SWANZEY ZONING BOARD OF ADJUSTMENT MEETING
OCTOBER 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
Keith Thibault, Charlie Beauregard, Jerry Walker, Bob Mitchell, Bill Hutwelker (arrived at 8:50). Town Planner Sara Carbonneau and Code Enforcement Officer Jim Weston also were present.

Vice Chairman Thibault called the meeting to order at 7:00 p.m. and read the agenda for the meeting. The Board addressed the following items.

Thibault explained to the applicants present that the Board prefers to seat five members, because an application requires three positive votes to prevail. With only four members present, applicants have the option of requesting a continuation to the next regular meeting, on November 16, 2009.

All applicants chose to have their application heard on October 19.

Noting the length of the agenda, Thibault explained the Board's practice of reserving the option to not commence a public hearing after 9:00 p.m., and the Board's preference of ending consideration of an application by 10:00 p.m. If necessary, public hearing on remaining applications will be postponed until a later meeting.

MINUTES
Motion by Beauregard to approve the minutes of September 21, 2009 meeting. Second by Walker. All in favor.

1. PUBLIC HEARING (AREA VARIANCE APPLICATION)
Applicant: Paul Breckell
Property owner: Paul J. Breckell and Judith A. Breckell
Property location: 260 Marcy Hill Road Tax Map 20, Lot 94
Zoning District(s): Residence District
Request: Area variance from Section IV.B.3. to permit the construction of a carport that does not meet required setbacks.

At 7:12, Thibault resumed the public hearing that had been continued from September 21, 2009.
Members seated: Thibault, Beauregard, Mitchell and Walker.
Representing the application: Paul Breckell
Abutters present: none

DISCUSSION

Breckell presented photographs to illustrate the vegetated buffer that separates his one-acre lot from that of his neighbor, as well as photographs of the view of his property from the vantage point of the neighbor's property. He presented a site plan sketch with corrected measurements. The sketch indicates that the corner of the proposed 24' x 24' carport that is closest to the Breckell property line would be 75 feet away from the back of the neighbor's house. Breckell also noted that the closest the proposed carport would be to the side property line would be 9 feet. Breckell said that garages exist in the neighborhood; he said that there are not many carports. His carport is proposed to be open on three sides and attached to the house on the fourth side.

In a visit to the site, Weston said that he found the wooded buffer to be adequate. Weston said that he has no issues with the front or rear setbacks.

Thibault determined that there were no further questions, and closed the public hearing at 7:18.

REVIEW OF CRITERIA

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

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

Members agreed in the affirmative, stating that no evidence had been presented to the contrary.

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

Members agreed in the affirmative, referencing the wooded nature of the buffer and the common presence of garages and carports.

3. *Owing to special conditions, would the denial of the 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 in the affirmative, noting that the angled lot line works against the property owner. Board member also noted that the existing driveway limits the location of the proposed carport.

b. *Could the benefit sought by the applicant be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance?*

Members agreed that there is no other reasonable location for situating the carport. Members also cited the location of the existing driveway.

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

Members agreed in the affirmative, noting that the wooded buffer protects the abutting neighbor.

5. *Would granting the variance do substantial justice?*
   Members agreed that, given the lot, the variance would do substantial justice, stating that a carport is a reasonable and customary amenity.

Motion by Beauregard to approve the area variance from Section IV.B.3. to permit the construction of a carport that does not meet required setbacks. Second by Mitchell. All in favor.

2. PUBLIC HEARING (AREA VARIANCE APPLICATION)
Applicant: BLM Contracting, LLC
Property owner: View Point Cooperative, Inc. (VPC)
Property location: 93 California Brook Road Tax Map 73, Lot 22
Zoning District(s): Rural/Agricultural District
Request: Area variance from Section IV.A. to permit the operation of a contracting business providing landscaping, construction and painting services.

Thibault reiterated ZBA policy regarding number of Board members in attendance to hear the application. The applicants chose to have their application heard. Thibault opened the public hearing at 7:25.
Members seated: Thibault, Beauregard, Mitchell and Walker.
Representing the application: Austin Reida and Joseph Blount
Abutters present: View Point Cooperative Board member Gale Shelly; Carolyn and Harley Davis; Dwight Whitmore

DISCUSSION

Reida stated that access to the 40' x 40' metal-sided structure is directly from California Brook Road. The structure is situated on an open, level, fenced gravel lot, which is also used by VPC residents for storage. The structure has an office space, a small loft, and a large open area with a concrete floor. Reida said that his company had already improved the condition of the yard and, with application approval, would landscape the entire space to showcase their work. The company receives no walk-in clients, instead meeting with clients at each job site.

Blount stated that no more than 10 pieces of equipment (such as trucks, trailers, tractor, skid steer, loader, small excavator) would be stored on the property. Three outside storage bins would contain a maximum 16 yards each of mulch, compost, and road sand/salt.

Reida stated that water is available. A proposed on-site septic system has State approval for construction. Reida stated that BLM Contracting LLC is a licensed septic system installer, and would install the system immediately upon ZBA approval.

In their information packets, Board members received an October 13, 2009 ZBA Application Summary prepared by Carbonneau. Carbonneau stated that VPC is a grandfathered, non-conforming use; the application seeks a variance to add another use that is not permitted under zoning. In the past, Carbonneau said that the Planning Board had authorized use of the building as an office and for the maintenance of equipment for the sole use of VPC. Carbonneau said

that the application proposes a business that would not be limited to serving the Cooperative.

Reida said that the former property owners had designed and used the structure for the similar yet more intensive use (developing land and building roads). Carbonneau noted that this use had never been permitted. Reida said that BLM Contracting seeks to remain a landscaping and property maintenance business. Reida said that BLM Contracting requires a greater volume of work than that generated by the VPC. He stated that BLM Contracting has a 3-year, renewable contract with VPC.

Viewpoint Cooperative Treasurer Shelley stated that he is qualified to sign a lease agreement on behalf of VPC, which owns both the land and the building. He stated that 65 of 67 VPC members present at a recent membership meeting voted in favor of leasing the space to BLM Contracting LLC, because the company maintains roads, grounds, and handles emergency maintenance issues for VPC. Shelley stated that a lease also would help offset the expense of property taxes. Shelley noted that there are 98 residences at VPC.

Those present discussed the number of vehicles that might be stored at the site, and possible outcomes of BLM Contracting business growth. Equipment generally is stored on job sites; Reida's property in Gilsum is available for storing heavy equipment.

Blount estimated that 4-5 vehicles typically would be stored at VPC. He stated that the company would move if it outgrew the VPC space.

Abutter Davis stated that she and her husband have not been bothered by BLM noise or activity. Whitmore stated that, unlike the prior property owner, BLM was not running heavy equipment all the time. He said that the VPC Board's in-house enforcement abilities would make it easy to resolve any problems. Lee Kennedy, who lives adjacent to VPC, expressed concern that noise or hours of operation might affect property values.

Austin stated that the proposed use would meet the spirit of the ordinance because it is a business that "serves the community." He acknowledged that the location is "on the margin" of the area designated for business uses; however, other business properties are located less than half a mile.

Motion by Beaureard to conduct a site visit on Saturday, November 7, beginning at 9:00 a.m., without further notice. Second by Mitchell. All in favor. Thibault noted that the November 7 site visit is a public hearing, and the public is encouraged to attend.

Motion by Beauregard to continue the public hearing, without further notice, to the next regular meeting of the ZBA on November 16. Second by Walker. All in favor.

Determining that there were no further questions, Thibault tabled the matter at 8:26.

3. PUBLIC HEARING (AREA VARIANCE APPLICATIONS)

Applicant: William F. Fenton
Property owner: William F. Fenton

Property location: 591 Monadnock Highway Tax Map 3, Lot 44
Zoning District(s): Business District
Request: Variance from front setback requirements. Also, an area variance from Section III.S.6.b to permit an attached sign that exceeds square footage requirements.

Thibault reiterated ZBA policy regarding number of Board members in attendance to hear the application. He opened the public hearing at 8:29.
Members seated: Thibault, Beauregard, Mitchell, and Walker.
Representing the application: Dave Bergeron, Brickstone Masons. William Fenton also was present.
Abutters present: none

DISCUSSION

Bergeron addressed the setback variance, stating that the building currently is 75' from the front property line. The proposal would extend the building approximately 2' over the setback line. Bergeron stated that the glass addition would be 29' tall and 3' deep, would have no door, would be lit from behind, and would function as a large sign.

In their information packets, Board members received an October 13, 2009 ZBA Application Summary prepared by Carbonneau. Carbonneau stated that the application clearly is for an architectural feature/very large sign containing no habitable space. She advised ZBA members to find a compelling reason why the proposed location is the only reasonable place to situate the addition, or whether a similar façade could be located elsewhere on the building without encroaching into the setback. Carbonneau noted that a denial of the setback would make the sign area variance moot.

Board members agreed that the setback encroachment would be minor, and would not affect sight distances. Some members felt that, owing to the location of the existing building, there would be no other way to position the requested structure. Others felt that the same objective could be accomplished within the setback, requiring no variance.

Determining that there were no further questions, Thibault closed the public hearing on the setback variance at 8:55.

REVIEW OF CRITERIA

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?*

In the absence of evidence to the contrary, members agreed in the affirmative, noting that lighting is inherent in the Business District.

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

Members agreed that the encroachment would be minimal.

3. Owing to special conditions, would the denial of the 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 the variance appears to be needed to comply with the corporate design.

b. Could the benefit sought by the applicant be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance?

Members were not in agreement, some feeling that the façade could be added to another location on the building. Others felt that another location would not be reasonably feasible.

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

Members were not in agreement.

5. Would granting the variance do substantial justice?

Members disagreed, some noting that the area variance is not needed for sales or showroom space, but merely as a different way to display a sign. Others felt that the variance would do substantial justice.

Motion by Mitchell to grant the area variance from front setback requirements. Second by Walker. Mitchell, Walker, Beauregard in favor; Thibault opposed. Motion carries.

At 9:07 Thibault opened the second part of the public hearing, to consider the application for an area variance from Section III.S.6.b to permit an attached sign that exceeds square footage requirements.
Members seated: Thibault, Beauregard, Mitchell, Walker, and Hutwelker.
Representing the application: Dave Bergeron, Brickstone Masons. William Fenton also was present.
Abutters present: none

Bergeron stated that the application is for an attached 940 square foot sign in a location where a 243 square foot sign is permitted. He said that the sign is a portal structure bearing the Toyota insignia, with internal illumination, to be lit 24 hours a day. He stated that the extra size is needed to draw attention to and help the public identify a structure that is set back 73' from the road, as well as complying with Toyota's corporate branding program. Bergeron said that the portal structure is an architectural element as well as a sign, and said that its location on the front of the existing building would update the façade.

Carbonneau stated that the ordinance calls for calculating sign square footage based on the length of the side of the building upon which the sign is to be located. She noted that a free-standing sign already exists on the property, and in front of the location proposed for the new façade.

ZBA members agreed that the proposed sign would exceed zoning ordinance

limits by 400%. Determining that there were no further questions, Thibault closed the public hearing at 9:20.

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

Members disagreed, and noted that no evidence had been presented to address this question.

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

Members felt that the requested variance is proportionately extreme.

3. Owing to special conditions, would the denial of the 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 an area variance would be necessary.

b Could the benefit sought by the applicant be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance?

Members agreed that the applicant has a reasonable alternative.

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

Members agreed that the spirit would not be observed, due to magnitude of the requested sign.

6. Would granting the variance do substantial justice?

Members agreed that granting the variance would do substantial justice.

Motion by Hutwelker to deny the application on the basis that the applicant has a reasonable alternative. Second by Walker. All in favor.

4. (Public Hearing) REQUEST FOR EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS

Applicant: Mary Ballou
Property owner: Mary, Jesse & James Ballou, III
Property location: 93 Matthews Road Tax Map 39, Lot 8
Zoning District(s): Residence District
Request: Equitable waiver of dimensional requirements for a storage shed that has been constructed that does not meet required setbacks.

Thibault opened the public hearing at 9:25.
Members seated: Thibault, Beauregard, Mitchell, Walker, Hutwelker.
Representing the application: Barry Faulkner
Abutters and members of the public present: Bruce Bohannon

DISCUSSION

Faulkner said that Ballou was unable to attend the meeting. He said that Ballou obtained a building permit for the shed, which was constructed by friends during the period between May and August. The shed was constructed about 20' feet from the road, whereas the front setback requirement is 30 feet, and is visible now that leaves have fallen. Faulker said that the curvature of the road and wooded topography in the vicinity might have contributed to the error in placement. The structure lacks sills, with vertical building members directly attached to Sonotubes.

As the shed poses no travel hazard, Faulkner said that there is little public purpose to move the shed. Faulkner said that the location was an honest mistake.

In their information packets, Board members received an October 13, 2009 ZBA Application Summary prepared by Carbonneau. Carbonneau stated that the 12' x 12' shed does not meet Town setbacks for front and side property lines. Board members questioned whether the shed encroached onto property owned by the State of NH (rail trail) and whether the request forequitable waiver would relate to the encroachment on the State's property as well. Carbonneau advised the ZBA to consider the application only in relation to the property owned by the Ballou family.

Weston acknowledged that the edge of the railbed right-of-way is difficult to determine. He said that Ballou might have interpreted a very old sheep pasture fence to be the side property line.

Speaking as manager for the rail trail project, Bohannon said that his concern is the setback from the property line shared with the railbed right-of-way. He stated that locating the shed elsewhere on the property would create no hardship for the property owners. When questioned by ZBA members, Bohannon said that he did not know whether the encroachment would create a problem for future rails-to-trails uses.

Faulkner said that the sideline setback was not noted or considered at the time of building permit issuance. Hutwelker noted that the ZBA has no latitude to grant an equitable waiver for a use that encroaches on the land of another property owner.

Hearing no further questions, Thibault closed the public hearing at 10:25. Thibault re-opened the public hearing at 10:33 to seek clarification from Faulker, and closed the public hearing again at 10:39.

REVIEW OF CRITERIA

Board members agreed that the proposal would require an equitable waiver. Members reviewed the criteria for granting the requested equitable waiver.

1. Does the request involve a dimensional requirement, not a use restriction?

Members agreed that the request involves a dimensional requirement.

2. Has the violation existed for 10 years or more with no enforcement action, including written notice, being commenced by the town; OR was the nonconformity discovered after the structure was substantially completed or after a vacant lot in violation has been transferred to a bona fide purchaser; AND was the violation not an outcome of ignorance of the law or bad faith but resulted from a legitimate mistake?

Members agreed that the violation has not existed for 10 or more years.

Members agreed that the applicant appeared to be aware of the 30' setback from Matthews Road, and agreed that the curvature of Matthews Road could contribute to a miscalculation of the dimension. Members agreed that the applicant seems to have made no attempt to establish the side property boundary; the shed was constructed 6' to 7' from the old sheep fence that could have been interpreted as the side boundary. Members considered testimony from Faulkner that the Code Enforcement Officer had not indicated the need to consider the side property line. Members considered testimony from Weston that he never received a request to inspect the Sonotube placement and had instead found the shed completely constructed when he went to measure. Members agreed that Weston would have identified the discrepancy had he received the request to inspect. Members concluded that the violation was an outcome of ignorance of the ordinance and was not the result of a legitimate mistake.

3. Does the nonconformity not constitute a nuisance nor diminish the value or interfere with future uses of other property in the area?
Having concluded that the violation was not the result of a legitimate mistake, members did not address this question.

4. Would the cost of correction far outweigh any public benefit to be gained?
Having concluded that the violation was not the result of a legitimate mistake, members did not address this question.

Motion by Hutwelker to deny the request for an equitable waiver, based on the Board's finding that the violation was an outcome of ignorance of the ordinance and was not the result of a legitimate mistake. Second by Mitchell. All in favor.

6. VOTE ON ALTERNATE MEMBER VACANCY
Having no candidates for the position that expires at Town Meeting 2011, and the position that expires at Town Meeting 2012, Board members deferred action.

ADJOURMENT
Motion by Mitchell to adjourn. Second by Walker. All in favor. The meeting adjourned at 10:45 p.m.

Respectfully submitted,

Victoria Reck Barlow,
Recording Secretary