SWANZEY ZONING BOARD OF ADJUSTMENT MEETING
MARCH 16, 2009

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

Bill Hutwelker, Keith Thibault, Charles Beauregard, Bob Mitchell, Jerry Walker.
Alternates Bob Smith, Deirdre Geer, Robert DeRocher, Bryan Rudgers.
Town Planner Sara Carbonneau and Town Attorney Beth Fernald also were present.

Chairman Hutwelker called the meeting to order at 7:02 p.m. and read the agenda for the meeting. The Board addressed the following items.

MINUTES

Correction to page 6, paragraph 3, proposed by Jeff Kevan: Kevan said that ~~higher value wetlands in the approximate 2.5 to 3 acres at the south end of the parcel would be unaffected by the proposed development or by stormwater treatment measures. This portion of the parcel would be protected with a~~ at least 2.5 acres of land at the southern end of the site will be left in a conservation deed restriction. ~~and would be left in its grassed, natural state.~~ Kevan said that he anticipates placing stormwater treatment and recharge basins in that area, in that it is the lowest point on the site, and the stormwater management system will provide compatible functions and values as the wetlands. The ~~5.4+/-~~ +/- 2.9 acres directly to the north of the 2.5-acre portion would be mowed annually.

Motion by Beauregard to approve the minutes of January 19, 2009, as corrected. Second by Thibault. All in favor.

Correction to page 3, complete paragraph 5, proposed by Russell Gocht: ~~Gocht argued that the Board of Selectmen functions as a "disinterested third party" relative to the application.~~ Gocht said that he would never argue that the Board of Selectmen functions as a disinterested third party.

Motion by Beauregard to amend page 3, paragraph 5 of the January 19, 2009 minutes. Second by Walker. All in favor.

Hutwelker said that, due to a clerical error, reappointment of alternates DeRocher and Rudgers has not been formalized.

Motion by Thibault to authorize the chair to seat DeRocher and Rudgers during the March 16, 2009 meeting, and also for any continuation of the applications for which they might be seated. Second by Mitchell. All in favor.

1. PUBLIC HEARING: AREA VARIANCE APPLICATION

Applicant: Virginia Baldwin
Property owner: Virginia Baldwin
Property location: 16 North Pine Street Tax Map 18, Lot 235
Zoning District(s): Residence
Request: area variance from Sections XI.B.2. and IV.B 3. to permit the construction of a ramp.

Hutwelker opened the public hearing at 7:07
Members seated: Bill Hutwelker, Keith Thibault, Charles Beauregard, Bob Mitchell, Jerry Walker.
Representing the application: Kevin Dean, Jr.
Abutters present: none

DISCUSSION

Dean presented an overview of the application, and photographs of the site. Dean said that the proposed uncovered ramp will be accessed from the 36" front door, and will extend 4' from the front stoop, in the direction of the paved driveway. He said that a railing would be installed on both sides of the ramp.

Dean said that the other possible location for the ramp is not a reasonable alternative. The 30" doorway on the north side of the house would require modifications and a replacement door; ice is persistent in this area, and the area is used for driveway snow storage.

Hutwelker closed the public hearing at 7:11.

Board members agreed that the proposal would require an area variance, not a use variance. Members reviewed the criteria for granting the requested variance.

1. *Could the area variance be granted without diminishing surrounding property values?*
   Members agreed in the affirmative.
2. *Could the area variance be granted without the proposed use being contrary to the public interest?*
   Members agreed in the affirmative.
3. *Owing to special conditions, would the denial of the area variance result in unnecessary hardship to the land owner, according to the* Boccia *test for determining unnecessary hardship?*
   Members agreed that the narrow rear doorway, with its northern exposure, poses unnecessary hardship.
   a. *Is an area variance needed to enable the applicant's proposed use of the property given the special conditions of the property?*
      Members agreed in the affirmative.
   b. *Is the benefit sought by the applicant one that cannot be achieved by some other method reasonable feasible for the applicant to pursue, other than an area variance?*
      Members agreed in the affirmative.
4. *If the area variance is granted, would the spirit of the ordinance be observed?*
   Members agreed in the affirmative.
5. *Would granting the area variance do substantial justice?*
   Members agreed in the affirmative.

Motion by Beauregard to grant the area variance from Sections XI.B.2. and IV.B 3. to permit the construction of a ramp. Second by Mitchell. All in favor.

2. Public Hearing: Modification to previously approved special exception

Applicant: John Arnone
Property owner: City of Keene
Property location: 471 Old Homestead Highway Tax Map 34, Lot 32
Zoning District(s): Business
Request: that condition #7 as set forth in the Board's Notice of Decision dated June 28, 2004 be removed. Condition #7 reads as follows: "There will be no outside music or public address system permitted."

Neighbor Mitchell recused himself, and moved into the audience.

Members Hutwelker and Beauregard, who may or may not have expressed an opinion about the proposal to the applicant outside of a public meeting, also recused themselves, and moved into the audience. Thibault assumed the position of Chair.

Thibault opened the public hearing at 7:20.
Members seated: Thibault, Walker; Rudgers was seated for Hutwelker, Smith was seated for Beauregard, DeRocher was seated for Mitchell.
Representing the application: John Arnone
Abutters present: None. Neighborhood residents Bob Mitchell, Rob Hawkins and Penny Hawkins were present. The Board received a 3/12/09 letter in opposition to the proposal from Jason and Elizabeth Dean (71 Massey Hill Road), and a 3/1/09 letter in opposition from Robert Mitchell (47 Centerview Drive).

Discussion

Arnone stated that he seeks to improve his business, enhance his customers' experience, and make it easier to manage go-cart drivers. He proposes locating small speakers at each of the 18 holes of the golf course, and installing a public address system housed within the go-cart building to amplify instructions to go-cart drivers. He said that golf course music selections would appeal to all customers, and said that the PA system would not blare over the noise generated by the go-carts. Arnone expressed his desire to be respectful of area residents.

Mitchell, R. Hawkins and P. Hawkins presented their concerns. All perceived that the go-carts sounded louder in the second year of operation. (Arnone stated that he has not modified the carts to increase the noise they make; he has replaced one failed muffler.) Mitchell, R. Hawkins and P. Hawkins stated that they experience the noise generated by the go-carts as a nuisance, especially in the evenings and on weekends. Mitchell stated that Condition #7 was appropriate due to the many residents in the vicinity. R. Hawkins said that he would be concerned if the proposed music would be louder than the go-carts.

DeRocher described his experience of the go-cart noise as heard from the gas pumps at Neighbors, across Route 32 from the go-cart track. DeRocher felt that the noise was not a nuisance short-term, but recognized that it could become obnoxious over time. Walker stated that he agreed that the noise could become obnoxious over time.

Neighbors Mitchell and Hawkins said that in principle they could support the public announcement system, enclosed in the go-cart staging area. Neighbors agreed that they could in principle support Arnone's concept of occasional concerts by the Westmoreland Town Band or high school jazz band, proposed during the meeting as an alternative to providing for music at the golf course holes.

Those present acknowledged the Town's lack of a noise ordinance. Carbonneau stated that the impacts of noise are within the purview of the ZBA (such as when considering a special exception application) and within the review authority of the Planning Board pursuant ot the Town's site plan review regulations. Carbonneau reminded the group that a condition of approval restricting sound can function as a *de facto* noise ordinance.

Acknowledging the subjectivity of personal experience of noise volume, quality and type, the group discussed ways to quantify the amount of noise that might result from the proposal. Carbonneau encouraged ZBA members to request a formal plan to help clarify the terms of the proposal, and thereby enable a reasoned decision. The plan could include the specific number of speakers and their placement, the volume at which they would be operated, hours of operation, etc. She said that all aspects of the business are open to consideration, and said that the Town – especially for code enforcement purposes – needs to know exactly what is proposed.

Aronone requested that the public hearing be continued to give him time to prepare additional information.

Motion by Smith to continue the public hearing on April 20, 2009. Second by Walker. All in favor.

At 8:00, Hutwelker, Beauregard, and Mitchell returned to the table. Hutwelker resumed the chair.

3. Public Hearing: Area Variance Applications

Applicant: Ronald and Nancy Gocht
Property owner: Ronald and Nancy Gocht
Property location: 46 East Shore Road Tax Map 45, Lot 12
Zoning District(s): Rural/Agricultural and Shorelands Protection Overlay District
Request: area variances from Section III.C. and from III.A.1. to permit the construction of a "carriage house (garage on lower level and one bedroom apartment above)."

Hutwelker offered the applicant the option of requesting the Board to consider agenda item #4 before agenda item #3. Gocht requested that the Board consider agenda item #3 first.

Hutwelker opened the public hearing at 8:04.
Members seated: Bill Hutwelker, Keith Thibault, Charles Beauregard, Bob Mitchell, Jerry Walker.
Representing the application: Russell Gocht (primary presenter); Ronald Gocht
Abutters present: none.

DISCUSSION

Gocht distributed a 7-page document dated 3/16/09, and outlined its contents, which include information on background and prior applications, photographs of existing structures on the property, an overview of the proposal, photographs of the proposed site for the carriage house and a location map and lot section, and photographs of 5 guesthouses located on Swanzey Lake. He stated that the materials show that the proposed use is modest relative to the neighborhood, would not be a burden on anyone, and would be accessory to the main structure. Gocht said that he seeks ZBA agreement that a carriage house is a common entity on Swanzey Lake, per Section III.C. of the Zoning Ordinance.

Gocht asked Fernald whether she was comfortable representing both the Town and the ZBA, and asked whether he had recourse. Hutwelker stated that Fernald was present to advise the ZBA, and stated that the ZBA would rely on Fernald's advice during the meeting. He offered Gocht the option of continuing the public hearing to another date. Gocht did not accept the offer.

Hutwelker requested clarification as to why, if Section III.C. rules, it is necessary for Gocht to obtain a variance. Carbonneau stated that if Section III.C. does apply, the applicant would not need to obtain a variance. However, Carbonneau further stated, the application is for a dwelling unit, not an accessory use. Fernald concurred, referencing the Zoning Ordinance definition of dwelling unit, and Section III.A.4., which states that only one residential use or residential dwelling unit per lot is allowed. Because of the applicant's representation that the carriage house will be an accessory use rather than a dwelling, Fernald stated that the ZBA would need to determine whether the structure would be sufficiently small and subordinate to the principal use on the property to qualify it as an accessory use.

Gocht stated his contention that the proposal is an accessory use: size does not define "accessory use," but common neighborhood practice does. He said that he disputed the notion that his proposal was outside of the bounds of what happens on Swanzey Lake. Given that that the Ordinance defines "dwelling" as accommodations for permanent occupancy, he said that he would entertain a deed restriction stipulating that one of the two structures could never be occupied on a permanent basis. He stated that the family has no interest in coverting the structure into a full time residence at this point in time.

Hutwelker asked for clarification as to how the current request is substantially different from the November 19, 2007 (continued to December 17, 2007) request for use variances from Section IV.A. and XI.C.1.to permit the construction of a second dwelling on the property.

Gocht stated that the proposed structure itself is similar, with minor changes: The building is 1' larger in both directions to account for the size difference between post and beam framing and wrapping materials, and the proposed location is modified slightly. As proposed, the two-story structure would contain one bedroom, bath, kitchen and living facilities, all above the garage.

Gocht stated that a change in circumstance and parameters also govern the request. He said that the denial of another proposal to expand living space constitutes a material change (specifically, the denial of the variance application considered by the ZBA in January 2009). He said that the Constitution compels the ZBA, in its role as safety valve, to consider the expansion of use as a single family residence. He said that the property and proposal are reasonable, economically justified, and within the spirit of the Ordinance; given the parameters of the property and its use, the family has an inherent right to expand the use. He said that it is substantive to their claim that, following expansion of the property in 2002, the family now has a right to do more with the property.

Gocht stated that during the 2007 meeting two ZBA members said it would be preferential for the Gochts to expand the cottage. Those present reviewed minutes of the 2007 meetings, and determined that the minutes show that "Board members questioned whether there were other options that may be pursued, such as expanding the existing structure" (page 2, 5th complete paragraph). One Board member expressed a personal opinion after the public hearing had been closed (page 3, 2nd complete paragraph). Hutwelker stated that the Board is obligated to gather information regarding alternatives that have been considered by an applicant, but it is never the intent of the Board to suggest to applicants how to approach accomplishment of their goals.

Gocht further stated that it was his opinion that the ZBA encouraged the applicant to expand the existing structure in 2007 and that since this application was denied in 2009, this constituted a change in circumstances allowing for the Board to consider the pending application.

Those present discussed ways in which the current application might differ from the 2007 application.

Fernald said that a change in circumstance can be viewed as qualification for a new submittal: as an example, the *Simplex* case permits re-submittal of applications that were denied on the basis of unnecessary hardship.

Ronald Gocht said that restricting one of the structures to seasonal use would constitute a change in circumstance.

Gocht said that the existing structure does not have central heat (a wood stove is present) and has never been permanently occupied. He said that the application is for an accessory use, with constraints, and said that "living" is different from "dwelling."

Gocht said that Conditions A., B., and C. (Gocht Plan C, Narrative, dated 2/18/09) differentiate the two plans. Hutwelker said that the proposed conditions represent uses for a structure, but not substantive changes to the plan. Hutwelker said that Conditions A., B., and C. could have occurred with the 2007 proposal. Gocht said that he had not known that such points could be

material, and had been led to invoke a different section of the ordinance.

Hutwelker said that Gocht contends that adding Conditions A., B., and C. in testimony gives the opportunity to submit the new proposal. Gocht said that that is true.

Gocht said that the 7/2008 revisions to State shorelands protection regulations also are material to the change in circumstance, by allowing a more objective evaluation of the proposal relative to issues of water quality. Fernald advised the Board that the proposed building is outside of the regulated area, so shorelands protection regulations would not affect the application. Hutwelker said that he did not recall a prior discussion regarding water quality, and asked Gocht to summarize the points of that discussion for the ZBA to consider.

In response, Gocht said that the proposal is a different application insofar as the Gochts have a more precise understanding of the ordinance and their place in the ordinance, and the State has given better regulations for evaluation, including new thresholds for allowable amounts of impervious surface.

Gocht said that the material circumstance has changed because he now has a better understanding of the part of the ordinance where he belongs, contrary to prior advice from two members of Town staff. He said it was important for the ZBA to contemplate Supreme Court guidance regarding an applicant's right to get good guidance from town staff. Carbonneau said that the 2007 application is now a matter of litigation, and said that if Gocht felt he had been led astray he could raise the matter as an argument in the Superior Court action. Gocht said that while it might be possible that the matter will be resolved in a court of law, it was his desire –both for his family and for the Town -- to avoid legal action.

Fernald said that coming in under a different section of the Ordinance does not differentiate the application from the 2007 application; relief under another part of the ordinance is not a material change. She advised the ZBA to look at what is actually being proposed. Mitchell said that he was not receptive to the idea that returning to the first proposal after denial of the second proposal represents a material change of circumstances.

Mitchell said that, in his opinion, Gocht offers three criteria in support of a material change of circumstance: denial of the 2009 application, State adoption of shorelands protection regulations, and the choice to approach the Board under Zoning Ordinance Section III.C. Mitchell said that because he does not believe the three criteria are sufficient to constitute material change, the Board's duty is to consider the three changes to the proposal itself, Conditions A., B., and C.

The crux of the application, according to Carbonneau, is that the applicant is seeking two separate dwelling units on the property. In response to Gocht's proposed condition restricting one structure on the property to seasonal use only, Carbonneau advised the Board that the Zoning Ordinance does not differentiate between seasonal and permanent dwellings. Referring to Ordinance Section III. G., Gocht said that many Swanzey Lake properties do not have a leaching area. He said that whether the ordinance is explicit or not, there is

administrative gloss; the lack of mention in the Ordinance does not mean that seasonal residences do not exist and are in fact allowed by the Town. Rudgers said that the Ordinance's lack of distinction between seasonal and permanent dwellings might preclude the Board from considering Conditions A., B., and C. Gocht said that the ZBA can make distinctions in cases where the ordinance is incomplete.

Hutwelker said that in his opinion the circumstances do not represent a material change in the actual proposal; the difference between the actual and implied presentation is Condition C. Thibault agreed, saying that because he had never thought it was implied that all structures would be permanently occupied, the condition to have one structure not be permanently occupied failed to make the proposal materially different.

Motion by Mitchell: After considering the applicant's suggested material changes in circumstance and the material changes of the proposal, the Board determined that the application does not constitute a material change from the 2007 application. Second by Beauregard. All in favor.

The Board concluded the matter at 9:14.

4. Request for re-hearing

Ronald and Nancy Gocht request a rehearing regarding the decision of the Zoning Board of Adjustment rendered on January 19, 2009.

Hutwelker opened the discussion at 9:14, advising the ZBA that the matter was not a public hearing, but rather a discussion among Board members in which all members were encouraged to participate. He said that the Board's charge is to determine whether the Board made an error in judgment or procedure, or whether new information is now available that was not previously available at the public hearing.

Members reviewed and discussed the February 16, 2009 Motion for Re-hearing of January 19, 2009 decision, prepared by attorney Tom Hanna. The Board determined that they had been thorough in their consideration; were charged with enforcing ordinances as they exist; and had not been improperly influenced by Town Council. Board members determined that they had made no errors in judgment or procedure, and that there was no new information being presented that was unavailable at the January 19, 2009 public hearing.

Motion by Beauregard to deny the request for re-hearing. Second by Walker. All in favor.

The Board concluded the matter at 9:28.

5. Election of officers

Motion by Mitchell to nominate the existing slate of officers (Hutwelker, chair; Thibault, vice chair). Second by Smith. All in favor.

Adjourment

Motion by Beauregard to adjourn. Second by Smith. All in favor. The meeting adjourned at 9:35.

Submitted by

Victoria Reck Barlow
Recording Secretary