SWANZEY ZONING BOARD OF ADJUSTMENT MEETING
JANUARY 19, 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

Bill Hutwelker, Bob Mitchell, Charles Beauregard, Keith Thibault and alternate Bob Smith. Smith was seated for Jenn Gregory for the entire meeting. Town Planner Sara Carbonneau also was present, as was Town Attorney Beth Fernald (until 9:00) and Selectman Nancy Carlson (until 7:55).

Chairman Hutwelker called the meeting to order at 7:02 p.m. and read the agenda for the meeting. The Board addressed the following items.

MINUTES OF DECEMBER 15, 2008

Correction to page 2, first full paragraph:

"Phippard presented his client's responses to ZBA conditions, concluding that conditions support granting of the special exception. ~~variance~~."

Motion by Beauregard to approve, as corrected, the minutes of December 15, 2008. Second by Mitchell. All in favor.

Hutwelker advised those present that the ZBA would determine at 8:30 whether the Gocht public hearing could be resolved by 9:00. Hutwelker said that the ZBA would begin the OVP public hearing at 9:00, and discussion would be limited to issues related to the proposed impact to the wetland.

1. PUBLIC HEARING: AREA VARIANCE APPLICATION

Applicant: Ronald and Nancy Gocht
Property owner: Ronald and Nancy Gocht
Property location: 46 East Shore Road Tax Map 45, Lot 12
Zoning District(s): Rural/Agricultural and Shorelands Protection
Request: area variances from Sections XI.B.2., XI.C. and XI.C.1. to enable the applicant to expand the existing cottage situated on the property.

Hutwelker opened the public hearing at 7:05.
Members seated: Beauregard, Hutwelker, Mitchell, Thibault and Smith.
Representing the application: Russell Gocht (primary presenter), Ronald Gocht
Abutters present: none

DISCUSSION

R. Gocht withdrew the request for an area variance from Section XI.C, and received confirmation from Town Planner Carbonneau that the pending application would not be affected by any changes to ordinances that may result from upcoming Town vote.

Presentation R. Gocht presented each page (excluding appendices) of materials contained in the document "Supplemental Materials, Variance application of July 28, 2008, Sections XI.B(2) & XI.C(1), 46 East Shore Road, Swanzey, NH, ZBA Meeting January 19, 2009." The materials include photographs, maps, text, and statistical analysis pertaining to matters including the proposed construction, Comprehensive Shorelands Protection Act application and approval, special conditions of the property, Swanzey's 125' lakefront setback requirement, the applicants' response to the five point variance test, and appendices.

In response to page 2 of the materials, Hutwelker corrected R. Gocht's impression that the ZBA "suggested expanding existing structure as alternative" when denying a November 2007 variance application for a separate structure. Hutwelker stated that the ZBA did not make this suggestion. R. Gocht expressed acceptance of Hutwelker's clarification.

Gocht stated that the lot – expanded to 1.06 acres in 2002 – has 202' of frontage on Swanzey Lake. Along with a detached two-car garage, the Gochts propose a 1,505 sf addition to the easterly side of the 1,009 sf non-conforming structure that was constructed between 1978 and 1980. With the proposed addition, living space in the 2,514 total sf structure would include three bedrooms, three bathrooms, an open loft, and an open loft office space. An existing porch would be converted to a dining room, and function as connector to the proposed addition. The structure is served by a septic system situated in part on property owned by the Town of Swanzey (as approved by a 1980 Town Meeting vote). The system leachfield is approximately 250' from Swanzey Lake.

Gocht stated that special conditions of the property include relatively dense screening of the waterfront buffer, the existence of a natural berm on the lakefront, the intangible value of the property to its owners, and the lot size and frontage, both increased in 2002 with the Gochts' purchase of additional land.

Gocht compared attributes of the parcel to others in Swanzey, including the tax assessment of the parcel relative to non-lakefront parcels, and comparisons of quantity of living space to other properties on Swanzey Lake and to new construction in Swanzey.

Gocht presented reasons to justify his conclusion that the Town's 125' lakefront setback is supported by little evidence. ZBA members challenged Gocht's assertion that the "ZBA consistently grants variance requests to expand non-conforming structures on Swanzey Lake" (Supplemental materials, page 25). Board members stated that the Board has had heated discussions regarding area variances, and has struggled with decisions, but the ZBA has not consistently granted area variance requests to expand non-conforming structures on Swanzey Lake.

Gocht presented reasons (Supplemental materials, pages 30-34) to justify

his conclusion that the presence of specified conditions support granting of the area variance.

Discussion Town Attorney Fernald said that she was present to provide input to the Board for their deliberation of how the variance criteria apply to the application.

ZBA members and Fernald discussed the relevance of pending litigation. Fernald stated that a structuring conference continued from the prior week had been suspended until resolution of the area variance application. She said that a ZBA approval would make the case become moot; a ZBA denial likely would result in consolidation of cases.

Regarding correspondence between the Board of Selectmen and the Gochts (included in ZBA members' information packets), Fernald said that the Selectmen's issues pertaining to the location of Gochts' septic system were beyond the purview of the ZBA, and need not be a consideration in reviewing the application. She said that an approval of the area variance might be conditioned upon resolution of the septic system issue (because the ZBA must determine that a proposal has in place a plan to provide adequate facilities), but could not require the specific terms of resolution.

Hutwelker said that the ZBA recognized that any approval would be contingent upon resolution of the septic system matter between Selectmen and the Gochts. Fernald said that the Selectmen have concluded that the legal procedure of RSA 41:14a is the proper way to resolve the matter.

Gocht argued that the Board of Selectmen functions as a "disinterested third party" relative to the application. He stated that a third party does not put a contingency into a ZBA decision and objected to having specified the means of the matter's resolution. Board members noted that no party except the ZBA itself can impose conditions on a variance; doing so is entirely within the purview of the Board. Selectmen Carlson said that the Board of Selectmen represent the interests of the Town; in this particular instance, Town interests are directly affected because a portion of the Gocht septic system is located on Town property. Fernald stated that it is not unusual for an approval to be contingent upon receipt of other approvals, e.g., receipt of a State wetlands crossing permit could be a condition of ZBA approval.

Gocht and ZBA members discussed the impetus behind past decisions to continue the application. Hutwelker stated that continuations have been at the request of the applicant.

Mitchell asked whether the second floor loft areas shown in the proposed floor plan could be used for bedrooms. R. Gocht stated that it would be more than possible to do so; the existing loft is used as a bedroom on occasion. He stated that the proposed loft is intended to serve as the home office for his software business, and said that he stated for the record that the new loft would not be used as a bedroom. Gocht stated that the proposed garage would be used for general storage and to house a car, canoe, and boat, and said that the space would not have plumbing or bedrooms.

Fernald cited relevant examples from case law. She said that a Chesterfield applicant argued for an approval based on the principal that zoning should change to reflect changes in land use in the area, along with the fact that the

proposal resulted in no greater density than that of a cluster subdivision in the vicinity. The Supreme Court determined that a purpose of zoning is to protect valuable natural resources; therefore, a zoning board has the authority to deny a request it deems likely to compromise natural resources. In an Enfield case, the Supreme Court determined that a ZBA could draw the line at permitting a additional structure be built in a lakeshore setback (in this example, a shed to house a boiler), determining that a ZBA is not bound by the density of surrounding properties.

Fernald advised the ZBA to consider special conditions that are unique and create a hardship. She said that the applicants' outline of special conditions cite "good" points of the property, and are not causes for hardship. Gocht said that the proposed increased use has many parameters in the applicants' favor to counteract any negative impact.

In response to questions from Mitchell, Gocht stated that intense use of Swanzey Lake is limited to a few days in the summer, and said that bacterial warnings relate to heavy rains and are not a persistent problem.

Hutwelker closed the public hearing at 8:08.

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

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

   Members agreed in the affirmative.

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

   Members discussed the public's interest in protecting Swanzey Lake from additional loading, and the role of the 125' setback in helping to achieve that public interest.

   Members agreed that the variance could be granted without the proposed use being contrary to public interest.

3. *Owing to special conditions, would the denial of the area 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 described by R. Gocht in his presentation are positive attributes of the parcel, and not ones that create hardship. Members recalled past ZBA consideration of "special condition" to relate to the property itself – for example, an unmovable boulder that prevents an applicant from situating a structure in a desired location. In the current application, members observed, the special condition relates to the Zoning Ordinance's requirement for a 125' setback.

      Upon request for her advice, Attorney Fernald advised the ZBA that the Chesterfield case (summarized above) applies: A special condition might exist if there was evidence that the house in its location differs from many others in the district. If, as represented by the applicant, 95% of the properties on Swanzey Lake are non-conforming due to their location relative to the 125' setback, then non-conformance is not a special condition.

ZBA members concluded that the non-conforming nature of the property drives the need for the request for an area variance. ZBA members determined that no special conditions differentiate the parcel from others, and determined that a denial would not create unnecessary hardship to the landowner.

b. *Is the benefit sought by the applicant one that cannot be achieved by some other method reasonable feasible for the applicant to pursue, other than an area variance?*

Members agreed that the benefit sought by the applicant can be achieved only with an area variance.

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

Members agreed in the affirmative.

5. *Would granting the area variance do substantial justice?*

ZBA members discussed the potential impact-mitigating functions of the lot size, shoreline berm and wooded buffer, in combination with the ZBA's responsibility to consider the public interest relative to the applicant's gain. Several members recognized the applicants' effort to create a proposal that is consistent with the intent of the district. Several others expressed discomfort with potential effects of the proposed doubling of the footprint of the structure. Members concluded that granting the variance would do substantial justice.

Motion by Mitchell: Motion to deny the area variances from Sections XI.B.2 and XI.C.1. to enable the applicant to expand the existing cottage situated on the property due to a negative finding on item 3.a. as set forth above. Second by Smith. Beauregard, Hutwelker, Mitchell, Smith in favor of the motion, Thibault opposed. Motion to deny the application carries.

Hutwelker stated that the applicant has within 30 days from the date of the decision to file a request for rehearing.

2. Public Hearing: Use Variance Application

Applicant: OVP Management, Inc.
Property owner: Swanzey N.H. Development, L.P.
Property location: off West Swanzey Road Tax Map 38, Lots 1 and 1-2
Zoning District(s): Commercial/Industrial
Request: area variance from Section VII.D. to permit a wetland impact of 8,755 sf for the construction of a retail development.

Hutwelker opened the public hearing at 8:56.
Members seated: Hutwelker, Beauregard, Thibault, Mitchell. Smith was seated for Gregory.
Representing the application: Jeffrey M. Kevan, Senior Project Manager, T.F. Moran and James R. Lamp, P.E., J & Co. Engineering and Development Consultants
Abutters present: Margaret Locher and Frank Buffum. Interested citizens included Dana Colson, Barbara Skuly and Jane Johnson.

DISCUSSION

Hutwelker reminded those present to restrict the focus of discussion to the proposed impact to the wetland, and to concerns or issues that may arise therefrom.

Kevan presented a concept plan for proposed retail development that would result in filling of the 8,755 sf wetland. Kevan stated that disturbance resulting from the former agricultural use of the parcel contributes to the wetland's low functions and values.

Kevan presented an overview of development plans for the 18.3-acre parcel, as well as photographs of the parcel taken before and after late summer mowing. Kevan said that higher value wetlands in the approximate 2.5 to 3 acres at the south end of the parcel would be unaffected by the proposed development or by stormwater treatment measures. This portion of the parcel would be protected with a deed restriction, and would be left in its grassed, natural state. The 5.4+/- acres directly to the north of the 2.5-acre portion would be mowed annually. The 5.4-acre area likely would contain some required stormwater treatment measures.

Kevan said that there are no plans to develop the 1.8-acre portion of the parcel north of the Swanzey-Keene border. Some amount of the 1.8-acre portion will contain a 30' landscaped buffer, possibly with a berm, to separate the proposed commercial use from the residential use on the adjacent parcel. Kevan expressed willingness to work with Bruce Bohannon to comply with his request that land be kept open for a snowmobile crossing. Kevan sad that are there no plans for any additional impacts to wetlands within the next 5 years.

Kevan presented responses (contained in the application for the variance) to the criteria for granting a variance.

Swanzey resident Barbara Skuly asked questions regarding the underlying types of soils on the parcel. She distributed a brochure, "Swanzey Groundwater: Vital, Valuable, Vulnerable," prepared by the Swanzey Aquifer Protection Task Force (1999). Skuly described the wetlands on the parcel as wet meadows that function in conjunction to hold water and release it slowly into the underlying aquifer. Rather than filling it, Skuly advocated incorporating the 8,755 sf wetland into the design of the landscaping plan of the proposed development.

Lamb stated that retaining the wetland would require downsizing the supermarket, or eliminating it entirely; in either case, the development would become untenable. He said that the proposal attempts to retain the majority of undeveloped open space in a large contiguous area, and said that landscaped areas subject to high human traffic "take a beating."

In response to questions from Skuly, Kevan described the process of designing the project. He said that final plans will reflect recommendations from State agencies and Town boards and committees.

Margaret Locher asked how the development would affect her property value. Kevan responded by saying that most strip development on heavily traveled State roads affects residential use, but increases the value of surrounding properties. He said that filling the wetland will have no impact on the value of the Locher property. Dana Colson stated that the area surrounding the proposal has high groundwater. Kevan said that a licensed soil scientist reviewed the proposal.

Skuly asked about the permanence of deed restrictions. Lamp expressed willingness to make proposed deed restrictions a part of the plans. Kevan said that the ZBA could make deed restrictions a condition of approval.

Representative Jane Johnson observed that the proposed use was a better plan than constructing the county jail on the property.

Hutwelker closed the public hearing at 9:48.

Thibault asked about the existence of past requests to the ZBA for variances related to wetlands. Town Planner Carbonneau said that the recent application of Moore Nanotechnology Systems, LLC had required a variance (as well as relief from the zoning ordinance to permit an industrial use in the business district).

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

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

   Members agreed in the affirmative.

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

   Members agreed in the affirmative, noting the small size of the wetland, and the fact that that the land is zoned for commercial uses.

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?*

   c. *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;*

   Members agreed in the affirmative, based on the size and location of the wetland.

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

   Members agreed in the affirmative, noting the developers' plans to compensate for filling the wetland.

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

   Members agreed in the affirmative.

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

   Members agreed in the affirmative.

5. *Would granting the variance do substantial justice?*

   Members agreed in the affirmative.

Motion by Thibault: Having found that the application is allowed by the ordinance and the specified conditions are present, motion to approve the special exception from area variance from Section VII.D. to permit a wetland impact of 8,755 sf for the construction of a retail development, with the understanding that no less than 2.5 acres of the southernmost portion of the parcel will have a deed restriction restricting future development. Second by Smith. All in favor.

ADJOURMENT
Motion by Mitchell to adjourn. Second by Thibault. All in favor. The meeting adjourned at 9:56.

Submitted by

Victoria Reck Barlow
Recording Secretary