

**SWANZEY ZONING BOARD OF ADJUSTMENT MEETING
NOVEMBER 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

Bob Mitchell, Jerry Walker, Keith Thibault, Bill Hutwelker, Charlie Beauregard (arrived at 7:08). Alternate Byran Rudgers (arrived at 7:25). Town Planner Sara Carbonneau also was present.

Chairman Hutwelker called the meeting to order at 7:04 p.m. and read the agenda for the meeting. The Board addressed the following items.

MINUTES

Motion by Beauregard to approve the minutes of October 19, 2009 meeting. Second by Walker. All in favor.

Motion by Beauregard to approve the minutes of the November 7, 2009 site visit. Second by Thibault. Walker, Thibault, Hutwelker, Beauregard in favor, Mitchell abstained. Motion passes.

1. VOTE ON ALTERNATE MEMBER VACANCY for one position that expires at Town meeting 2011 and one position that expires at Town Meeting 2012.

Motion by Mitchell to defer consideration of this agenda item to the end of the meeting. Second by Beauregard. All in favor.

2. (PUBLIC HEARING) USE VARIANCE APPLICATION

Applicant: BLM Contracting, LLC

Property owner: View Point Cooperative, Inc. (VPC)

Property location: 93 California Brook Road Tax Map 73, Lot 22

Zoning District(s): Rural/Agricultural District

Request: Use variance from Section IV.A. to permit the operation of a contracting business providing landscaping, construction and painting services. Continued from November 7, 2009 site visit.

Members seated: Thibault, Beauregard, Mitchell and Walker; following discussion, Hutwelker. Hutwelker stated that he had not been seated at the beginning of the public hearing (October 19, 2009 meeting), but had reviewed the minutes of that meeting and had attended the November 7 site visit. Reida and Blount stated that they had no objection to Hutwelker being seated. Thibault seated Hutwelker.

Representing the application: Austin Reida and Joseph Blount

Abutters present: View Point Cooperative member Carol Davis; abutter Lee

Kennedy

DISCUSSION

Mitchell noted for the record that he visited the site on November 16, 2009.

Carbonneau stated that she had received 33 pages of documents from VPC in response to her letter requesting information pertaining to Cooperative authorization of BLM's lease arrangement. The documents show that 62 members of the Cooperative voted in favor of the lease; 5 were opposed. Carbonneau stated that VPC as well as abutters were notified of the public hearing, and notice of the hearing was posted at VPC. Thibault stated that the paperwork confirms the adequacy of public hearing notice to all VPC members.

Thibault invited the applicants to update Board members on any changes. Reida stated that there have been no changes to the information presented at the prior meetings. He offered to replace with a signed copy the draft lease agreement on file with the ZBA.

To clarify the need for a variance, Thibault stated that the applicants seek to make VPC the primary place of a business that serves the Cooperative as well as clients from beyond VPC. Board members agreed that, as landowner, VPC needs to generate a compelling argument regarding unnecessary hardship. Carbonneau reminded Board members that the property under consideration is the entirety of Tax Map 73, Lot 22, a single lot of record consisting of 70.24 acres.

Thibault stated that VPC has to show that a denial of the variance request would deny any reasonable use of the property. In response to Thibault, Blount said that the park requires equipment and personnel to respond to emergencies, and to maintain structures such as fences.

Hutwelker said that, since VPC already has reasonable use of the property, the Board would need to find that VPC requires the use variance owing to special features of the property. In response to Hutwelker, Reida said that VPC lacks resources to make many changes, and could not afford to maintain the kind of specialized equipment on a scale suitable to the needs of the park.

Kennedy asked the Board to place limits on the size and scope of the operation. Davis stated that BLM generates little traffic, especially when compared to traffic generated by Forest View Estates. Board members observed that California Street and California Brook Road both are in relatively poor condition, and briefly discussed the roads' capacity to handle large trucks.

Thibault determined that there were no further questions, and closed the public hearing at 7:35.

REVIEW OF CRITERIA

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

Thibault said that the applicants presented no evidence that the park would not function without the proposed use. Board members discussed the need to protect against future expansion, should some other entity take the place of BLM, considering such options as conditioning an approval to fit a specific area, circumscribing the location of activities as well as pieces of equipment, and

requiring fencing to help define the area.

Motion by Walker at 7:58 to re-open the public hearing. Second by Mitchell. All in favor.

Board members asked the applicants whether the proposed maximum of 10 pieces of equipment includes non-motorized equipment, such as trailers. Reida stated that items are to include “pieces of equipment”; it will be physically impossible to store more than 10 items in the area allocated by VPC. Hearing no further questions, Thibault closed the public hearing at 8:00. Board members returned to their review of criteria.

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

Members agreed that no evidence had been presented to show that granting the variance would lead to a diminution of surrounding property values. Members noted that the applicants already had made improvements to the area, and noted planned additional upgrades.

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

Members agreed that the proposed use would not be contrary to the public interest.

3. Owing to special conditions, would the denial of the variance result in unnecessary hardship to the land owner, according to the Simplex test for determining unnecessary hardship?

a. A zoning restriction as applied to the property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment;

Some members expressed the opinion that, by curtailing storage of maintenance equipment, a denial could cause an unnecessary hardship

b. No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property;

Some members expressed the opinion that the proposed use will be similar in nature (albeit not in scale) to historic (albeit not permitted) uses of the portion of the VPC parcel.

c. The variance would not injure the public or private rights of others.

Members agreed that concerns of abutters can be addressed by fencing and landscaping to buffer the proposed use.

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

Members agreed that the spirit of the ordinance would be observed if the requested variance facilitates improvements to the VPC property.

5. Would granting the variance do substantial justice?

Members agreed that granting the variance would allow BLM to continue to enhance the VPC environment.

Motion by Mitchell at 8:25 to re-open the public hearing. Second by Walker. All in favor.

Board members and applicants discussed hours of operation, specified as 7:00 a.m. to 5:00 p.m., Monday through Friday, on the applicant's site plan application to the Planning Board. Reida stated that he and Blount strive to

minimize overtime beyond the 40-hour the company workweek; snowplowing and general emergencies are exceptions. To preserve flexibility, the applicants requested ZBA approval of hours of operation from 7:00 a.m. to 7:00 p.m., Monday through Friday, with the understanding that workdays will likely end earlier than 7:00 p.m.

Kennedy asked the ZBA to explicitly prohibit any processing of material on site, such as woodchipping.

Thibault determined that there were no further questions, and closed the public hearing at 8:32.

Motion by Mitchell to approve the use variance from Section IV.A. to permit the operation of a contracting business providing landscaping, construction and painting services, with the following conditions:

1. BLM's hours of operation at the VPC property shall not exceed 7:00 a.m. to 7:00 p.m., Monday through Friday, except in the case of emergencies;
2. BLM's activities shall be restricted to those related to landscaping and property maintenance;
3. BLM's area of use of the VPC property shall be limited to the area shown on the site plan dated 8/14/09;
4. BLM's equipment stored at the VPC property shall be limited to 10 vehicles with wheels or tracks. Storage of equipment shall be limited to the area on the southerly side of the metal-sided building, north of California Brook Road;
5. BLM's materials stored at the VPC property shall be limited to 3 bunkers, each holding up to 20 cubic yards of mulch/barkmulch and/or loam/compost, and situated in the location indicated on the applicants' site plan;
6. No mechanical processing (e.g., chipping) or creation of materials shall take place on the VPC property.

Second by Beaugard. Mitchell, Beaugard, Walker, Hutwelker in favor.

Thibault opposed. Motion passes.

Thibault advised those present that ZBA decisions may be appealed, and recommended consultation with Town Planner Carbonneau.

3. (PUBLIC HEARING) AREA VARIANCE APPLICATION

Applicant: Guy Gaffney

Property owner: Guy Gaffney

Property location: 45 Pasture Road Tax Map 18, Lot 99-1

Zoning District(s): Residence District

Request: Area variance from Section IV.B.3 to permit the construction of a front deck that does not meet required setbacks.

Hutwelker opened the public hearing at 8:35.

Members seated: Hutwelker, Thibault, Beaugard, Mitchell and Walker.

Representing the application: Guy Gaffney

Abutters present: none

DISCUSSION

Gaffney said that he seeks to build a 10' x 20' deck on the front of his house. The deck would encroach by 5' on the front setback of his property on Pasture Road. The deck would replace deteriorated steps. Gaffney stated that an abutter has written in support of Gaffney's application.

In their information packets, Board members received a November 9, 2009 ZBA Application Summary prepared by Carbonneau. Members noted that the lot is .37 acres in size, and is in a densely settled portion of Swanzey.

Hutwelker determined that there are no further questions, and closed the public hearing at 8:40.

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

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

Members agreed that granting the area variance would not diminish surrounding property values.

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

Members agreed that the proposed use would not be contrary to the public interest.

3. Owing to special conditions, would the denial of the variance result in unnecessary hardship to the land owner, according to the Boccia test for determining 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, given the small size of the lot in question and the small size of others in the vicinity.

b. Could the benefit sought by the applicant be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance?

Members agreed that an area variance is the most reasonably feasible method to achieve the benefit sought.

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

Members agreed that the spirit of the ordinance would be observed.

5. Would granting the variance do substantial justice?

Members agreed that granting the variance would do substantial justice.

Motion by Thibault to approve the area variance from Section IV.B.3 to permit the construction of a 10' x 20' front deck that does not meet required setbacks. Second by Mitchell. All in favor.

4. (PUBLIC HEARING) AREA VARIANCE APPLICATIONS

Applicant: Nancy Brown

Property owner: Nancy Brown

Property location: 170 Homestead Highway Tax Map 59, Lot 1

Zoning District(s): Rural/Agricultural District

Request: Variance from Section VII.E.1 to permit the construction of a septic system that does not meet required setbacks.

Hutwelker opened the public hearing at 8:40.

Members seated: Thibault, Beauregard, Mitchell, Walker, Hutwelker.

Representing the application: Nancy Brown; Pete Bissell, Quality System Design, LLC

Abutters present: none

DISCUSSION

Bissell reviewed the proposal and limitations of the site with Board members. The Environ-Septic system would be sized for a 3-bedroom house, and the leach field would be located 77' from a jurisdictional wetland. Bissell noted that NH-DES requires leach fields to be set back 75' from jurisdictional wetlands. Bissell stated that slopes and/or hydric soils limit options for locating a septic system; a test pit in the proposed location supports using the proposed area. Bissell stated that other locations in the vicinity of the studio would require extensive excavation and disturbance of natural vegetation.

Bissell stated that he has evaluated 130 Environ-Septic systems and feels that they have an outstanding performance record. He stated that these systems often are granted a waiver to authorize installation closer to the seasonal high water table.

In their information packets, Board members received a November 9, 2009 ZBA Application Summary prepared by Carbonneau. According to a 1995 letter from Health Officer Derocher, Carbonneau reported that the house formerly on the property (demolished in 2009) had been vacant since approximately 1976, and lacked a functioning septic system. Carbonneau stated that the 36.1-acre size of the lot might suggest the availability of alternative sites for the septic system; however, because the remaining structure on the property (an art studio) currently lacks septic facilities, it is reasonable to construct the proposed house adjacent to the studio. Brown stated that the house would be annexed to the studio, and a bathroom and running water would be installed in the studio as part of the house construction project.

Determining that there were no further questions, Hutwelker closed the public hearing at 9:05.

REVIEW OF CRITERIA

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

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

Members agreed that granting the variance would not diminish the value

of surrounding properties.

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

Members agreed that granting the variance would not be contrary to the public interest.

3. Owing to special conditions, would the denial of the variance result in unnecessary hardship to the land owner, according to the Boccia test for determining 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 that special conditions of the property and the presence of the existing structure make the area variance necessary.

b. Could the benefit sought by the applicant be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance?

Members agreed that an area variance is the most reasonably feasible method of achieving the benefit sought by the applicant.

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

Members agreed in the affirmative, especially given the topography of the lot and the demonstrated performance of the system.

6. Would granting the variance do substantial justice?

Members agreed that granting the variance would do substantial justice.

Motion by Beauregard to approve the area variance from Section VII.E.1 to permit the construction of a septic system that does not meet required setbacks. Second by Mitchell. All in favor.

5. DISCUSSION REGARDING SB 147, new variance criteria effective January 1, 2009.

Thibault stated that he, Hutwelker and Carbonneau seek authorization to speak with legislators on behalf of the ZBA regarding the likely impact of the new law. Those present agreed that, by eliminating *Boccia* and instead requiring a single standard for area variances and use variances, SB 147 will make it difficult if not impossible for zoning boards to find positively on applications for dimensional variances.

Motion by Mitchell to authorize Thibault, Hutwelker and Carbonneau to represent the will of the Board: The Swanzey ZBA supports efforts to reinstate the *Boccia* standard for reviewing applications for area variances. Second by Rudgers. All in favor.

OTHER BUSINESS AS MAY BE REQUIRED

A. John Arnone advised the Board that he will be seeking to make parking available in front of the restaurant at Arnone's Family Fun Center, situated at Tax Map 34 Lot 32. Carbonneau recommended that Arnone request in writing a modification of conditions of approval, for consideration at the joint Planning Board and ZBA meeting on December 10, 2009.

B. Carbonneau encouraged members to attend a December 1, 2009 Planning Board discussion of proposed amendments to zoning along the Route 10 corridor. Officials from Yale University have been invited.

6. VOTE ON ALTERNATE MEMBER VACANCY for one position that expires at Town meeting 2011 and one position that expires at Town Meeting 2012. Carbonneau informed members that she had received no nominations, and said she would re-notice the vacancies for the December 2009 meeting.

ADJOURMENT

Motion by Thibault to adjourn. Second by Beauregard. All in favor. The meeting adjourned at 10:00 p.m.

Respectfully submitted,

Victoria Reck Barlow,
Recording Secretary