

Call to Order: Chairman Morton called the meeting to order at 7:05 P.M. Board members in attendance: Ralph Estes, Richard Ford, Vincent Frank, John Frink, Edna Mosher, Chair: Matt Morton and Town Planner: Tom Morgan.

Correspondence: Town Planner Morgan pointed out copies of variance application from BankNorth. In addition, a response to Attorney Lyons, a response to abutter water levels concerns, and a memo regarding Special Exception for access way across wetlands, from Erin Baird. He handed out copies of a letter he received from Chairman Richardson of the Newington Conservation Commission to the Newington BOA regarding the Baird Subdivision Plan, Tax Map 53, Lot 5, dated June 27, 2007 and a copy of a letter to Erin Baird from Joseph Noel, Certified Soil Scientist, Wetland Specialist and Licensed Site Evaluator. This was regarding JWN#07-56, Baird Subdivision, Tax Map 53, Lot 5, located at 316 Newington Road. Attorney Lyons presented an email from James Carroll outlining their comments and concerns regarding the Baird requests. Mr. Carroll was called away and was unable to attend the meeting tonight.

Minutes: Mosher moved to accept the minutes of July 30, 2007; Frank seconded. Motion carried.

Public Hearings:

A) **TD BankNorth** requests a variance from Zoning Articles VI, XI (Sections 5 & 12), and XIII in order to allow the replacement of a non-conforming free-standing sign with a 16-foot high sign at 2033 Woodbury Avenue, Tax Map 27, Lot 3.

Paul Tripp, Classic Signs, Amherst, NH representing TD BankNorth spoke of the history of the existing sign. Since there is already an approved variance for the setback of sign on this property, he felt granting this new variance would simply be a continuance of the existing variance for sign location. There was discussion among Board members regarding the initial variance and reason for granting. Frink and Chairman Morton remembered going out to the site. Morton said they went to great lengths to grant that variance. There was great visibility then and now you want a variance to replace that sign. Morton stated if the applicant wanted to repair the current sign the applicant wouldn't need a variance, however, they wanted to replace the sign. There was discussion as to whether there was another location for the sign or another alternative. The applicant felt there was not another location.

Mosher and Frank were concerned the Town would find themselves overwhelmed with outlandish signage. Frink was not opposed to the request, however, Mosher said she was. Applicant stated there used to be a one hundred foot frontage zone requirement, now it is half of that. Ford said he could see justice being done granting this request; however, he too, was concerned that Pandora's Box was being opened. After more discussion from the Board members, the Chair asked if there were any comments from the Public. Being none, the hearing was closed. Chair asked if there was any further discussion from the Board or was there a motion before the Board. Frink moved to approve the request for a variance to allow the replacement of a non-conforming sign; Ford seconded. Morgan reviewed the five criteria.

1. Value of the surrounding property will not be diminished. Board agreed, no.
2. Will not be contrary to public interest. No.
3. Boccia hardship requirements:
 - a) An area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property. Yes
 - b) The benefits sought by the applicant can not be achieved by some other method reasonably feasible for the applicant's pursuit, other than an area variance. Yes
4. Substantial justice will be done. Yes.
5. The variance is consistent with the ordinance. Yes

There was comment and further discussion before agreement was made on the above criteria. Board members had comments for or against, however, the majority were for. The Chair asked for a vote. Estes, Ford and Frink were for; Frank and Mosher were against. Motion carried, variance approved.

B) The Estate of Barbara Baird requests:

- 1) 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 for two; and
- 2) A special exception to allow a driveway in wetlands pursuant to Article X Section 4C of the Zoning Ordinance.

The Baird property is located at 316 Newington Road, Tax Map 53, Lot 5.

Chair Morton directed the Board to correspondence from Justin C. Richardson, Chairman of the Conservation Commission and Joseph Noel, Certified Soil Scientist, Wetland Specialist and Licensed Site Evaluator addressed to Ms. Baird and just received by the Board. Also included is an email from James Carroll to the Board regarding the issue of the ROW. Mr. Carroll was unable to attend the meeting. Time was taken for Board members to review.

Chair informed Board and the Public that this was a rehearing based on the fact that some of the abutters had not previously been notified. Chair stated that Edna Mosher was stepping down from this hearing. He advised everyone that he and the other four Board members would be voting on this rehearing.

He asked Ms. Baird if there were any changes to the original request and she advised that there were. Ms. Erin Baird is the official agent for the Baird Estate. She said the lots have been changed from two acres to three acres. The remaining thirty plus acres will go to the Nature Conservancy. She stated the first lot has the required 200 ft. road frontage, however, the second lot has 198+ ft. The request is a variance for a 1.4 ft road frontage.

She said the Conservation Commission has unanimously voted to recommend that the New Hampshire Department of Environmental Services approve their application for a permit pursuant to RSA 482-A:3.

Issues were then discussed regarding access to the back property. Ms. Baird stated that the ROW to the property, which crosses in front of the Carrolls, has been utilized by the Baird family for over 40 years. She stated the Carroll's only legal right of access is over the Baird property.

There is the issue regarding a threat to public health because of beavers trying to flood the two ponds causing an overflow of water into the culvert. This has been a concern of the Baird's for years, and Ms. Baird stated that about ten years ago the Bairds and the Carrolls shared costs to put in a second culvert to help with this problem. The beavers, however, continue to try to flood the ponds with their dam behind the larger pond. Mr. Carroll has continued to put plywood over the culvert. This has been a concern of the Bairds and the plywood has been removed in the past. She stated that the Bairds do not feel that the Carrolls are doing this to be malicious, however, they feel there is a better way to correct the problem. Her comments regarding water level concerns are attached hereto.

Attorney Lyons referenced his letter to the ZBA on July 11, 2007 outlining his clients concerns. He said he would not go over them again as they were already part of the record. He assumed that all abutters, as required by State Law, had been notified by certified mail. However, he did want to point out for the record, their position was still the same; the notice for this meeting was defective. Article VI of the Zoning Ordinance says each individual lot must have 200 foot road frontage. It does not talk about 400 feet. Their position would be that this

request should have been for a 2-lot subdivision where one lot has X amount of road frontage and the other lot has X-amount. He does not feel that the Board can approve this request based on their Zoning Ordinance.

He spoke of some what if's and how they might affect his clients. He talked about the plywood that had been used to cover the culvert to address the problem of beavers, prior to his clients purchasing their home. For the record he stated that he has advised his clients that from a legal stand point, that as owners of the ROW, they have the absolute right to maintain and preserve that ROW. They have not put back any plywood. He questioned whether or not it is a driveway. If the variance is granted, he feels it is not a driveway, but an access road that goes through one lot to get to another that has to be passed through to get to the other. He referenced a plan prepared by John Durgin July 1949 and how this property had been divided up.

Attorney Lyons again stated he did not feel the Board could grant this variance because it was not correctly advertised; there is no 400 ft. reference in Article VI of the Zoning Ordinance, and therefore, he asked that his letter to the ZBA dated July 11, 2007 be considered when making a decision.

The Chair asked if there were any questions from the Board. After asking questions of the Attorney, Ford asked and wanted on the record, "What are the real reasons your clients are really opposed to this request?" Attorney Lyons stated it all had to do with the ROW. The value of the Carroll's house is based on the ROW. The issue of safety, use of the road if it is flooded, emergencies, what would they do?

Frink asked the Attorney if he had the wording for the ROW as written in the deed to the Carrolls. Attorney Lyons responded saying he did not have the deed, he was researching the title. He did have two deeds that showed there were two lots. These were owned by a Mr. Kennard. A plan written by John Durgin in 1949, divided the land into two lots, a smaller lot and a larger lot. Kennard conveyed the smaller lot to a Wilhamina Sorlie and soon after, conveyed the larger lot to a Wilhamina Russell whom he would assume was the same person. Frink asked what the wording was in the deed for the larger lot? Attorney Lyons gave the wording that stated where the ROW was located and that they could use it. It did not say anything else. He said he had not done all the research he could, however, he felt confident that his clients, as the owner of the dominant estate, have the right to maintain that ROW as stated by NH Law.

Estes asked if the Carrolls sold their house, would the person who purchased the house, have the ROW. Attorney Lyons, after some thought, felt he had to respectfully decline giving the answer to that question or giving legal advice.

Chair asked if there were any questions from the Public. Paul Clark, abutter, not really for or against. He only commented on the beavers on his property and that

he had gone to Fish and Game and they do not take care of beavers anymore. Gail Pare, spoke in favor of the variance, particularly turning over 30+ acres of land to a conservation easement. She felt this was in direct support of Newington's number one priority, keeping the rural nature of the community.

The Chair closed the meeting to the public and asked if there was any more discussion from the Board or were they ready to propose a motion. Frink expressed concern regarding the issue of how the request was advertised and how the Board should address it. Town Planner Morgan asked to address the issue. He stated his disagreement with Attorney Lyons was that he (Lyons) talks as though there are already two lots. The lots do not exist until the Planning Board votes to subdivide. Morgan drafted the Public Notice in such a way, it doesn't pre-suppose the Planning Board is going to grant a subdivision or not. The Zoning Board's job is to take the 200 ft. road frontage requirement and decide whether to go plus or minus, based on the criteria. The second item Morgan wanted to bring up; Attorney Loughlin was at the last meeting to determine whether there would be a re-hearing. We asked what the reasons would be for a re-hearing, and he said the only valid reason was that we didn't notify all of the abutters. Morgan told Frink that Attorney Loughlin had no qualms about the wording of the Public Notice.

Frink moved to accept request for a variance to allow two building lots with a total road frontage of 398 feet where Article VI of the Zoning Ordinance requires 400 feet for two lots, Vincent seconded.

The Chair asked if there was any further discussion. Estes stated that he had done a lot of research on some of the old originally passed ordinances on Zoning. He said they were not very clear on anything. He did talk with Paul Kent who was on the Planning Board at one time and he said they kind of left it open at the time, but the intent was that there would be two acres, 200 ft. from roadway and a driveway for each lot. Estes asked him about some specifics where this wasn't the case. Kent said, "Well we left it up to you guys!"

There being no more comment, the Chair asked Frink to go through the five criteria:

1. No decrease in value would be suffered. – no. Ford said, "There's already a shared driveway, where is the compromise?"
2. Granting must not be contrary to public interest. – no. Ford, "According to Ms. Pare the 30+ acre Conservation easement will enhance Newington's #1 priority, the enhancement of its rural community."
3. Denial would result in unnecessary hardship to the applicant. - yes

4. By granting, substantial justice would be done. – yes. Vincent, protecting the wetlands, is like gold

5. Use must not be contrary to the spirit of the ordinance. - no

Estes stated he had a problem because ordinance says 200 ft. After more discussion, the Chair called for a vote. Ford, Frink and Frank for; Morton and Estes against, motion carried.

The Chair gave a five-minute break. Meeting brought back to order at 9:05 p.m.

The next item to address was a special exception to allow a driveway in wetlands pursuant to Article X Section C of the Zoning Ordinance. Ms. Baird stated they had met all criteria for the three crossings, one 20'X45', one 20'X25' and the third 20'X30", regarding their impact on the wetlands. Memo from Joseph Noel, Licensed Site Evaluator included with tonight's packet. Vincent spoke of other requests for similar variances that were approved by ZBA for much larger areas, so he had no problem with this request.

Ms. Baird was asked if she had her formal approval from the Conservation Commission, and her permit from DES. She said she did not have either, however, she was meeting with the Conservation Committee next week at which time she would have her approval. She has submitted her application to Concord. There was discussion regarding granting conditional approval based on receipt of these two items and it was decided that it had been done in the past. There was discussion among Board members. Vincent commented "If the Bairds do not get their permit this request and any approval from ZBA or the Planning Board would be null and void."

Attorney Lyons stated he would object to granting a conditional approval. He said "you've approved two lots, we have no idea what the road frontage is of either one." "You are now proposing conditional approval for a special exception." "We don't know the design, what is the construction, we don't know what they're doing." The Town Planner stated that all night long he has heard several people at the table and the attorney, trying to step on Planning Board territory and that is not our job. He added that only the Planning Board can "approve" the creation of new lots.

The Chair and Town Planner stated the Board has the right to make a conditional approval. Frink referenced the letter from the Wetlands Scientist. He read part of his report that stated the road would have minimal impact on the wetlands. With that, the Chair asked if there was a motion before the floor.

Ford made a motion to grant a special exception to allow a driveway in wetlands pursuant to Article X Section 4C of the Zoning Ordinance, Vincent seconded. Chair asked if there was any discussion.

Morgan suggested that the Board go through conditions of Special Exceptions. Frink reviewed conditions.

1. Proposed construction is essential to productive use of non-wetland areas - yes
2. Design, construction and maintenance will minimize any detrimental impact on the wetlands and will include restoration of its site to as nearly possible to its original grade and condition. - yes, have assurance from Wetland Scientist.
3. No alternative route is feasible and reasonable. - no
4. Issuance of permit to the NH Wetlands Bureau and the Army Corp of Engineers. - yes
5. Would not have adverse affect on applicant's property. - no
6. Cause significant increase in traffic. - no
7. Odors, dust, vibrations, smoke or fumes do not go beyond the applicant's property – no Provision - Have to ensure there are mitigation measures in Newington if necessary, if wetland system damaged.

Frank stated he was not uncomfortable with any of the conditions. Chair asked if there was any more discussion before the Board took a vote.

Paul Clark, as an abutter asked if he could speak. Said he wasn't given the opportunity before. Stated he was amazed that the Conservation Commission and this Board were not insisting to see what was in the D.E.S. permits that listed the requirements the Bairds must meet. Said when they (Clarks) got their wetlands permit, they had to meet one and a half pages of requirements. He was asked how long it took to get permit in hand. Mrs. Clark stated it was a long time. Clark said he really didn't know, he didn't go, the builder took care of that. However, he said they had to have the permit before they went before the Zoning Board. Clark said he only knew that Zoning Board Ordinance stated applicant had to have permit in hand when coming before the Board.

There was discussion between Board members. Frink moved to table this motion based on the fact that this driveway is considered an access way, Estes seconded, motion carried. Next ZBA meeting will be held on October 1, 2007 at 7:00 P.M. Frank moved to adjourn, Ford seconded, motion carried. Meeting was adjourned at 10:10 P.M.

Respectfully submitted,

Sandra W. Sweeney, Secretary