

**SWANZEY ZONING BOARD OF ADJUSTMENT MINUTES
AUGUST 20, 2007**

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

1. Public Hearing (Equitable Waiver of Dimensional Requirements) -

Louis LaBarre seeks an equitable waiver of dimensional requirements as an out-building structure constructed on the premises does not meet required setbacks. The property is located at 48 Woodland Heights Drive, shown at Tax Map 14, Lot 4-15 situated in the Rural/Agricultural Zoning District. Seated for this matter were: Hutwelker, Beauregard, Thibault, Bob Smith for Bob Mitchell and Bob DeRocher for Jenn Gregory. Louis LaBarre appeared before the Board. No abutters were present.

Public hearing opened.

LaBarre stated that a few years ago he had constructed a 16' by 20' shed on his property. The shed is set on sona tubes and has a ramp leading up to it. LaBarre utilizes the shed for storage of his utility trailer, snowblower, lawnmower and other yard equipment.

LaBarre stated that he obtained a building permit to construct the shed and that Code Enforcement Officer Jim Weston had inspected the shed and signed off on the Certificate of Occupancy.

LaBarre stated that recently, the abutting property owner Jeannine Lawson had a survey done on her property (Map 14, Lot 4-14) and it was discovered that the shed was situated approximately 18 inches from the property line. LaBarre noted that when he applied for the building permit, he and the Code Enforcement Officer had reviewed the proposed siting of the shed and made a mistake as to where they believed the property line to be. LaBarre stated that they believed that he was siting the shed at least 30 feet from the property line versus the required 20 feet in order to be "on the safe side."

Board members were in receipt of a letter from Jeannine Lawson stating that she had no objection to the granting of the equitable waiver request. It was noted that Lawson stated in her letter that “the shed does not obstruct my view nor do I consider it bothering in any way...” LaBarre stated that there were woods situated between the shed and Lawson’s house and that the shed is setback at least 60 feet from Lawson’s house.

When questioned as to whether or not it was feasible to move the shed, Code Enforcement Officer Weston stated that it was a sizeable structure situated on sona tubes.

When questioned whether a boundary line adjustment could be effectuated, LaBarre felt that it would be financially burdensome to do so. LaBarre also stated that Lawson was fine with the equitable waiver request. Public hearing closed.

Board members reviewed the criteria for granting the equitable waiver request. After finding that the applicant met all the requirements for granting an equitable waiver, a motion was made by Thibault to grant the application. Seconded by DeRocher. Vote: All in favor.

2. Public Hearing (Appeal from Administrative Decision) - RT

Cummings Developers, Inc. challenges a determination rendered on June 18, 2007 by Homer S. Bradley, Jr. on behalf of the Swanzy 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.

Seated for this matter were: Hutwelker, Beauregard, Thibault, Geheran for Bob Mitchell and Bob DeRocher for Jenn Gregory. Attorney Thomas Hanna appeared before the Board on behalf of the Applicant. Attorney Sam Bradley appeared before the Board on behalf of the Swanzy Board of Selectmen. Abutters were present. Public hearing opened.

Hanna polled Board members to determine if they felt that they may have a conflict of interest or could not be impartial due to the fact that Attorney Bradley was representing the Board of Selectmen. Hanna prefaced his remarks by noting that Attorney Bradley and his firm are the “Town’s attorneys.” Hanna further stated that he was prepared to go forward this evening if the Board members stated that they did not feel that they had a conflict of interest and that they felt that they could be

impartial in this matter. Each Board member, including Smith who was not seated for this matter, was polled and stated affirmatively that they felt that they did not have a conflict of interest and that they could be impartial.

Attorney Bradley reminded the Board that if they felt that they needed legal counsel that they would need to obtain its own counsel and that he and his firm could not provide legal counsel to the ZBA on this matter.

Hanna provided Board members with the following documents for review and to be included in the record:

1. 2 page memorandum dated August 20, 2007 entitled "Chronology of development off Lady Slipper Lane" and Exhibits A through M.
2. 3 page memorandum dated August 20, 2007 subject "Parcel at tax map 14, lot 14-1"
3. Copy of tax map 14 with Lady Slipper Lane highlighted.

Hanna stated that in October 1977, the Planning Board approved the Lehto subdivision (recorded Cab. 1, #56 of the Cheshire County Registry of Deeds). Hanna noted that 2 five acre lots were created by this subdivision, each having frontage on the "old road." Hanna read the Planning Board's note on the plan recorded at 1/56 into the record. Hanna stated that he assumes that the Planning Board considered the "old road" to be a public road, as they made the approval of the plat conditioned upon the road being subject to gates and bars and subject to the condition that the road be posted. Hanna noted that the "old road" is now shown on the tax map as "Lady Slipper Lane."

Hanna stated that Lehto sold Lot 14-2 to Lamothe in 1977 and Lamothe subsequently built a house on the property in 1980.

Hanna also reviewed boundary line adjustment plats approved by the Planning Board in 2005 and recorded at Cab. 13, Dr. 1, Plan 117 and Cab. 13, Dr. 1, Plan 166 of the Cheshire County Registry of Deeds. Hanna stated that these plats show the entirety of Lady Slipper Lane. In addition, the plat recorded at 13/1/166 shows the boundary line of Lot 14-1 in proximity to Lady Slipper Lane.

Hanna also stated that Lot 14-1 is subject to a road maintenance agreement serving Lots 12, 13, 14, 14-1 and 14-2.

Hanna stated that he feels that feels that Lot 14-1 qualifies for a building permit pursuant to RSA 674:41,I(b)2 as the street giving access to this lot corresponds in its location and lines with a street on a subdivision plat approved by the planning board. Hanna noted that Bradley's argument that the "street giving access to the lot in question is not shown on the subdivision plat. The strip of land shown on you plat does not go anywhere" (as contained in his June 18, 2007 letter) amounts to "form over substance." Hanna also noted that the plat recorded at 1/56 notes that it is 850 feet from the "old road" to Flat Roof Mill Road.

Hanna noted that the zoning ordinance in 1977 required that a lot have frontage on a public street. Hanna further noted that “public street” was not defined in the zoning ordinance. Hanna stated that RSA 672:13 defines street very broadly and read the following definition into the record: “Street” means, relates to and includes street, avenue, boulevard, road, lane, alley, viaduct, highway, freeway and other ways.” Based on this definition, Hanna stated that he felt that the “old road” clearly is a street giving access. Hanna noted that the Swanzey Zoning Ordinance now defines a public street as being on a Class V road or better.

Hanna stated that Bradley will argue that the Planning Board was wrong in 1977 to grant the subdivision. Hanna noted that there was no appeal of the Planning Board’s decision.

Hanna stated that it is his opinion that the subdivision has vested, as there has been substantial completion – notably, improvements to Lady Slipper Lane, the fact that Lot 14-2 has a home built on it and that Lot 14-1 has been sold. Hanna stated that *AWL v. Rochester* provides case law backing that the right to build on Lot 14-1 is vested.

Bradley provided the Board with a 19 page document entitled “Memo to the Swanzey Zoning Board of Adjustment on Behalf of the Board of Selectmen” with attachments. This document was entered as part of the record.

Bradley stated that the subdivision plat is not vested based on the Supreme Court’s holding in Morgenstern. Bradley stated that Lehto was the developer in this particular case and vesting could run only to Lehto. Bradley stated that Lehto made absolutely no improvements to the property which would trigger vesting. Also, Bradley stated that the easterly portion of Lady Slipper Lane running past Lot 14-1 is extremely narrow, has not been improved and is barely passable.

In addition, Bradley stated that the plat at 1/56 does not meet the statutory requirement of corresponding “in its location and lines.” (RSA 674:41,I(b)) Bradley stated that Lot 14-1 needs to comply with current zoning regulations and needs frontage on a Class V road or better and cited the Vachon case. Bradley stated that the creation of the subdivision in 1977 was illegal and should not have been granted by the Planning Board.

Bradley stated that while the 1977 ordinance may not have defined public street, he stated that there was absolutely no way that anyone on the Planning Board believed that Lady Slipper Lane was a “public street.”

Thibault inquired if there are benchmarks that establish vesting. Both Bradley and Hanna agreed that there is no hard and fast rule and that the Court considers each matter on a case by case basis.

Jebediah Muzzey and Travis Muzzey were present on behalf of their mother Judy Muzzey Durocher. A letter for Durocher was read into the record, expressing Durocher’s opinion that Bradley’s June 18, 2007 decision should be upheld.

Abutting property owner Richard Dicey was present and stated that if Lot 14-1 is allowed to be built upon, improvements would be needed over the right of way which may negatively impact his property (as the right of way runs over his property).

Geheran stated that he would like time to review the new case law presented this evening. In addition, Hutwelker stated that he would like to see other cases that discuss vesting. Bradley stated that he would assemble this information and provide it to Board members prior to the next meeting.

Motion by DeRocher to continue this matter without further notice to the September 17, 2007 meeting. Seconded by Geheran. Vote: All in favor.

Re: Items 3, 4 & 5 – Motion by Geheran to continue, without further notice, items 3, 4 & 5 (Snow, Duquette & Johnson applications) to a special meeting of the Zoning Board of Adjustment to be held on Monday, September 10, 2007 at 7:00 p.m. at the Town Hall. Seconded by Beauregard. Vote: All in favor.

3. Public Hearing (Area Variance) - Ernest & Jean Snow request an area variance from Section IV.B.3. and Section XI.B.2. to permit the construction of an addition that does not meet required setbacks. The existing structure currently does not meet required setbacks. The property is located at 92 Westport Village Road, shown at Tax Map 88, Lot 28 situated in the Residence Zoning District.

4. Public Hearing (Use Variance) - Richard Duquette requests a use variance from Section IV.B. to permit the operation of a home improvement company. The property is located at 38 Swanzey Factory Road, shown at Tax Map 18, Lot 280 situated in the Residence Zoning District.

5. Public Hearing (Use Variance) - Arnold & Mary Johnson request a variance from Section V.B. to permit the existing structures situated at 49 Old Homestead Highway to be utilized for multi-family housing (a total of 3 residences located within 2 buildings). The property is situated in the Business Zoning District and shown at Tax Map 37, Lot 32.

6. Minutes from June 18, 2007 – Motion by Thibault to approve the June 18, 2007 minutes as submitted. Seconded by Beauregard. Vote: All in favor.

Motion by DeRocher to adjourn. Seconded by Beauregard. Meeting adjourned at 10:00 p.m.

Submitted by,

Sara H. Carbonneau
Town Planner