

**SWANZEY ZONING BOARD OF ADJUSTMENT MINUTES
SEPTEMBER 18, 2006**

[Note: 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.]

The regular meeting of the Swanzeay Zoning Board of Adjustment was called to order at 7:05 p.m. by acting chair Keith Thibault. Members present: Keith Thibault, Charles Beauregard, Sr., Bob Mitchell, Jenn Gregory and Bob DeRocher. Bill Hutwelker arrived at 8:15 p.m. Town Planner Sara Carbonneau was also present. The agenda for the evening's meeting was read and the following matters were addressed:

Thibault announced that it is the policy of the Board not to commence new public hearings after 10:00 p.m. Due to the length of the agenda, it was possible that some items would not be addressed this evening.

1. Application Submitted by Gail Guyette (Tax Map 9, Lot 7) - It was suggested that a site visit regarding Gail Guyette's application for variances might be useful. Motion by Beauregard to continue this matter to a site visit (at which time the public hearing would be opened) on Saturday, September 30, 2006 at 9:00 a.m. without further notice. Seconded by Mitchell. Vote: All in favor. It was noted for those abutters present that the public is invited to attend this site visit. It was recommended that people should park at Gail Guyette's home at 45 Hale Hill Road.

2. Minutes from August 14, 2006. Motion by Beauregard to approve the minutes from August 14, 2006 as submitted. Seconded by Gregory. Vote: All in favor.

3. Public Hearing (Variance and Special Exception Applications). David Roy requests a variance from Section IV.B. to permit access through the residence district to a business situated on another portion of the premises located in the business district and a special exception from Section V.B.2.a. to permit the operation of a portable sawmill and to erect a temporary structure on the portion of the property situated within the business zoning district. The property is located at 49 Spring Street, shown at Tax Map 57, Lot 72 situated in the Residence Zoning District. Seated were: Thibault, Mitchell, Gregory, Beauregard and DeRocher (for Hutwelker/Geheran). It was noted that DeRocher had been present for prior public hearings and the site visit regarding this matter. Present were: David Roy, Attorney Jeremy

Hockensmith on behalf of Roy and Attorney Silas Little on behalf of abutters Gail Davis and Mark Desilets.

Thibault asked Town Planner Carbonneau which application should be addressed first. Carbonneau advised that she thought that the Board should address the special exception first, as the Board should know what the business uses would be utilizing the driveway that is the subject of the variance application.

Public hearing regarding the special exception application was opened. Hockensmith requested that the Board incorporate the information presented at the prior public hearings (including the site visit) concerning the variance. Board agreed to do so. Hockensmith provided the Board with 5 photographs of the site, 10 letters of support from residents in the area, and a Hearing Brief regarding the request for special exception.

Hockensmith specifically reviewed his client's responses to the criteria for special exception as set forth in the Hearing Brief. Hockensmith stated that the use of the sawmill fits within the definition of a manufacturing use. Gregory and Beauregard concurred, noting that Geheran had suggested at the last meeting that it would be appropriate for the applicant to apply for a special exception for this use. Hockensmith stated that the sawmill was similar to other uses in the district, notably Port-O-Lite. In addition, Hockensmith stated that there are other business uses in the district. Hockensmith noted that the sawmill is set back approximately 300 feet from the road and will have appropriate screening. It was also noted that there will be limited hours of operation. While Roy characterized the sawmill operation as a "hobby," it was later determined that it is a low-volume, part-time business. Roy stated that the mill currently operates 20 to 25 hours per week and that it does not operate on Sundays. Hockensmith stated that Roy would be agreeable to limiting operating hours from 8 a.m. to 5 p.m. Monday through Friday and from 9 a.m. to noon on Saturday.

Interested citizen Barbara Skuly inquired what would prevent Roy from increasing the size of the sawmill in the event that the special exception was granted. Carbonneau noted that the Board could establish conditions to restrict the expansion of the sawmill. Little expressed concern that the Board does not have any baseline data (such as noise levels, the amount of wood processed, the size of the engine, etc.) to determine if Roy expands or not.

Little also stated that he felt that the applicant could not, of right, obtain a special exception if any of the conditions established for granting a special exception are varied or waived. Little cited *Stone v. Cray*, *New London Land Owners Association v. New London* and *Mudge v. Haverhill* in support of this position. Little stated that Roy does not meet the criteria for granting the special exception, as the business use does not have frontage on a town-maintained road. Town Counsel Beth Fernald was present and stated that it was her opinion that the property did, in fact, have frontage – even though that frontage was situated in the Residence Zoning District.

Little also stated that he felt that the criteria for granting the special exception was not met without variance, as the applicant needed a variance for the driveway. Hockensmith stated that he felt that the Board was wrong

in requiring that a variance be obtained for the driveway and cited the case of *Duffy v. Dover* and provided the Board with a copy of this case. Little stated that it was his opinion that the *Duffy* case was inapposite to this matter and could not be applied to the Swanzey Zoning Ordinance. Hockensmith stated that the driveway was an accessory use to the timber storage use; noting that the timber storage use was permitted in the business district (warehousing). Little disagreed, noting that a portion of the driveway is located within the residence zoning district and that timber storage or warehousing is not a permitted use in that district.

Fernald stated that it was her opinion that Roy needed a variance to place a driveway in the Residence District that serves a business use. Carbonneau noted that the Board had taken this position in the past and that a driveway is clearly part and parcel of the business use. Fernald stated that the focus of the special exception application, however, is on the parcel itself and not the access.

Davis expressed her concern with the driveway and the businesses utilizing the driveway. She felt that the trucks are loud and that the trucks leave early in the morning. In addition, Davis stated that the sawmill can be seen from her property and that the operation of the sawmill can be heard from within and without her house. Davis stated that she felt that there was inadequate buffering and that her property values would be negatively impacted if Roy's business use is allowed to continue.

Skuly stated that she has also heard noise from that property and agreed that a logging truck utilizing Spring Street was too loud and too large for the area. Public hearing closed.

Board members reviewed the criteria for granting the special exception. Board members felt that the exception was allowed by the ordinance, as sawmill makes "a product."

They felt that it was an appropriate location, with Mitchell stating that he felt that it was an appropriate location at its current level of operation. Most members agreed that it was an appropriate location but felt that conditions regarding the extent of the operation and buffering would be required.

Board members generally felt that there would be no diminution of property values if the special exception was granted, with Gregory noting that the use has been there for almost 30 years already. Beauregard noted that there was only anecdotal evidence that property values may diminish.

Board members also felt that the use would not be injurious, offensive or obnoxious, citing the 10 letters provided this evening that states that "the noise from the sawmill and log truck has not disturbed us."

Board members felt that the sawmill would not be a nuisance or serious hazard to vehicles or pedestrians, as the sawmill was set "well back on the property." In addition, most felt that adequate and appropriate facilities would be provided for the property operation of the proposed use, noting that they felt that the variance required for the driveway was not part of this consideration.

Motion by Mitchell to grant the special exception application subject to the following conditions:

- a. Hours of operation would be limited to the time period running from 8 a.m. to 5 p.m. Monday through Friday and from 9 a.m. to noon on Saturday, with no Sunday hours; and
- b. The size of the motor operating the sawmill is limited to a two-cycle diesel engine.

Motion seconded by Beaugard. Vote: All in favor.

The Board then re-opened the public hearing on the variance application request that was continued from the August 14, 2006 meeting. Seated were: Thibault, Mitchell, Gregory, Beaugard and DeRocher (for Hutwelker).

Hockensmith provided the Board with a supplemental brief regarding the variance application. Hockensmith reiterated his position that he feels that Roy does not need a variance for the driveway, again citing *Duffy v. Dover*. Hockensmith stated that the Superior Court has determined that a driveway is not a "use." However, in light of the fact that the Town states that a variance is required, Roy has submitted an application for the same.

Hockensmith stated that there is no other reasonable way to access the business portion of Roy's premises other than crossing the residence district. Hockensmith noted that there is no direct road frontage on the business portion of the premises. In addition, there are wetlands on the rear of the property that would require wetlands permits should he seek to cross in that area. Also, he would need to be granted a right of way over an abutting property owner's land should he want to access the business portion of his property without crossing the residence district.

Hockensmith stated that the ordinance contemplates business uses occurring in the residence district, notably home occupations, stating that this is in contract to Little's assertion that "that business district was created solely for the benefit of businesses 'located on a highly accessible highway network.'"

Hockensmith stated that due to conditions special to the property, Roy cannot access the business zoned portion of his property without going through the residence district. Hockensmith reiterated his argument set forth earlier that due to the wetlands area and the fact that there is no direct road frontage on the business portion of the premises in support of this position. Hockensmith also noted that this property is uniquely situated in that it is divided by two zoning districts.

Little stated that he did not feel that the property was uniquely situated, as many other properties in Town are divided by zoning districts and that the zoning ordinance contemplates and addresses properties situated in more than one zoning district.

Little stated that there was no evidence provided that this property was uniquely situated and cited *Garrison v. Henniker* in support of his position.

Skuly stated that she did not feel that granting the variance would be in keeping with the spirit of the ordinance, stating that slowly the residential nature of the neighborhood is being eroded by granting home occupations and other business uses. She noted that the fact that Roy

testified earlier that he had moved the location of his driveway due to the number of cars being parked in the area, as well as children playing in the street, reflected the residential nature of the street. Public hearing closed.

Board members discussed the criteria for a use variance. DeRocher noted that DPW Director Dunham has already issued a driveway permit, which he felt indicated that Dunham was satisfied that conditions required to issue a permit had been met.

Board members generally felt that there would be no diminution of surrounding property values, noting that the use has been on the property for approximately 30 years and did not appear to impact the neighborhood. However, Mitchell disagreed stating the that location of the driveway in question has invoked negative responses from property owners, who have also indicated that their property values may be negatively impacted.

Board members discussed whether granting the variance would be contrary to the public interest. DeRocher noted that there were at least 10 letters from people in the neighborhood who stated that the “noise from the sawmill and log truck has not disturbed us.” Beauregard stated that granting the variance would add only one additional truck to the road and that it would be “no worse than Patnode Oil.”

The hardship criteria was discussed, vis a vis the “unique setting of the property in its environment.” Board members felt that due to the wetlands on the rear of the property, the fact that the property was divided by zoning districts and that there was no other reasonable way to access the portion of the property situated in the business district, Board members felt that the property was “unique” in its setting.

Board members felt that there was a fair and substantial relations between the general purposes of the zoning ordinance and the specific restriction on the property, as the proposed use is for a driveway only.

As to whether granting the variance would injure the public or private rights of others, DeRocher, Beauregard and Gregory felt that it would not. Mitchell disagreed, stating that evidence has been presented that it has negatively impacted residents along the street.

DeRocher, Beauregard and Gregory also felt that granting the variance is consistent with the spirit of the ordinance and that it would do substantial justice, as it would allow the applicant the ability to utilize the business portion of his property for a business use. Mitchell disagreed, noting his reasons stated above.

Motion by Gregory to grant the variance application based on the review of the criteria to permit access through the residential district to the business district at 49 Spring Street, subject to the conditions that a vegetative buffer be planted to screen the business use from the residential uses, specifically with evergreens being planted between the shed to the south side of the gate and that all idling trucks associated with the business must be parked in the business district portion of the lot. Seconded by DeRocher. Vote in favor: DeRocher, Gregory and Beauregard. Opposed: Mitchell and Thibault. Motion carries.

DeRocher steps down and Hutwelker assumes his position as a Board member and Chair.

4. Public Hearing (Administrative Decision Appeal). Kevin Jefts challenges a determination rendered on July 25, 2006 by Code Enforcement Officer Jim Weston denying a Building Permit Application for property shown at Tax Map 88, Lot 3-1. *Due to time constraints, a motion by Gregory to continue this item to a special meeting scheduled for October 2, 2006 at 7:00 p.m. without further notice was made. Seconded by DeRocher. Vote: All in favor.*

5. Public Hearing (Application for Variances). Kenneth & Joyce St. Lawrence request a variance from Section V.B. to permit an existing building situated on property located at 51 Pine Street to be used as a residence (there is currently an existing residential use on the property) and from Section VII.E.2. to permit the construction of a septic system that does not meet setbacks from wetlands. The property is shown at Tax Map 57, Lot 128 situated in the Business Zoning District. *Due to time constraints, a motion by Gregory to continue this item to a special meeting scheduled for October 2, 2006 at 7:00 p.m. without further notice was made. Seconded by DeRocher. Vote: All in favor.*

6. Public Hearing (Special Exception and Area Variance Applications). William B. & Sandra A. Mispel request an area variance pursuant to Section IV.B.3. and a special exception pursuant to Section IX. to permit the construction of a carport on property situated at 33 Whitcomb Road. A variance is required as the proposed carport does not meet required setbacks; a special exception is required as the carport is situated within the Flood Plain District. The property is situated in the Residence Zoning District and shown at Tax Map 23, Lot 3-15. *Due to time constraints, a motion by Gregory to continue this item to a special meeting scheduled for October 2, 2006 at 7:00 p.m. without further notice was made. Seconded by DeRocher. Vote: All in favor.*

7. Public Hearing (Area Variance Application). Donna Lowe requests an area variance from Section IV.B.3. and XI.B.2. to permit the construction of a sunroom that does not meet required setbacks and increases the footprint of a non-conforming structure. The property is located at 64 Wilson Pond Road, shown at Tax Map 19, Lot 50 situated in the Residence Zoning District. Seated were: Hutwelker, Gregory, Mitchell, Thibault and Beauregard. Donna Lowe and Tim Cleasby were present. Interested citizen June Messer was also present. Public hearing opened.

Lowe reviewed the plan before the Board, presenting photographs and letters from abutting property owners who expressed no objection to the granting of the variance. Lowe stated that this is one of the larger lots in the area and that it is uniquely situated.

Lowe pointed out the property lines on the map and clarified that a line indicated as being 55 feet long near the end of her driveway is the

property line and not the lines indicated as being 29 feet and 40 feet. Based on Lowe's statement and her further representation that the addition would be in excess of 20 feet from the closest property line, the Board did not address the variance application from Section IV.B.3.

Board members noted that Lowe's existing structure currently encroaches on setbacks, making it a non-conforming structure – hence, the application for a variance from Section XI.B.2. Lowe stated that the addition will provide a secondary means of egress from the house and will not be visible to most abutting property owners. Public hearing closed.

The Board reviewed the criteria for granting the variance. Board members felt that it would not diminish property values; would not be contrary to the public interest; noted that Lowe has no other reasonable location in which to site the addition; it would observe the spirit of the ordinance; and it would do substantial justice.

Motion by Beauregard to grant the variance based on the review of the criteria. Seconded by Mitchell. Vote: All in favor.

Motion by Gregory to adjourn. Seconded by Thibault. Vote: All in favor. Meeting adjourned at 10:10 p.m.

Submitted by,

Sara H. Carbonneau
Town Planner