

Town of Newington, NH
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – June 1, 2015

Call to Order: Chair Matt Morton called the June 1, 2015 meeting at 6:30 PM.

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

Public Guests: Attorney Chris Mulligan; Attorney Walter Mitchell; Madeline Mills; Justin Richardson; Lorna Watson; Denis Hebert; Attorney Bernie Pelech; Mohamed Ebrahaim

Minutes: *Ralph Estes motioned to accept the Zoning Board Minutes of April 27, 2015. Jim Weiner seconded the motion.*

Board member, John Frink asked if the reference to Selectmen Jan Stuart half way down on page regarding disagreements with neighboring tenants had actually been discussed or if it should be stricken from the record. Board members agreed that it had and could remain in the minutes.

The motion passed and all were in favor.

Public Hearings:

A) Request by Keith Frizzell regarding property at 34-46 Patterson Lane, Tax Map 19, Lot 6, and Map 13, Lot 11 for a Special Exception to permit the construction of water impoundment infrastructure in wetlands, pursuant to Article X Section 4C of the Zoning Ordinance.

Chair Morton said this item had been cancelled. Town Planner, Tom Morgan said the applicant indicated they would like to come back, but they were not sure when they would receive their permit approval from the State. Board member, John Frink asked if the applicant had given advance notice of the application and Mr. Morgan said they had notified him two hours prior to the meeting.

B) Regarding property at the corner of Nimble Hill Road and Fox Point Road (Tax Map 17, Lot 11-2), and in conjunction with a proposed 2-lot subdivision that was granted conditional approval by the Planning Board on May 14, Bruce Belanger requests the following:

- 1) A variance from Article X Section 6 of the Zoning Ordinance to allow the construction of a driveway through a wetlands buffer; and

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- 2) An appeal of the Planning Board's administrative decision that requires Mr. Belanger to obtain the aforementioned variance.

Chair Morton informed the applicant that Board member, Jim Weiner also served on the Conservation Commission and had voted against a recommendation for the applicant's dredge/fill application. Mr. Denis Hebert, Planning Board Chair said Mr. Weiner was a Planning Board member as well, but had not been on the board up to this point. Attorney Chris Mulligan asked that Mr. Weiner recuse himself and Mr. Weiner stepped down. Chair Morton informed the applicant that only four Board members would be voting and Attorney Mulligan said that would be acceptable.

Attorney Mulligan suggested that the Board address the first variance request and the appeal could be dismissed if the variance was granted.

Mr. Frink noted that the applicant had been before the Board regarding a driveway going over wetlands before and asked Mr. Morgan what was different in this request. Mr. Morgan passed out the Board's December 2015 Minutes regarding the applicant's appeal of the Planning Board's interpretation for a Special Exception for a driveway crossing the wetlands that was granted, however the Ordinance still required a variance to cross the wetlands buffer. Mr. Morgan passed out correspondence from Attorney Mulligan with a narrative on the administrative appeal that had not been included in the packet.

Attorney Mulligan said they had since modified their proposal from a 3-lot subdivision to a 2-lot subdivision. He went on to say that the Planning Board had advised them that the 2-lot subdivision would receive approval on the condition that they received approval for the variance. He said the lots exceeded the dimensional requirements and Town engineering consultant, Altus Engineering had said the uplands were suitable for building. He said the lot with access from Nimble Hill Road didn't require a variance, only the driveway from Fox Point Road would cross the wetlands, but they had obtained DES dredge/fill permits to gain access to the buildable uplands.

Attorney Mulligan went through the criteria for granting the variance, noting that it would not be contrary to the Spirit of the Ordinance or contrary to the public interest in that the subdivision would be consistent with neighboring development and would not threaten the health, safety or welfare of the public, or alter the essential character of the neighborhood, nor would surrounding property values be negatively affected. Attorney Mulligan went on to say that the request met all of the dimensional requirements and the required State permit was obtained to cross the wetlands. He said there were unique aspects to the corner lot that was burdened by significant wetlands, but a 2-lot subdivision was a reasonable use. Attorney Mulligan summed up by saying substantial justice would be done by granting the variance because there was a balance between the loss to the applicant and benefits to the public, and denying the variance to cross the wetlands buffer to reach the uplands would create a road to nowhere and an unnecessary hardship on the applicant.

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Chair Morton asked if they had received dug test pits and septic preliminary approval for both lots and Attorney Mulligan said they had dug pits, provided a couple of different options for each lot and received approval from the Planning Board.

Board member, Ralph Estes asked if the Conservation Commission had provided a written recommendation. Mr. Morgan said the Commission had reviewed the dredge/fill application. Conservation Commissioner, Jim Weiner said the Commission did not make a recommendation because the applicant had come in with a proposal for a 3-lot subdivision and the original lot line adjustment was for a single-lot home with two wetlands crossings and they still did not make a recommendation for the 2-lot plan and it was in the Minutes. Mr. Estes said the Board needed something in writing.

Mr. Justin Richardson of Old Post Road asked if the permit had been approved and Attorney Mulligan said the DES permit for a wetlands crossing had been issued on March 14, 2015.

Mr. Frink asked what the expectation was when the Planning Board gave conditional approval. Mr. Hebert replied that the Planning Board was in an awkward position because the Zoning Board originally upheld the applicant's administrative appeal of the Planning Board's request for an all-inclusive Special Exception to cross the wetlands. He said the Board had since clarified the wording for a Special Exception requirement last March, but in the meantime they were still required to obtain a variance to cross the wetlands buffer, along with eleven other conditions for approval. Mr. Hebert said the Board would clarify the wetlands buffer variance wording for the next Town meeting. Mr. Frink commented that the wording of the Special Exception seemed like a housekeeping measure to which, Board member, Ted Connors said it still wouldn't pertain to the current request.

Ms. Madeline Mills of Old Post Road passed out an original plan that had been surveyed by Mr. David Hislop before and Mr. Michael Mathes had received the property from Ms. Dorothy Watson. Ms. Mills read through a statement that said she believed the proposal was intensive and the development would adversely affect surrounding properties.

Chair Morton asked if the applicant would be building single-family dwellings, condominiums or duplexes on the lots. Attorney Mulligan said one of the Planning Board's conditions was that they would have to return to the Board for approval if they wanted building permits for anything but single-family dwellings. He said at this point the intention was that the dwelling off Nimble Hill Road would be a single-family dwelling, but added that the Ordinance allowed duplexes.

Mr. Richardson said he was present when the Planning Board made the conditional approval and he was concerned that a single-family dwelling could be turned in to a duplex and later a condominium, creating the potential for four units on the property. Chair Morton said he heard Attorney Mulligan state that one lot would be a single-family dwelling and asked if he would put it in writing. Attorney Mulligan replied that he could not agree to that stipulation for certain at this point.

Mr. Weiner commented that in previous hearings he heard the applicant's attorney say they would return with the 3-lot subdivision proposal if the 2-lot proposal was turned down, which came across as a threat. Attorney Mulligan objected to the

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characterization and said they had only reserved the right for consideration of a 3-lot subdivision without prejudice to get momentum for approval of the revised 2-lot proposal. He added that the permit application with DES for the 3-lot subdivision had expired anyhow so it didn't matter.

Mr. Estes asked if any construction had begun and Attorney Mulligan said several other conditions such as easements, invasive species mitigation and technical conditions still needed to be completed. Mr. Estes asked how long before construction would begin if the variance was granted and Attorney Mulligan said probably in the next couple of months.

Mr. Richardson of Old Post Rd commented that Mr. Frink had a long discussion regarding other properties in town that had obtained Special Exceptions to cross wetlands and said the Board should consistently apply the rules. He went on to say that the Board needed to determine the intent of the Ordinance to avoid projects that would have maximum encroachment to the wetlands and the wetlands buffers. Mr. Frink replied that the Board had already made an interpretation of the Ordinance as it was written at the time of the applicant's appeal to the Special Exception and determined that driveways were allowed to pass through the wetlands to get to buildable lots. He went on to say that a request for a variance was now before the Board and he thought it would be in everyone's best interest to grant rather than get caught up in semantics that would serve no purpose.

Mr. Richardson said he had no personal interest, but he was there to help his neighbor, Ms. Mills look at the criteria. Mr. Connors said reviewing the criteria was the Board's job and he was out of bounds. Mr. Richardson asked if he was not allowed to discuss the criteria and Chair Morton replied that Mr. Richardson had taken as much time speaking as the applicant's attorney. Mr. Richardson cautioned the Board not to rush to judgement in their interpretations. Mr. Estes asked Mr. Richardson if he was representing the abutters and Mr. Richardson replied that he was only present as friend and had not billed anyone.

Ms. Lorna Watson of Fox Point Road asked if the attorneys or anyone had investigated the legitimacy of the original sales from Michael Mathes and Dorothy Watson. Attorney Mulligan objected and said that was not the issue before the Board, but the applicant owned the property and anyone that had a beef could take it up with Superior Court. Chair Morton agreed that it was not the Board's jurisdiction, but she could hire an attorney if she wanted to bring an injunction. Ms. Watson said she didn't have the money and Chair Morton said perhaps Mr. Richardson could represent her. Mr. Richardson said the matter had been discussed before and agree that there was nothing that the Board could do.

Ms. Mills asked Mr. Frink how he would like a development in his back yard and Chair Morton said Mr. Frink he did not have to answer. Mr. Frink said he didn't envy anyone who felt encroached and it was unfortunate that the wording in the Ordinance was not clear, but everyone still had to work on getting along.

Mr. Estes asked if the adjoining properties would be in her line of site and Ms. Mills said her septic was nearby and she was concerned that there would be an increase in noise when the trees were gone. Ms. Watson said she lived even closer.

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Attorney Mulligan said they had done a 50 year drainage study and had agreed to double the southern setback from what was required, but the variance before the Board only had to do with the lot off Fox Point Road.

Chair Morton closed the public hearing and Mr. Estes said the applicant had received their DES permit and obtained conditional approval from the Planning Board so he didn't see any way around it even though the neighbors might hate them for it, but at least the applicant claimed there would only be one house on the Nimble Hill Road lot. Chair Morton said he never thought Newington would grow as it had in the last 40 and he sympathized with the abutters, but agreed with Mr. Estes. said claimed would only be one house on nimble hill lot.

Ralph Estes moved to approve a variance from Article X Section 6 of the Zoning Ordinance to allow the construction of a driveway through a wetlands buffer regarding property at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2 that was granted a conditional 2-lot subdivision approval by the Planning Board on May 14, 2015. Mr. Connors seconded the motion.

Mr. Frink read through the five criteria, noting that granting the variance would not be contrary to the public interest to allow complete driveway access, not just through the wetlands, but through the wetlands buffer as well. He said it was in the spirit of the Ordinance to agree with the Planning Board's requirement for a variance to allow an access through the wetlands buffer. He went on to say the variance would not alter the essential character of the surrounding community or threaten the public health, safety or welfare. He said substantial justice would be served in allowing the access to continue through the wetlands buffer and it would be absurd to deny.

Mr. Frink said they heard from abutters that were concerned as neighbors are always concerned with nearby developments, but he doubted that the value of anyone's property would go down and thought it would probably go up. He said the proposed use was reasonable considering driveways through wetlands were permitted.

The motion passed with Ralph Estes, John Frink and Ted Connors voting in favor and Matt Morton opposing.

Chair Morton's final comment was to suggest that the applicant not put multi-family dwellings on the lots.

C) Request by Northeast Medical Properties and the Islamic Society of the Seacoast Area for a variance from Article V Section 2B of the Zoning Ordinance in order to allow a place of religious assembly in the Office Zone, behind 2299 Woodbury Avenue, Tax Map 19, Lot 9-1.

Attorney Bernie Pelech appeared before the Board representing Northeast Medical Properties and on behalf of the Seacoast Islamic Society. Their director, Mr. Mohamed Ebrahim also appeared before the Board.

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Attorney Pelech said the lot line adjustment for the property was created in March 2015 behind the Old Beane Farm complex. He said the lot was conforming and met all zoning requirements, but the Planning Board added a condition that the property could not be accessed thru Shattuck Way because of a 40' grade difference. He said access would be through Patterson Lane which served the Beane Farm and this lot.

Attorney Pelech said certain permitted uses were removed from office zone at the last Town Meeting in March 2015, including conference centers and schools, but they were proposing a religious place of worship with schools and offices. He said they currently operated a mosque in Dover, but they wanted to move closer to Portsmouth. He said they submitted a letter of intent, but they would need a variance to change the accepted uses.

Attorney Pelech said the use would not substantially alter the character of the neighborhood, would not be contrary to the public interest or spirit of the Ordinance in an area that had a multi-tenant office building, commercial storage and industrial use. He said they would meet once a week for religious observation and have classes for children.

Attorney Pelech said the utility easements, and the lack of access from Shattuck Way were the special conditions that made the property unique and created a hardship that warranted a variance, location. He said he was not sure what the intent of the elimination of permitted uses in the zoning were, but the location and use seemed reasonable so he didn't think there was a relationship between the intent and this property. He said if the variance was not granted, the property would just sit because it was a challenged property.

Mr. Ebrahim said he was a resident of Portsmouth and director of the Islamic Society of the Seacoast, which had been in existence since 1994 and was registered with the State and the City of Dover. He said their current site was part of a condo complex with approximately 80 people attending Friday services from 1-2 p.m. in the afternoon, which had doubled in the last five years and they expected it to continue to expand to as many as 200 people in five more years. He said the use in the proposed location would be the same with a prayer hole, library, offices and children's school on the weekends.

Mr. Estes asked what it would look like and Mr. Ebrahim said would be simple architecture like a mosque in a typical, two-story New England Building. Mr. Estes asked why the building was set at an angle on the lot and Mr. Ebrahim said their preference was for the prayer hall to face 60 degrees north, but it was not an absolute requirement.

Chair Morton asked if the 50-100 parking spaces would accommodate 200 people and Attorney Pelech said they were only required to have 70 parking spaces, but they were providing 99 spaces.

Mr. Frink asked if the 75' setback would pertain to parking lots and Mr. Morgan said the Planning Board determined that Shattuck Way would be the frontage and should be 75' setback. Attorney Pelech read from the previous meeting minutes and said Town counsel later determined that they would not need a variance. Mr. Morgan said non-permitted use was on the agenda, not parking.

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Mr. Weiner asked if they had looked in areas of permitted use in town and Mr. Ebrahaim said they were looking for three acres and this was 2.75 acres. Mr. Weiner asked what zones would permit this use and Mr. Morgan said the places of worship were allowed in the Commercial zone.

Mr. Estes asked if the use would be tax exempt and Mr. Morgan said they were and would not have to pay property taxes. Mr. Connors said it would be the same even in the Commercial Zone. Mr. Estes said the Office District objectives were for higher paying job opportunities to maximize the tax base and were not close to places of religious use. Mr. Morgan said places of worship were allowed in the Commercial zone only, where the Lutheran Church was and the Next Level Church met at the movie theatre.

Chair Morton closed the public hearing.

Discussion ensued and Mr. Estes said he didn't believe the use related to the intention for the Office district. Chair Morton said there was no hardship because the property was still useful for business.

Jim Weiner moved to deny the request by Northeast Medical Properties and the Islamic Society of the Seacoast Area for a variance from Article V Section 2B of the Zoning Ordinance in order to allow a place of religious assembly in the Office Zone, behind 2299 Woodbury Avenue, Tax Map 19, Lot 9-1. Ralph Estes seconded the motion.

Mr. Frink read through the criteria, noting that granting the variance would not be in the spirit of the Ordinance because the intention of the Office district was to provide spaces for jobs and this use would not do that. He said the proposed use would be contrary to the public interest because it was in close proximity to the Industrial district where the safety for general assembly might be an issue. He said substantial justice would not be done to the individual property owner because other could use the property in ways that would better conform to uses in the Office district. He said the easement and access issues could not be said to cause a hardship to the property that would make it any better for the proposed use than the accepted Office zone use. Mr. Frink summed up by saying the entry and departure of large gatherings for Friday afternoon services could be a problem in Newington considering how many vehicles used Shattuck Way.

The motion to deny passed with all in favor.

Adjournment: *Mr. Connors motioned to adjourn, Jim Weiner seconded, and all were in favor and meeting adjourned at 8:18 p.m.*

Next Meeting: To be announced

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

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