unnecessary hardship to the owner because the siting was limited. He said the proposed use would not be contrary to the spirit of the ordinance because the use would remain the same. Discussion ensued regarding PSNH's overhead utility lines and easements.

Mr. Richardson said an easement would tell how close another structure could be proposed on one side Mr. Gregsak said PSNH was on the backside and the only easement necessary would be the Wilcox easement. Mr. Richardson said the reason for an easement on the PSNH land would be so they could sell the land to another party, but still be allowed to maintain their power lines, but the law said property owners couldn't have easements on their own land. He said an easement would prevent development on the property and it could be recorded on the plan. Mr. Frink said they should make a condition that no structures be built within the easement. Mr. John Bernier, the builder said they would need to install a new water main to for PSNH before they could get rid of the water main easement and will then they could record the deed.

*Ted Connors moved to **grant** the request by Wilcox Industries and 25 Piscataqua Drive LLC for a variance to allow a 2-foot rear yard setback where Article VI of the Zoning Ordinance requires a 50-foot setback at 25 Piscataqua Drive, Tax Map 27, Lot 22. Ralph Estes seconded the motion.*

# Town of Newington, NH

## ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

Mr. Frink said granting the request would not be contrary to the public interest in that it was in keeping with the industrial use. Mr. Richardson noted that the easement would not allow any buildings to be built there.

Mr. Richardson said he would like to know what their snow management plan for site visibility and to prevent damage to surrounding areas. Mr. Estes said that was the Planning Board's purview and Mr. Morgan agreed. Mr. Richardson said he still wanted to know. Mr. Gregsak said the area would be curbed and they would have a closed drain system, catch basins, an open detention area, an oil water separator that fed into an underground detention pond with chambers, and a recharge system to reduce the rate of flow during storms.

Mr. Richardson asked about their snow removal plan and Mr. Bernier said they hadn't discussed it yet. Chairman Morton said could bucket out and Mr. Gregsak agreed that they wouldn't have piles of snow that would interfere with parking.

Planning Board Chair, Denis Hebert said the Planning Board would make sure there was a snow removal plan.

Mr. Richardson went on to review the criteria for granting the request and said substantial justice with the expansion for a tax-paying applicant who employed many. He said the value of surrounding properties would not diminished as the abutting power lines would not be worth any less as a result of the variance. He said not granting the variance would create an unnecessary hardship on the applicant because they would not be able to improve the parking area for their expansion and increase their employees.

*The motion **passed** 4-1 with Mr. Frink opposing.*

Mr. Richardson suggested that they make the approval conditional upon he applicant submitting a legal document to the Town planner for review by Town counsel to be sure it was recorded and enforceable. He also suggested that they submit a snow removal plan with no on site storage. Mr. Frink said the Planning Board would take care of those matters and Chairman Morton agreed that it was not in the ZBA's purview. Mr. Richardson agreed, but said they needed to be mindful of setting a precedent with a 2' setback. Chairman Morton asked if the applicant's attorney could supply the a legal document and Mr. Gregsak said they could and the plan would be on file and recorded.

*Mr. Richardson moved that the request by Wilcox Industries and 25 Piscataqua Drive LLC for a variance to allow a 2-foot rear yard setback where Article VI of the Zoning Ordinance requires a 50-foot setback at 25 Piscataqua Drive, Tax Map 27, Lot 22 **be granted** on the condition that a legal document showing the 60' utility easement be submitted to the Town planner and recorded. Mr. Frink seconded the motion **and all were in favor.***

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2014

**Adjournment:** *Ted Connors motioned to adjourn, and Jim Weiner seconded. All were in favor, and the meeting adjourned at 8:27 p.m.*

**Respectfully  
Submitted by:** Jane K. Kendall, Recording Secretary