

**SWANZEY ZONING BOARD OF ADJUSTMENT MEETING
APRIL 19, 2010**

Minutes are not final until reviewed and approved by the Board. Review and approval of minutes generally takes place at the next regularly scheduled meeting of the Board.

ATTENDANCE

William Hutwelker, Chair; Keith Thibault, Vice Chair; Charles Beauregard, Sr., Jerry Walker. Alternates John Arnone, Charles R. Beauregard, Jr. Code Enforcement Officer Jim Weston also was present. (Town Planner Carbonneau was not present.)

Chairman Hutwelker called the meeting to order at 7:00 p.m. Barlow read the agenda for the meeting. The Board addressed the following items.

MINUTES

Motion by Beauregard, Sr. to approve the minutes of March 15, 2010 meeting. Second by Walker. All in favor.

1. VOTE ON ALTERNATE MEMBER VACANCY; position expires at Town Meeting 2013. Board members reviewed applications submitted by nominees James T Vitous and Steven Dunshee, who were present and spoke briefly about their interest in serving the town. Hutwelker called for a paper ballot. Barlow counted the ballots, and determined that Vitous received the majority of votes.

2. (PUBLIC HEARING) APPEAL OF ADMINISTRATIVE DECISION

Applicant: Mary Beth & John Coughlin, Jr.

Property owner: Mary Beth & John Coughlin, Jr.

Property location: 50 Sawyers Crossing Rd Tax Map 41, Lot 1

Zoning District(s): Residence and Rural/Agricultural District

Request: Challenge of a determination rendered on November 10, 2009 by Code Enforcement Officer James Weston that the applicants are operating a business "of raising, breeding, selling alpacas, and selling the fleece of alpacas" from their property, "which is not allowed in the Residential Zone."

Members seated: Hutwelker, Thibault, Beauregard, Sr., Arnone was seated for Mitchell; Beauregard, Jr. was seated for Walker. Walker (an abuttor) recused himself and moved to the audience.

Representing the application: attorney Tom Hanna & Mary Beth Coughlin

Abutters present: Deborah & Gary Davis. Also participating in the discussion were Bruce Tatro, Richard Scaramelli, Barry Dwyer, Jim Viteous, and Scott Meader.

Hutwelker called the public hearing to order at 7:15.

DISCUSSION

Weston outlined the basis for the November 10, 2009 notice of violation, referencing documents provided to Board members and the applicant. Weston said that the property spans the Residence and Rural/Agriculture zoning districts, and stated that the barns and pasture mostly are located in the Residence district.

Weston reviewed State regulations related to farming and agriculture. He stated that Swanzey zoning permits raising any animal in the Residence district, but prohibits sales of animals or their products. (Weston said that town zoning requires a special exception for marketing and sales of animals in the Rural/Agriculture district.) Weston stated that he issued the notice of violation under the belief that alpacas were being sold from the property. Weston stated that he has not been asked to withdraw the notice of violation by Town attorney, Town administrator, Land Use Planner, or the Board of Selectmen.

Representing the Coughlins, Hanna began by polling Board members to determine whether each felt he could be objective. Each member felt that he could evaluate the application objectively.

Hanna distributed to Board members and presented information contained in an April 19, 2010 affidavit signed by John R Coughlin and Mary Beth Coughlin, as well as a binder containing photographs, a plan showing the layout of the area designated as Current Use farm land, and other materials. Hanna stated that the Coughlin's business, Mt. Caesar Alpacas, is located at 441 Main Street in Keene, where sales of alpaca-related products are handled exclusively through a website; Hanna stated that no products originate from the alpaca herd. Hanna stated that the Coughlins conduct no business activity at 50 Sawyers Crossing Road, and have never sold any item related to alpacas from their farm.

Hanna discussed the definitions of farm, agriculture and farming contained in RSA 21:34-a.II.(a)(4), noting that the raising and sale of livestock specifically includes alpacas, and noting that defined farm practices include "preparation for market, delivery to storage or to market . . . of any products from the farm" (RSA 21:34-a.II.(b)(1)). Hanna directed the Board to consider RSA 21:34-a.III: "A farm roadside stand shall remain an agricultural operation and not be considered commercial, provided that at least 35% of the product sales in dollar volume is attributable to products produced on the farm or farms of the stand owner." Hanna directed Board members to consider RSA 672:I.III-b regarding the contributions of agriculture: "Agricultural activities . . . shall not be unreasonably limited by use of municipal planning and zoning powers or by unreasonable interpretation of such powers." Hanna stated that an unreasonable interpretation includes the failure of local land use authorities to recognize that agriculture is traditional and fundamental; in Hanna's opinion, a prohibition upon such uses cannot be inferred from the failure of an ordinance or regulation to address them. Hanna directed Board members to consider RSA 674:32-a: ". . . whenever agricultural activities are not explicitly addressed with respect to any zoning district or location, they shall be deemed to be permitted there, as either a primary or accessory use, so long as conducted in accordance

with best management practices adopted by the commissioner of agriculture, markets, and food and with federal and state laws, regulations, and rules.”

Because the Swanzey zoning ordinance fails to define farming or agriculture, Hanna said, NH state laws govern those definitions. Hanna said that zoning ordinance Section IV.A.1.d. lists farming as a permitted use in the Rural/Agricultural district, and requires a special exception and site plan approval for farming as a business. This explicit language, Hanna said, represents a special effort on the part of the town to address farming as a business in the Rural/Agriculture district. Section IV.B.1.b. makes no effort to be equally explicit about farming as a business in the Residence district, or to explicitly address the raising and sale of livestock, Hanna said, instead referring only to “customary agricultural uses including gardens, nurseries and greenhouses.” Hanna asked Board members to consider a variety of small-scale business activities (e.g., sales of surplus chicken eggs to neighbors, raising horses, boiling off and selling maple syrup) that he felt to be comparable with the Coughlin’s raising of alpacas, and said that he would expect the Town to take action upon these uses should the Coughlin appeal be denied.

Hanna concluded by stating that no business transactions have occurred at the Sawyers Crossing property. He stated that the Board must rule that alpacas may be sold from the farm because agriculture includes the sale of alpacas, and no language in Section IV.B.1.b. explicitly prohibits any type of agriculture, including preparing for market, delivering products to storage facilities, mini-mills or festivals. Hanna said that the Coughlins do not, at this time, seek permission or a ruling that gives them the right to sell anything other than alpacas from their farm even though, Hanna said, that right would be supported by the zoning ordinance.

At 8:13, Hutwelker called for a short break. The hearing resumed at 8:15.

Richard Scaramelli presented a statement in support of upholding the zoning ordinance, making a comparison with a prior case, and urging the Board to be mindful of setting precedent. Hanna stated that the Coughlins had received no complaints during the five years they have been raising alpacas.

Barry Dwyer spoke in favor of the applicants, stating that he has made frequent visits with students and found the premises to be extremely clean, and the animals completely fenced and tame.

Members of the audience raised questions regarding operation of the farm. Hanna stated that the Coughlins pay to have fiber processed into yarn or prepared as handspinners’ roving at mini-mills in the region; each animal yields approximately 3 pounds of usable fiber at a value of approximately \$40/pound. Hanna stated that the Coughlins handle all farm work, with the exception of professional services such as veterinary care and annual shearing. Hanna stated that expenses far exceed income from fiber products from the herd, which is operated as a “total hobby.” Hanna stated that there is a certain level of activity that can be done from home that cannot be described as commerce.

Hutwelker said that the zoning ordinance makes no distinction between a hobby or business; best management practices are not considered by the

ordinance. Hutwelker, explaining that any qualifying use that occupies less than 300 square feet of a dwelling unit or accessory structure may constitute a home occupation, said that the application exceeds the scope of a home occupation.

Hutwelker said that the Town has explicitly addressed agricultural uses, with a broader definition in the Rural/Agriculture district and with a more limited definition (gardening, nurseries, greenhouses) in the Residence district. Given those definitions, Hutwelker said, omitted uses are not permitted. Hanna disagreed, stating that “customary agricultural uses” are permitted in the Residence district. Hanna said that the issue raised by Weston’s notice of violation is whether the Coughlins are conducting a business activity from the premises, and stated that the answer is no.

Hearing no further comments or questions, Hutwelker closed the public hearing at 8:55.

BOARD MEMBERS’ REVIEW AND DISCUSSION

Board members agreed that Section IV.B.1.b. is the applicable section for consideration.

Hutwelker encouraged Board members to determine whether the Coughlins are engaged in a business. Beauregard, Jr. stated that all of the applicants’ farm activities are allowable by State law, and are customary agricultural uses according to his interpretation of the ordinance. He said that raising and breeding of animals constitutes a business, but the Coughlin’s production of raw material—alpaca fiber—is more of a hobby; however, financial transactions occur off-site.

Thibault said that the ordinance does not help the Board define agriculture or farming. In his opinion, Thibault said, this production of raw material (for use in business or hobby) is a “customary agricultural use” and stated that, in his opinion, the expression “customary agricultural use” is not limited to uses such as gardens, nurseries and greenhouses. Thibault stated that the present case had no parallel in a prior case (referenced earlier by Scaramelli) involving the breeding and selling of dogs, deemed by the Board not to be a customary agricultural use.

Motion by Thibault at 9:10 to re-open the public hearing to clarify a point. Second by Beauregard, Jr. All in favor.

Hanna stated that all farm activities other than annual shearing are accomplished by the Coughlins. Hanna stated his contention that the use is allowed and, as should be resolved in a separate and distinct finding, the operation is not a business. Objecting to Hutwelker’s statement that the ZBA needs to find both on whether a business is being conducted and whether the ordinance allows the raising, breeding and selling of alpacas and their fleece in the Residence district, Hanna advised the Board to resolve what he considers the ultimate question: Was Weston correct in determining that the use is not allowable in the Residence district?

Hutwelker re-closed the public hearing at 9:13.

Weston stated that he felt that the Board’s charge was to determine whether he had made the correct decision regarding the business of raising alpacas,

based on the information he had. He said that he had made a decision that the Coughlins were conducting a business in the Residence district, and stated that he was not concerned with what the Coughlins were raising.

Hutwelker encouraged the Board to consider a two-fold violation: the agricultural use in the Residence district, as well as operation of a business. For clarification, Hutwelker stated that Weston's notice of violation was in response to his perception that the Coughlins were conducting a business at the premises, not in response to the particular product of the business. Weston concurred. Hutwelker noted that the applicants maintain that raising alpacas is an allowable use in the Residence district.

Motion by Thibault at 9:22 to re-open the public hearing for clarification. Second by Beauregard, Jr. All in favor.

Hanna stated that no business activity takes place at the Coughlin's farm. He stated that the use, which he deems to fall into the definition of "customary farm activities," complies with zoning ordinance provisions for the Residence district. Arnone stated that Weston's notice of violation requires the Board to consider whether business activity is occurring at the farm. Board members and members of the public discussed whether the business use or the agricultural activity should take precedence in the Board's deliberation.

Hutwelker closed the public hearing at 9:32.

Thibault said that the Board's general charge relates to land use. He said that he felt the distinction between "business" or "hobby" is unclear and less relevant than the question of land use, and encouraged the Board to focus on the use in question—the raising, breeding and selling of alpacas and their products. Based on available information, Thibault said, this use appears to constitute a customary, normal and acceptable agricultural use. While the discussion is complicated by a greater level of definition in the Rural/Agriculture section of the ordinance relative to that of the Residence section, Thibault said that the Swanzey community values using land in a way that supports families and agriculture. When the ordinance was originally drafted in 1947, Thibault said, it is likely that uses like the one under discussion probably took place in the Residence district. Thibault said that the property is large and, in his opinion, the volume of production of usable material is so small as to scarcely qualify as general farming.

Beauregard, Jr. agreed, saying that the ordinance and State statute permit the use. He said that the town already has lost much of its agricultural aspect, and he wouldn't want to lose more.

Hutwelker advised the Board that it must first determine whether the Coughlin's activity qualifies as a business, since that was the violation cited by Weston. Because the ordinance (as amended in 1997-1998) requires a special exception and site plan review for farming being conducted as a business in the Rural/Agriculture district, Hutwelker said that the Board could not ignore the ordinance. In fact, Hutwelker said, the town had had the opportunity to expand definitions of agriculture, and had chosen not to do so. Hutwelker said that he felt that the Board would err if it started to expand uses beyond the horticultural examples of "customary agricultural uses" in the Residence

district. In his opinion, he said, the size of the parcel should be moot. Hutwelker encouraged the Board to uphold Weston's decision; should the applicant return and request a variance, the Board could consider definitions of customary agricultural uses at that time.

After brief discussion, Hutwelker said that the Board had concluded that the use does not conform to the ordinance and is not an allowable use in the Residence district. Hutwelker said that the Board must now determine whether the Coughlins' activity is a business.

Beauregard, Jr. disagreed, stating the he felt that the use does conform to the ordinance, and thereby is a legal use. If the Board determined that the use is permissible, he said, then the Board could determine whether the use is a business.

Hutwelker's poll of the Board determined that Hutwelker and Arnone felt that the Coughlin's raising and breeding of alpacas was being operated as a business. Thibault, Beauregard, Jr. and Beauregard, Sr. felt that the activity was not being operated as a business.

Based on the majority opinion of Beauregard, Jr., Beauregard, Sr., and Thibault (with Hutwelker and Arnone in opposition), Hutwelker stated that the applicants have met their responsibility, causing the ZBA to determine that the operation does not constitute a business and causing the ZBA vacate the administrative decision of November 10, 2009. Code Enforcement Officer Weston's decision was not upheld, and the Coughlins prevailed in their appeal of the administrative decision.

The matter concluded at 9:55, and Hutwelker called for a 5-minute break.

3. a. (PUBLIC HEARING) VARIANCE & SPECIAL EXCEPTION

Applicant: Scott & Tamanee Meader

Property owner: Scott & Tamanee Meader

Property location: 231 South Rd Tax Map 24, Lot 49

Zoning District(s): Residence District

Request: Variance and special exception from Section IV.B.2.b to permit the conversion of a structure to a two-family dwelling on a property that does not contain the required 1.5 acres.

Members seated: Hutwelker, Thibault, Beauregard, Sr., Walker (who returned to the table). Arnone was seated for Mitchell. Beauregard, Jr. recused himself and moved to the audience.

Representing the application: Scott & Tamanee Meader

Abutters present: none

Hutwelker called the public hearing to order at 10:03.

DISCUSSION

Board members received an April 19, 2010 application summary prepared by Town Planner Carbonneau. The summary includes a list of prior applications before the Planning Board and ZBA, beginning with a 1986 application and ending with a 1999 application. The property has been assessed as a two-family structure since 1990. S. Meader purchased the property in 2000.

S. Meader said that the building was set up to house two families, and was served by two separate electrical meters. He said that the town historically had assessed the building as a two-family dwelling, and listed the lot acreage as 1.48 acres. He said he sought a variance of .02 acres to allow him to market the property as a two-family dwelling. He said that space for parking is ample, and the septic system includes a 1,000 septic tank.

Beauregard, Jr., speaking from the audience, said that the house “has always been” a two-family dwelling. Given the small difference in zoning, he said that granting a .02 acre variance would be a fair use of the zoning.

Hearing no further comments or questions, Hutwelker closed the public hearing at 10:17.

Board members reviewed the criteria for granting the requested variance.

1. Could the variance be granted without the proposed use being contrary to the public interest?

Members agreed in the affirmative

2. If the variance is granted, would the spirit of the ordinance be observed?

Members agreed in the affirmative.

3. Would granting the variance do substantial justice?

Members agreed in the affirmative.

4. Could the variance be granted without diminishing surrounding property values?

Members agreed in the affirmative.

5. Do special conditions of the property distinguish it from other properties in the area?

- a. Owing to the property's distinguishing special conditions, is there a fair a substantial relationship between the general purposes of the ordinance and the specific application of that provision to the property?

Members agreed in the affirmative.

- b. Is the proposed use is a reasonable one?

Members agreed in the affirmative.

- c. Owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property.

Members agreed in the affirmative.

Motion by Beauregard, Sr. to approve the variance of .02 acres from the required 1.5 acres. Second by Walker. All in favor.

At 10:20 Hutwelker opened the public hearing to hear testimony regarding the requested special exception to special exception from Section IV.B.2.b to permit the conversion of a structure to a two-family dwelling on a property that does not contain the required 1.5 acres. Board members acknowledged that ample parking is available, and both septic system and well are of adequate size to serve three bedrooms.

Hearing no further comments or questions, Hutwelker closed the public hearing at 10:22.

Board members reviewed the criteria for granting the requested special exception.

1. Is the exception allowed by the ordinance?

Members agreed in the affirmative.

2. Are specified conditions present under which the exception may be granted?

a. Is the proposed use similar to one or more of the uses already authorized in that District and is it an appropriate location for such use?

Members agreed in the affirmative to both parts of the question.

b. Will such approval reduce the value of any property within the district, or otherwise be injurious, obnoxious, or offensive to the neighborhood?

Members agreed that approval would not reduce property values or otherwise harm the neighborhood.

c. Will there be a nuisance or serious hazard to vehicles or pedestrians?

Members agreed that there would be no nuisance or hazard.

d. Will adequate and appropriate facilities be provided for the operation of the proposed use?

Members agreed in the affirmative.

Motion by Beauregard, Sr. to grant the requested special exception from Section IV.B.2.b to permit the conversion of a structure to a two-family dwelling on a property that does not contain the required 1.5 acres. Second by Thibault. All in favor.

3. b. (PUBLIC HEARING) SPECIAL EXCEPTION

Applicant: Scott & Tamanee Meader

Property owner: Scott & Tamanee Meader

Property location: 231 South Rd Tax Map 24, Lot 49

Zoning District(s): Residence District

Request: In the event that the above-requested variance and special exception are denied, the applicants seek a special exception from Section III-AA for an accessory dwelling unit at the same property.

With the Board's approval of the above-requested variance and special exception, the applicants withdrew their application.

ADJOURNMENT

Motion by Beauregard, Sr. to adjourn. Second by Walker. All in favor. The meeting adjourned at 10:25 p.m.

Respectfully submitted,

Victoria Reck Barlow,
Recording Secretary