

**SWANZEY ZONING BOARD OF ADJUSTMENT MINUTES
SEPTEMBER 27, 2007**

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

The special meeting of the SwanzeY Zoning Board of Adjustment was called to order at 7:00 p.m. by Chair Bill Hutwelker. Roll call: Bill Hutwelker, Keith Thibault, Bob Mitchell, Charles Beauregard, Sr. and alternates Marty Geheran and Bob DeRocher. Town Planner Sara Carbonneau was also present. The agenda for the evening's meeting was read and the following matters were addressed:

1. Public Hearing (Appeal from Administrative Decision) filed by RT Cummings Developers, Inc., Applicant. The Applicant challenges a determination rendered on June 18, 2007 by Homer S. Bradley, Jr. on behalf of the SwanzeY Board of Selectmen. The appeal application states that the letter "unreasonably interprets the 1977 subdivision plan, recorded at Cabinet 1, Number 56 of the Registry of Deeds, as failing to show the road furnishing access to the lot in question. The letter incorrectly concludes that the plan fails to satisfy the requirements of RSA 674:41,I(b)(2)." The property is situated off Lady Slipper Lane and is shown at Tax Map 14, Lot 14-1 situated in the Rural/Agricultural Zoning District. The property is owned by Nicole and Wayne Dunham.

In the alternative, the Applicant requests the ZBA to grant an exception under Section II of RSA 674:41.

Hutwelker noted that the public hearing regarding the Appeal from Administrative Decision has been closed as to the public comment portion of the hearing. Members seated for this matter were: Hutwelker, Thibault, Beauregard, Geheran (for Jenn Gregory) and DeRocher (for Bob Mitchell). Attorney Thomas Hanna and the applicant were present. Also present were Attorney Homer Bradley and Selectman Nancy Carlson on behalf of the SwanzeY Board of Selectmen. Numerous abutters were present. Public hearing opened.

Geheran stated that when the Planning Board granted the subdivision creating Map 14, Lot 14-1 in 1977, it was conditioned upon the lot receiving a variance. Geheran stated that it was his opinion that no variance was obtained at that time; in addition, the variance application submitted in 2005 was denied. Geheran stated that he felt that the Board did not have to go any further in considering this matter as conditions established by the Planning Board in 1977 have not been met.

Geheran noted that there is sufficient evidence to indicate that a variance had been obtained for Map 14, Lot 14-2 (currently owned by the Lamoths). Geheran stated that Hanna provided only one piece of evidence that Map 14, Lot 14-1 may have obtained a variance in 1977, but Geheran further stated that this piece of evidence was “speculative, at best.”

Remaining Board members felt that it was important to address the specific issues raised in the Appeal of Administrative Decision and in Attorney Bradley’s letter dated June 18, 2007.

The Board reviewed Attorney Kane’s letter dated September 25, 2007 (Kane had been retained by the ZBA after the September 17, 2007 to provide legal counsel to the Board).

Kane’s letter summarized the questions facing the Board. The Board addressed these questions one by one.

Question #1: “Was there already a variance granted to allow the construction of a building on Map 14, Lot 14-1?” Board members stated that the 1977 Planning Board approval was clearly conditioned upon the ZBA’s granting a variance. Board members stated that evidence is clear that Map 14, Lot 14-2 received the required variance. However, it was the opinion of the Board that Map 14, Lot 14-1 did not receive a variance in 1977 and that it was clearly denied a variance in 2005. Board members noted that on October 17, 1977, Lehto signed a statement that stated “in consideration of the granting of a variance...”. However, Board members noted that there is no reference to a map or lot number on this statement and that the only application for a variance was submitted by the Lamoths. In addition, the ZBA minutes from October 17, 1977, indicate that the ZBA approved Lamoths’ application for a building permit. Board members noted that an application for a variance for Map 14, Lot 14-1 was applied for in 2005 and was denied. All Board members concurred that a variance was never granted to allow the construction of a building on Map 14, Lot 14-1.

Question #2: “If no variance has been granted, is one necessary or does the exception in RSA 674:41,I(b)2 allow for a building permit to be issued based on the fact that the street giving access to the lot corresponds in its location and lines with a street on a subdivision plat approved by the Planning Board?” Thibault stated that it is clear that a variance was needed per the Planning Board’s 1977 approval. All Board members concurred.

DeRocher stated that the Applicant did not meet the conditions pursuant to RSA 674:41,I(b)2 as the street giving access to the lot does not correspond to its location and lines with a street on a subdivision plat approved by the Planning Board. DeRocher stated that the statute is very specific and that the plat approved by the Planning Board in 1977 does not meet the statutory requirement. DeRocher noted that Lady Slipper Lane (which Board members defined as the access running perpendicular from Flat Roof Mill Road) and Flat Roof Mill Road were not shown on the plat in conjunction with proposed lots Map 14, Lot 14-1 and Map 14, Lot 14-2. In addition, DeRocher stated that he does not believe that the Planning Board ever considered Lady Slipper Lane to be a street. Geheran disagreed with DeRocher and stated that it was his opinion that there was enough information shown on the plat to infer that the street giving access was

shown. Board members, with the exception of Geheran, felt that the conditions set forth by RSA 674:41,I(b)2 were not met.

Question #3: “Does RT Cummings, Inc. have a vested right to develop this property pursuant to RSA 674:39?” Thibault stated that there have been no improvements to Map 14, Lot 14-1 since its creation in 1977 nor have there been improvements to the portion of the access serving only Map 14, Lot 14-1. Board members were divided as to whether or not vesting was required in this particular case (Geheran felt that vesting was not an issue, as Map 14, Lot 14-1 never obtained the required variance that was a condition of the subdivision; Hutwelker felt that Lehto was not a “developer,” but merely someone who subdivided his property with no intention of performing “improvements” other than the sale of the lots). However, all Board members agreed that there have been no improvements specifically associated with Map 14, Lot 14-1.

Motion by Thibault to deny the appeal from administrative decision based on the following: A variance was required to allow the construction of a building on Map 14, Lot 14-1 and no variance was ever obtained for the same; the conditions pursuant to RSA 674:41,I(b)2 for allowing a building permit to be issued were not met, specifically that the street giving access to the lot does not correspond in its location and lines with a street on a subdivision plat approved by the Planning Board; and that RT Cummings, Inc. does not have a vested right to develop Map 14, Lot 14-1 pursuant to RSA 674:39. Seconded by DeRocher. Vote: All in favor.

Hutwelker opened the public hearing to consider the exception under Section II of RSA 674:41. Seated were: Hutwelker, Thibault, Beauregard, Mitchell and Geheran (seated for Jenn Gregory). Attorney Thomas Hanna and the applicant were present. Also present were Attorney Homer Bradley and Selectman Nancy Carlson on behalf of the Swanzey Board of Selectmen. Numerous abutters were present. Public hearing opened. Hanna requested that the Board incorporate the evidence submitted during the public hearing on the Appeal from Administrative Decision. The Board agreed to do so.

Hanna stated that the exception being requested is an exception pursuant to Section II of RSA 674:41 and is not to be confused with either a special exception or a variance. Hanna submitted a two page memorandum to the ZBA dated September 27, 2007 in support of RT Cummings request for exception in accordance with RSA 674:41,II. Hanna stated that the practical difficulty or unnecessary hardship in this matter was the fact that without relief pursuant to 674:41,II the lot would not be a buildable lot. Hanna noted that appraisals had previously been provided indicating that the value of the lot as a buildable lot would be \$66,000; with a building permit, the lot is valued at \$15,000.

Hanna also noted that the circumstances of this case do not require that the building be related to the street. Hanna argued that “the road will provide adequate access for emergency vehicles” and that a “safe new roadway will be constructed.” Hanna also noted that Swanzey allows “back lots, which by definition are located a considerable distance back from the public street.”

Hanna stated that it was his opinion that allowing a building permit to be granted for Map 14, Lot 14-1 would not “distort the official map or increase the difficulty in carrying out the master plan.”

Hanna also stated that the owners of Map 14, Lot 14-1 have entered into a maintenance agreement for Lady Slipper Lane, thereby granting the exception will not impose a hardship on future purchasers, not will it impose a financial burden on the Town. Hanna provided the Board with a copy of the maintenance agreement recorded at Vol. 2364, Page 710 of the Cheshire County Registry of Deeds. Hanna stated that the applicant will do whatever is required by DPW Director Lee Dunham to meet the requirements of the driveway permit regulations.

Abutting property owner Richard Dicey stated that part of the access to Map 14, Lot 14-1 is over his property and that there is limited distance between the rental house on the property and the stone wall in which to build a driveway that meets Town regulations. Dicey also noted that the Map 14, Lot 14-1 is not subject to the maintenance agreement until such time as a house is built on the lot.

Abutting property owner Linda Lamothe stated that it was her understanding that Map 14, Lot 14-1 was to be used for recreational purposes only. She stated that she was Eugene Lehto’s daughter. Hanna stated that no such restriction that the lot was to be used for recreational purposed on was included on the subdivision plat nor was it included in the deed to the property.

Bradley stated that if the Board allows the exception, it creates the risk of a financial burden on the Town. Bradley noted that it is not uncommon for residents along private roads to petition Towns to accept private roads as public ways, with the result that the Town incurs the maintenance costs.

Selectman Nancy Carlson stated the sales price of the lot in 2005 was \$15,000. and that the low sales price was indicative of the fact that a building permit could not be obtained for the lot. The current owner of Map 14, Lot 14-1, Nicole Dunham, was present and stated that she was aware that a variance had been denied in April 2005. N. Dunham noted that the variance was denied prior to the time that she purchased the lot. Dunham stated that they purchased the lot as they believed that there was a possibility that they could improve the road to Town standards and that they could obtain a building permit.

Bradley stated that it has been the position of the Town that it does not grant building permits for properties that do not have frontage on Town maintained roads. Hanna stated that the Board of Selectmen have issued building permits in the past for properties that do not have frontage (he gave the example of property at the end of Day Road). In addition, Hanna stated that the Planning Board was aware that the driveway access for Map 14, Lots 12 and 13 were off Lady Slipper Lane, even though they have frontage on Flat Roof Mill Road.

Bradley stated that he did not know what the statute meant by “practical difficulty” and felt that the Board should utilize the definition of unnecessary hardship as set forth in variance case law. Hanna disagreed.

Thibault stated he felt that Hanna's prior comments that Lady Slipper Lane was "good access" was incorrect. Thibault stated that the access to Map 14, Lot 14-1 is barely passable beyond the access for Map 14, Lot 14 (currently owned by Dicey). Thibault stated that he felt that the access was fairly steep and that its junction at Flat Roof Mill Road would not meet Town or State regulations. Public hearing closed.

Board members stated that they felt that in order to construct a building on Map 14, Lot 14-1, the circumstances of this case do require that the building be related to existing or proposed streets. Thibault stated that the denial of the variance application in 2005 was clearly related to the access issue. Board members felt that since this provision was not met, that the exception request pursuant to RSA 674:41,II must be denied. Board members noted that the circumstances present under which an exception could be considered under the statute entail "practical difficulty or unnecessary hardship, and that the "circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets..." Board members felt that while they might not be able to define "practical difficulty or necessary hardship," it was a moot point since the "circumstances of the case..." was a required condition as evidence by the fact that the phrases were connected by "and" and not by "or."

Motion by Thibault to deny the exception request under RSA 674:41, II as the circumstance of the case do require the building, structure or part thereof to be related to existing or proposed streets. Seconded by Geheran. Vote: All in favor.

Motion by Beauregard to adjourn. Seconded by Geheran. Vote: All in favor. Meeting adjourned at 9:15 p.m.

Submitted by,

Sara H. Carbonneau
Town Planner