

Call to Order: Chairman Morton called the meeting to order at 7:06 PM. Board members in attendance: Edna Mosher, Ralph Estes, Vincent Frank, Richard Ford, John Frink, Chair: Matt Morton, and Town Planner: Tom Morgan.

Minutes of June 4, 2007: Mosher outlined errors in the minutes. Ford moved to accept minutes, Mosher seconded as corrected. Motions carried. The secretary informed the Board that those changes had been recognized and final minutes were sent to the Town Planner with corrections.

Correspondence: Morgan informed the Board that he had received correspondence from Attorney Lyons, Lulu Picking and from the Graciano's.

Public Hearings:

A.) Request by Mo Wong to sell groceries and gifts at the Asia Restaurant (347 Shattuck Way) where such use is not permitted by Article V, Section 2 of the Zoning Ordinance.

Mr. Wong and Attorney Pelech who was representing Mr. Wong were present to outline plan for inclusion of the sale of Asian food and gifts as an addition to the Asia Restaurant. Attorney Pelech reminded the Board he had presented a memo outlining the five criteria at the June 4 Board meeting. Attorney felt that Mr. Wong met the criteria. The Attorney felt the Board could look at this request in two ways. One that the Asian food specialty sales was some what of an accessory use. The other, the restaurant was initially zoned correctly. They have been selling gifts presently.

The area has been zoned Office so the restaurant is not in compliance at this time, a valid non-compliance. The restaurant has been in non-compliance legally for many years. In addition to the restaurant's non-compliance they are abutted by Custom Pool on one side, the turnpike on one side, Sprague salt pile across the street, River Road and basically a vacant lot on the other sides.

Mr. Wong does not plan any external changes to the building. Attorney Pelech recognized that there was concern by the Board that they would be setting a precedent. The Town has been very cautious granting variances. Attorney Pelech felt this was a natural expansion to a non-conforming restaurant. This will not affect the neighborhood. He feels there are no other restaurants in the area in the position to offer this type of service. He felt the Board should therefore, deal with subsequent requests, on a basis-to-basis situation. He recommended the Board approve to adopt this request.

Chair asked if there were any abutters present or any one present who opposed this proposal. There was no one present.

The Chair advised that the Town's Attorney, Peter Loughlin was there to advise the Board on matters that arose this evening. His specialty is Zoning and he is an expert in Zoning requirements. Attorney Loughlin told Board that the Town Planner had called and told him about this request. Morgan expressed concern that the Board would be setting a precedent if they approved this request. He asked that the Attorney review and be present at this meeting. Attorney Loughlin presented a Zoning finding on Mo Wong's request. A copy should be in each packet. He advised Chairman Morton and the Board that they were not really granting a variance. per se. He made a recommendation that the Board accept this request. There was more discussion among Board members. Mosher made a motion to accept findings and to incorporate them into these minutes. Vincent seconded. Motion carried.

B) The Estate of Barbara Baird requests a variance in order to allow two building lots with a total road frontage of 398 feet where Article VI of the Zoning Ordinance requires 400 feet. The property is located at 316 Newington Road, Tax Map 53, Lot 5.

Edna Mosher stepped down from voting on this request.

Erin Baird, granddaughter of Barbara Baird presented visual aids regarding area variance. The request is to build a family home on one of the lots that is surrounded by similar homes. She presented the five criteria at the last meeting and how she felt they met the criteria and hoped the Board would look favorably on their request to approve 1.4 foot difference between the 398 plus feet where the ordinance requires 400 ft .

The land and driveway accessing this land was established over 40 years ago. The Bairds maintained the driveway for over 40 years. The driveway became an established driveway for multiple families when David Emery sold his farm and split it into separate lots which are now owned by the Carrolls, the Clarks and the Gracianos. The Carrolls realized when they bought their property that they would be accessing their property by a shared driveway that crossed over the Baird property.

Ms. Baird went on to explain the use of the land, that there would be no cut-ins. She outlined the wetlands area and the fact they met requirements. There was discussion regarding septic system, who would maintain driveway, etc.

Ms. Baird said the Carrolls have always maintained the driveway to their house. Ms. Baird felt they would have to establish a legal document to outline financial responsibility for maintenance of the shared driveway. She said it was their intention to share cost of maintaining the driveway to Carroll's home and fully maintain the driveway going from there to their proposed home. She advised Board that there was a drainage flow path that would require that they put in a culvert in two areas.

She was asked how the fire department would be able to access their lot and how electricity would be brought to their proposed home. Ms. Baird advised the Board that

they had contacted the Fire Department and PSNH. PSNH is coming out to look at the site to determine the most feasible way to get electricity to the proposed lot. As for the Fire Department, they talked with the Fire Chief and he said he didn't think they would have a problem, because the Town has access to the dam that is on the Baird property. The access allows the Fire Department to protect surrounding homes in that area.

The applicant was asked if their driveway would pass in front of the Carroll home. Her reply was yes it would, however, this has always been the case. Ford asked how often they use the road now. Ms. Baird said her uncle has camped off and on over the years in a small building that sits on the property. He enjoys being in the woods, observing wildlife and birds. In the summer it is used as a club house of sorts for camping by various members of the family. It has no electricity. In the winter they have gone in to collect wood.

The Chair asked if there were any more questions from the Board. Being none he opened the hearing up for comments from the abutters.

Present were Mr. & Mrs. Carroll, represented by Attorney Lyons. Attorney Lyons stated that the Carrolls were direct abutters to this property and were opposed to this request. Ms. Baird said she was making this request because they wanted to maintain a presence here. Attorney Lyons said, the family has been here for 68 years and they could still maintain a presence by living in the front house.

The Attorney said Ms. Baird was honest when she said, "Look, we want to divide this up and this will help us money-wise to do that." The Attorney said, "This is what this is all about, to find a way to make money so all of the heirs will be satisfied, that's not sufficient grounds to grant a variance in any regard."

He stated Ms. Baird also indicated that this lot would be held in the name of the Trust. Attorney Lyons said that under the Town's own Zoning Ordinance, Article 13, Section 3, this can not occur. The Ordinance states if two or more adjacent lots under the same ownership do not meet dimensional requirements, the land involved will be considered undivided property under this ordinance. So if the request for variance was to be granted, one of the lots would have to be conveyed to another entity to prevent a merger from occurring again.

Attorney Lyons felt this then raised some significant legal issues. Ms. Baird at the last meeting talked about the dominant/servient stake. He stated "The minute there are two lots here, issues regarding his client's right-of-way come into play." He said this may have to be decided by Superior Court. From their position, however, they feel the Baird's request is beyond the scope of what they would be allowed to do as far as subdividing, and the use of his client's R-O-W, which they have held for a significant period of time.

The attorney said, if the Board looked at the fifth element of criteria, which is, is this proposal contrary to the spirit of the Law? He feels if the Board looked at the merger part of the Ordinance, his clients feel it is contrary to the spirit of the law.. If you look at

the purpose section, found in Article I, Section 3, it talks about health, and safety. He feels there are real issues regarding this section as it relates to access to the back area.

Attorney feels if the Board grants this variance they will overlay three R's-O-W; feels the Board is not legally entitled do that and he and his clients will challenge this. It is the Attorney's understanding that the Zoning Board and particularly the Planning Board have been very diligent in opposing shared driveways.

Attorney Lyons advised the Board based on the safety reference, he was forced to write a letter to the Town Planner regarding a discussion between his client and Ms. Baird. Letter attached to June 18 Agenda. This is why he feels the Town has been against shared driveways.

The Carroll's Attorney stated the Town has no provision for back-lot subdivisions. Why? He feels granting this request and allowing this variance creates the precedent for back-lot subdivisions. When allowing someone to subdivide he feels it goes against the purpose section of the Ordinance, which talks about the rural nature of the area. Section 1 under the residential section A, says any future development that does not promote a neighborhood function is prohibited. He feels allowing this request goes against that section. Attorney Lyons stated when you look at section 4, which can be seen on the internet, it states, granting the variance would do substantial justice.

He felt it could probably be looked at two ways and perhaps Attorney McLoughlin could address that better. However, Attorney Lyons wanted it on the record that before his clients purchased their property, they looked to see if there was sufficient road frontage so the back lot could be subdivided. This was part of their process in deciding to purchase this property. Allowing this variance he feels does not do substantial justice.

He talked about his client's relationship with Mrs. Baird over the years; it was a good one. Mrs. Baird said the property would never be subdivided. He said the Carrolls told him they had conversation at Mrs. Baird's funeral and were told not to worry. The property was being donated to the Nature Conservancy; it was not going to be developed. Attorney wanted it on the record that his clients were not just someone who purchased this lot based on some belief that the lot behind them would be developed.

Attorney Lyons addressed how granting the request would diminish the value of his client's property, how granting would not be a benefit to the public interest and he felt not granting would not be a hardship to the applicant. He outlined various examples of why granting the ordinance would affect his clients and the surrounding properties.

The next criteria, granting the variance would benefit the public. He again outlined reasons why this would not benefit the public or his clients.

He addressed the issue of hardship. He felt the Baird's have presented nothing that would indicate a hardship to the applicant. The Attorney wanted to know which lot the applicant was requesting the variance for.

The Attorney advised the Board that his clients took the position that when you're giving a plan for a dimensional clearance, there should be a formal outline for that request. He reviewed items he had already addressed and reiterated those comments.

Frink inquired whether the Board was acting on the request for a variance of 398 feet where 400 feet was required or the issue of a disputed driveway? Chair said yes it was a request for a 1.4 ft. variance. Frink replied, so this request involves only the requirement for a 400 foot frontage where there is only 398 feet on the property? Morgan said Frink brought up a good point, the Board could only respond to the request as advertised for the Public hearing.

The Chair opened the discussion to abutters and any other interested persons present.

Gail Pare spoke in favor of the request. The key here is that the entire back lot would become a conservation easement. There does have to be some surveying to determine how many lots could be developed, but the issue is that it will be a conservation easement and she feels this is a win-win situation.

John Frink and Attorney Lyons had discussion regarding R-O-W's and how many should be using a R-O-W. Frink said Newington does not encourage shared driveways, however, there are several shared driveways in Town. The Attorney felt it was not legal to have shared driveways.

Edna Mosher stated that she was adamantly opposed to this request and hoped that the Board would not approve. She stated that she has been in litigation for two years regarding a shared driveway and Attorney Lyons has been her legal counsel.

Leslie Baird Hutchinson, daughter of Barbara Baird, spoke very emotionally when she stated why she and her brother wanted the property divided. She wanted to bring her children back. She wanted her grandchildren to live in Newington and become part of what she so loved of being here in this town. She made it clear that this was not about money!

Paul and Connie Clark, abutters, spoke against the variance. They bought their land 13 years ago and they are opposed to the variance. They were also opposed to creating two smaller lots for which this variance would apply. Chairman advised the Clarks that he didn't see this as smaller lots, there are 30+ acres, the Town requires 2 acres. There was further discussion of the plan to create two smaller lots. Ms. Baird responded by saying that, yes, there would be a larger lot and two smaller lots, however, the lots all had to meet the two-acre requirement of the Town.

There was more discussion and comments by Ms. Baird. Board member, Ford, asked Attorney Lyons if there wasn't a way to compromise. The attorney stated there was no compromise as he could see. He stated, "Someone has to win and someone has to lose."

There were more comments from Ms. Baird and Mrs. Hutchinson (daughter) of Barbara Baird. Mrs. Hutchinson feels her mother had no idea that someone in the family would want to build on the property. She said her mother would be very upset if she knew of this the issues being brought up. She felt her mother would have been very happy to see her granddaughter build on the property. Mrs. Hutchinson said she (Barbara Baird) just did not want to see the property developed.

A recess was called at approximately 8:15. The Chair called the meeting back to order around 8:20. He asked if there was any more discussion; if not would someone like to make a motion.

Frink moved to approve as advertised, Estes seconded.

Tom Morgan, Town Planner, advised the Board to look at page 15 regarding the Boccia standards. This should be part of minutes. Frink read the requirements of the Bocchia standards. That an applicant seeking an area variance can demonstrate that, 1) Special conditions of the property make an area variance necessary in order to allow the applicant to construct the development as designed; and 2) the applicant can not achieve the same benefit without some other reasonably feasible method that would not impose an undue financial burden.

Attorney Loughlin felt this is somewhat of a restatement of some of the standards before; that there has to be some kind of special conditions about the property that distinguish it from the majority of other properties. He went on to give examples to show what constitutes special condition and what doesn't.

The Chair asked if there were any other people who wished to speak either for or against this request. Being none, the hearing was closed at 8:35.

Board member Frink reviewed the 5 criteria -

1) No decrease to the value of surrounding property; feel there is no decrease. There was discussion regarding the first criteria. Frink stated that the issue of shared driveways, etc. would have to be decided by the Planning Board.

2) Granting the variance must not be contrary to public interest. Felt it was not. Board members talked about fact that they were only asking for a two foot variance.

3)

A) Denial of the variance would result in unnecessary hardship to the owner seeking it.- yes

B) Feel the applicant cannot achieve the same benefit without undue financial hardship.-yes

Frink referred to Boccia requirements.

4) Granting the variance substantial justice would be done. yes.

5) Use must not be contrary to the spirit and intent of the ordinance. Asking for 2 foot variance, feel is not an unreasonable request.

Chair asked if there was any further discussion. Board member Estes felt this was the worst hearing the Board has had to hear. This is a no win situation. No matter which way we go, somebody is not going to be happy. He went on to say that the Board was here to vote on a variance for 2 feet on the frontage. The driveway and everything else will be taken care of by the Planning Board.

The Chair wanted to remind the Board that they have never voted on this type of variance or granted this variance. He agrees it is a hardship, wished Board was voting on a 50 ft. variance. Reminded the Board that they had heard all the arguments and it was now time for a vote. Secretary was asked to read the motion. Chair called for a vote, in favor: Frink, Estes, Ford, Frank. Morton, nay. Motion carried.

Estes moved to adjourn, Ford seconded, motion carried. Meeting adjourned at 8:50 P.M.

Respectfully submitted,

Sandra W. Sweeney