

**SWANZEY ZONING BOARD OF ADJUSTMENT MEETING
OCTOBER 18, 2010**

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

William Hutwelker, Chair; Keith Thibault, Vice Chair (left at 7:56); Charles Beauregard, Sr. (arrived at 7:20), Bob Mitchell, Jerry Walker. Alternate Charles R Beauregard, Jr. Town Planner Carbonneau also was present.

Chairman Hutwelker called the meeting to order at 7:00 p.m.

MINUTES

Motion by Thibault to approve the minutes of the September 20, 2010 meeting. Second by Beauregard, Jr. All in favor.

1. (Public Hearing) Special Exception

Applicant: Jen Wyman

Property owner: Jen Wyman

Property location: 51 Pasture Rd Tax Map 18, Lot 98

Zoning District(s): Business

Request: Special exception pursuant to Section V.B.2.a to permit the property to be utilized for a daycare facility (continued from August 16, 2010).

Before opening the public hearing, Hutwelker explained to the applicant that the Board prefers to seat five members, because an application requires three positive votes to prevail. With only four members present, Hutwelker offered the option of postponing the public hearing until the arrival of Beauregard, Sr. Wyman asked the Board to delay the public hearing until five members could be seated.

At 7:25 Hutwelker opened the public hearing.

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

Beauregard, Jr. was seated for Thibault, who stepped down due to a possible conflict of interest.

Representing the application: Jen Wyman

Abutters present: none

DISCUSSION

On August 16, 2010, members received an application summary from Town Planner Carbonneau. Reviewing the summary with the Board at the August 16, 2010 ZBA meeting, Carbonneau said that she posted legal notice of the hearing on August 5, 2010. She said that the parcel is served by public

water and sewer, clearly is in a residential type of neighborhood while being located within the Business district and, at .67 acre, is an existing non-conforming lot.

Carbonneau stated that the applicant responded to her request for additional information with materials showing the layout of the play area and parking, as well as details of the daycare operation such as hours, number of children present, and how the house is used. Carbonneau said that the Planning Board would consider the application from the perspective of site plan review, and might request modifications that are beyond the ZBA's purview.

Wyman stated that currently two children are enrolled full-time, and two children are enrolled part-time. Wyman said that she would be required to obtain a State license if more than three children (in addition to her own children) attended her daycare; however, she said, the facilities at her home (play area, napping area, etc.) could handle four children at full time. Wyman said that she could define "full time" in terms of number of hours in one day, or in terms of number of days in the week.

Wyman stated that her current hours of operation are from 7:30 a.m. to 4:30 p.m., although she would like the option of operating from 5:00 a.m to 7:00 p.m. Carbonneau advised Board members that they could make a finding that hours of operation are not important for the proposed use, or could include the expanded hours in a condition of approval. Carbonneau said that, in lieu of the regulations of State licensing, the ZBA needs to determine whether the daycare facilities are adequate and appropriate. Carbonneau said that a motion to approve could stipulate that the number of children in attendance would have to be under the threshold for a licensed day care facility.

Board members discussed the challenge of balancing their general desire to help applicants minimize the need for return visits to the ZBA, while at the same time protecting the interests of customers who use an approved use, along with the interests of the neighbors and the community as a whole. Rather than having the ZBA propose changes to the application, some members felt that the Board should base decisions on applications as presented.

In response to questions from the Board, Wyman said that the play yard is surrounded by a 6' stockade fence. A portion of the area is separated with a chain link fence and is reserved for use by the family's dogs (a Lab and a Lab/St. Bernard cross). The dogs' access to the yard also is separated from that used by children in the day care; a gate in the chain link fence for adult access to the dogs' area can be locked. Wyman said that the dogs and children may be together inside the house, but are separated in the yard to keep the play area clean and to avoid having dogs jump on the children. Board members discussed the concerns of some that children might put fingers through the chain link fence and get bitten by the dogs.

Wyman expressed frustration with the Board's scrutiny of her application, stating that others in the neighborhood operate unapproved day care businesses. At 8:11 Hutwelker called for a 5-minute recess.

The public hearing resumed at 8:15. Board members briefly discussed their concerns regarding safety of children enrolled in the day care. Hearing no further comments or questions, Hutwelker closed the public hearing at 8:19. Members reviewed the criteria for granting the requested special exception.

1. Is the exception allowed by the ordinance?

Members agreed in the affirmative.

2. Are specified conditions present under which the exception may be granted?

a. Is the proposed use similar to one or more of the uses already authorized in that District and is it an appropriate location for such use?

Members agreed in the affirmative.

b. Will such approval reduce the value of any property within the district, or otherwise be injurious, obnoxious, or offensive to the neighborhood?

Members agreed that the approval would not be injurious, obnoxious or offensive to the neighborhood.

c. Will there be a nuisance or serious hazard to vehicles or pedestrians?

Members agreed that granting the special exception would pose no hazard.

d. Will adequate and appropriate facilities be provided for the operation of the proposed use?

Members discussed whether a chain link fence adequately separates children from dogs. Some members felt that a chain link fence is an adequate separation because Wyman's dogs are family-oriented breeds, are familiar to the children, and spend time with the children in the house. Referencing media reports of family dogs that have reacted unpredictably, other members felt that the chain link fence is an inadequate separation.

Motion by Beauregard, Jr. to re-open the public hearing to consider additional testimony. Second by Beauregard, Sr. All in favor. The public hearing re-opened at 8:24.

Wyman explained that children and dogs use separate entrances into the house from the fenced area, and said that she exclusively operates the gate that separates the dogs' area from the children's play area. Board members discussed ways to make it more difficult for children to reach through the chain link fence, including inserting vertical slats in the chain link. Mitchell said that Board members' decisions can extend into the future -- in this instance, perhaps beyond the lifetime of the family's dogs.

Wyman said that she lacks the money necessary to replace or alter the existing fence.

Hutwelker said that it appears that the Board may be comfortable with the proposed number of children and hours of operation, but less comfortable with the chain link fence. Wyman requested a continuation of the public hearing so that she could determine costs of barriers to prevent children from putting fingers through the fence. Hutwelker also suggested that the applicant provide information about State licensing requirements, specifically those relating to the number of full-time and part-time children that trigger the need for a State license.

Motion by Beauregard, Sr. to accept Wyman's request to keep the public hearing open until the next regularly scheduled meeting of the ZBA, on November 15. Second by Beauregard, Jr. All in favor.

2. Discussion regarding public interest criterion in variance

applications.

Carbonneau presented an overview of materials provided to Board members prior to the meeting. Those present discussed a previous Court interpretation (adhered to for approximately twenty years) that Boards needed to determine that a requested variance would be *to the benefit of the public interest*, rather than *not contrary to the public interest*.

Carbonneau said that today the Court sets a relatively low bar: Lacking evidence to the contrary, a Board may accept an applicant's statement that granting a variance will not be contrary to the public interest, so long as the proposal is in compliance with the underlying zoning. In the Chester Rod & Gun Club case, Carbonneau said, the Court observed that any variance would be, to some extent, contrary to the ordinance (and thereby contrary to the public interest); however, the desired variance must not "unduly, and in a marked degree" violate the basic zoning objectives of the ordinance, or "alter the essential character of the locality" or threaten public health, safety or welfare. Board members observed that a variance that is not contrary to the public interest likely will be in the spirit of the ordinance.

Board members discussed a working definition of "the public," considering possible concerns of a neighborhood versus a community, and agreed that granting a variance may be in the interest of the larger community, but could be less in the interest of the immediate neighborhood. Carbonneau encouraged Board members to consult and bear in mind the purpose and intent statements of each zoning district.

Beyond considerations of the ordinance, Board members questioned how much of their personal knowledge they should bring to a deliberation. In the absence of testimony, is it appropriate for members to propose ways in which a variance might or might not be in the public interest? Carbonneau encouraged members – as elected representatives -- to bring their own knowledge to the discussion, within the framework of the purpose and intent statements of the zoning districts.

To better understand considerations that go into the ordinance, Hutwelker encouraged ZBA members to attend Planning Board meetings to listen to the Planning Board as they develop zoning updates.

Carbonneau recommended that Board members ask applicants to provide their own answers to the questions that are the basis for Board deliberation.

3. Other matters as may be required

Carbonneau reminded members that they have been invited to an open house ceremony for Page Homestead Senior Housing on Wednesday, October 20 from 1:30 to 3:30.

On Saturday, October 23, from 10:00 a.m. to noon at Richardson Park, Bruce Bohannon has arranged for an information program on the Comprehensive Shorelands Protection Act. The pavilion building is unheated.

ADJOURMENT

Motion by Beauregard, Jr. to adjourn. Second by Beauregard, Sr. All in favor.
The meeting adjourned at 8:58 p.m.

Respectfully submitted,

Victoria Reck Barlow,
Recording Secretary