

**SWANZEY ZONING BOARD OF ADJUSTMENT MINUTES
SEPTEMBER 22, 2008 SPECIAL MEETING**

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, Keith Thibault, Charles Beauregard (arrived at 7:43), Bob Mitchell, Jennifer Gregory. Alternate Deirdre Geer.

Town Planner Sara Carbonneau and Code Enforcement Officer Jim Weston also were present

Chairman Hutwelker called the meeting to order at 7:00 p.m. and read the agenda for the meeting. Hutwelker 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 hearings on remaining applications are postponed until a later meeting.

The Board addressed the following items.

MINUTES

Motion by Thibault defer consideration of the minutes of August 18, 2008 and September 15, 2008 until the next regular meeting. Second by Geer. All in favor.

1. PUBLIC HEARING: AREA VARIANCE APPLICATION

Applicant: Daniel Kuraner

Property owner: Daniel Kuraner

Property location: 25 Davis Avenue Tax Map 33, Lot 57

Zoning District(s): Residence

Request: area variance from Sections IV.B.3. and XI.B.2. to permit the construction of a deck that does not meet required setbacks. The existing building is a non-conforming structure.

Hutwelker opened the public hearing at 7:06.

Members seated: Hutwelker, Thibault, Mitchell, Gregory. Alternate Geer was seated for Beauregard.

Representing the application: D. Kuraner

Abutters present: none

DISCUSSION

Kuraner described the proposed 18' by 18' open deck. The deck's perimeter

is designed to line up with the exterior wall of the existing attached garage. Like the non-conforming garage, the deck is proposed to be 11.5' from the property line. The deck will be approximately 8" off the ground, and so will not require steps or railing. The deck's perimeter will be landscaped, and its low profile and location are designed to minimize its visual impact. Access to the deck from the house would be through a sliding glass door that would replace three windows on the east wall of the house.

Kuraner said that he had already moved a propane tank shown in the photographs that he supplied with his application. An existing septic tank and basement bulkhead encumbers other potential locations for the deck, as does the interior layout of the house. Kuraner contacted neighbors who would be able to see the deck, and none have objected to its construction.

Board members determined that only the garage is non-conforming due to its setback. The house itself is 36' from Davis Avenue, but is connected to the garage.

CEO Weston said that he has inspected the plans, and finds them satisfactory.

Hutwelker said that any future improvement to the deck – for example, to enclose its space – would require approval from the ZBA.

Hutwelker 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.

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

Members agreed in the affirmative.

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?

- 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.

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

Members agreed that the benefit could not be achieved in another way.

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?

Members agreed in the affirmative.

MOTION by Thibault: Having found that the application meets all five criteria, motion to approve the area variance from Sections IV.B.3. and XI.B.2. to permit

the construction of a deck that does not meet required setbacks. Second by Gregory. All in favor.

2. PUBLIC HEARING: AREA VARIANCE APPLICATION

Applicant: Melissa and John Diven, Jr.

Property owner: Melissa and John Diven, Jr.

Property location: 20 Rust Way Tax Map 18, Lot 57

Zoning District(s): Residence

Request: area variance from Section IV.A.3 and XI.B.2. to permit the construction of an addition to a garage that does not meet required setbacks. The existing building is a non-conforming structure.

Hutwelker opened the public hearing at 7:22.

Members seated: Hutwelker, Thibault, Mitchell, Gregory. Alternate Geer was seated for Beauregard.

Representing the application: John Diven, Jr.

Abutters present: Roy Sabolevski

DISCUSSION

Diven said that he seeks to double the size of the existing, non-conforming garage by adding a second bay, to create a final structure that will be 24 feet wide and 30 feet long. His plans call for extending the roofline of the building. The existing garage is on a concrete slab; Diven anticipates installing hardpack for the floor of the addition. He described drainage on the property, which collects in a small ditch on the north of the existing garage. Diven said that the driveway, drainage area and other physical features of the property limit the location of any garage. The .24 acre property slopes to the west, but the area under the proposed garage is relatively flat.

Gregory asked about the location of a storage shed shown in photographs supplied with the application. Diven said that the shed is four to five feet from the back boundary, and would be eliminated after construction of the garage addition.

Abutter Sabolevski said that he has no problems with the addition, which would be close to his property line.

CEO Weston said that he has inspected the plans, but not the site. He said that hardpack is an adequate floor material for a garage. He questioned the amount of encroachment at the rear of the lot, where the proposed garage addition's corner appears to be within three to five feet of the west property line. Weston said that the area variance request was not unusual: The ZBA granted three area variances in this compact neighborhood in 2007.

Because the addition, as proposed, would encroach on both the west and south setbacks, Hutwelker suggested the ZBA conduct a site visit and make a final determination at the site, immediately after the visit. He asked Diven to flag the proposed corners of the addition.

Motion by Gregory to continued the public hearing to Saturday, October 4, at 8:00, with the location of the public hearing to be at 20 Rust Way. Second by

Mitchell. All in favor.

3. PUBLIC HEARING: USE VARIANCE APPLICATION

Applicant: Robert McClure

Property owner: Katherine Maher, et al.

Property location: 10 Aldrich Road Tax Map 23, Lots 5 and 13

Zoning District(s): Residence and Rural/Agricultural

Request: use variance from Section IV.B. to permit the operation of a business consisting of the breeding and sale of dogs. The applicant also seeks approval to operate a farm on the premises, which may include the raising and on-site sale of livestock and produce. The applicant anticipates the farm being open as an “educational source for youth groups.”

Hutwelker opened the public hearing at 7:44.

Members seated: Hutwelker, Thibault, Beauregard, Mitchell, Gregory. Geer recused herself, and left the table.

Representing the application: Robert McClure and Diana McClure

Abutters present: Approximately 20 abutters and interested citizens were present. Those who spoke include Gail Duplissie, Rebecca Hayes, Scott Szymick, Dave Lundberg, Richard Scaramelli, Matt Clark, Pat Clark, Robert Winkler, Mike Maher, and Katherine Maher.

DISCUSSION

Board members corrected the request as being for a use variance from Section IV.B. rather than Section IV.A., because the location of the structure for the proposed business is in the Residence District.

Carbonneau advised the ZBA to consider the request in two parts: the dog breeding business, and the livestock/produce/”educational source” farm business. She stated that the application submitted by the applicant did not adequately clarify the proposed business operations (with the exception of the breeding and sale of dogs).

Hutwelker asked for background on the dog-breeding proposal. According to the McClures, the business has been in operation for about three years. In November 2006, Weston said that he noticed newspaper advertisements for dogs for sale, and since January 2008 has been trying to get R. McClure to apply for a home occupation permit. McClure provided several incomplete applications; on April 16, 2008 the Board of Selectmen denied the home occupation. The applicants did not appeal the Selectmen’s decision. At a subsequent meeting, the Selectmen re-affirmed their denial of the home occupation. The application was denied, as the documentation provided did not meet the criteria established for a home occupation.

From April 2008 onward, Weston said that he had received numerous complaints about the dog breeding business, and had corresponded with the State veterinarian regarding the health of the dogs. However, Weston stated that his business at the ZBA meeting pertained to land use issues. He said that McClure had constructed a 10’ by 50’ addition to the house without a building permit.

Over thirty days after the Selectmen denied the home occupation, Town Administrator Fox, Carbonneau, R. McClure, and K. Maher met at Town Hall to discuss options. Since the appeal period had lapsed, a use variance was the only alternative.

The property consists of a 1.9-acre parcel that is entirely in the Residence District (upon which the barn is situated), and a 15-acre parcel that is in both Residence and Rural/Ag Districts. A little more than half of the 15-acre parcel is situated in the Rural/Ag District. The house is located in the Residence District.

R. McClure and D. McClure described the dog breeding business. They own approximately eleven small dogs (Yorkshire Terriers, Shih-Tzus, and one pug) that are kept indoors most of the time, and seven Golden Retrievers that R. McClure runs in the woods twice daily. The Retrievers also are used to keep away predators. The approximately 18 dogs are all AKC breeds. D. McClure said that each dog is bred every other year. D. McClure said that in addition to the dogs covered by their pet shop license, she also has rescue dogs and elderly dogs, but these animals are included in the 18-dog total.

Carbonneau said that the State veterinarian had informed her that inspections had taken place, but no pet shop license had been granted. D. McClure said that a license is pending the ZBA decision.

Twelve dogs are housed in the 10' x 50' addition on the back of the house, and the seven Golden Retrievers are kept in the barn. Some dogs also are kept in the house itself. D. McClure said that her intention is for all dogs to have ground time and outside air time. R. McClure said that the dogs are kept close to the house to facilitate their care, and to help keep the dogs quiet. The addition is proposed to ultimately be soundproof. Weston explained that the soundproofing design calls for rigid Styrofoam insulation and plywood, but necessary venting of the building allows noise to escape.

Bedding consists of wood shavings and newspaper. Waste shavings are used as fill in a low spot of an internal roadway, and newspapers are taken to the Swanzey Recycling Center.

R. McClure plans to build an 8' tall fence of railroad ties and "pig fence" along Carlton Road and Aldrich Road on the 1.9-acre parcel. (The back portion will remain unfenced.)

R. McClure said that the property has always been used as a farm, thereby "grandfathering" agricultural uses. He said that new neighbors in nearby subdivisions were now trying to direct activities on the McClure parcel.

Carbonneau advised the Board to research the extent of historic farming activities in order to determine what had occurred on the premises, and to determine whether the non-conforming farm use has lapsed. She noted that Town records clearly indicate the on-going sale of Christmas trees. She also stated that proposed dog kennels require ZBA approval and site plan review by the Planning Board. Carbonneau said that zoning regulations – not neighbors – proscribe uses of land.

Abutter Gail Duplissie, a neighborhood resident for 30 years, said that she was aware of the dog breeding business for the past two years because of an increase in noise from barking dogs and because loose McClure dogs and

puppies frequent her property. She said that the dogs come to her car and bark at her as she tries to get into the car in the morning; the Retrievers were at her door twice last week. People stop at her house to find out where dogs are for sale. She said that the road lacks capacity to handle business traffic. In her opinion, key features of a business should be fully functioning before the business opens.

Rebecca Hayes, a neighborhood resident for over 21 years, said that the McClure dogs are audible on Whitcomb Road. She expressed concern about sanitation, given the hydrology and geology of the McClure parcels. She expressed concern about the potential for excessive numbers of puppies, should multiple litters be born during the same time period.

Abutter Scott Szymick asked whether the proposed fence would reduce noise. He said that dogs housed in the not-yet-soundproof room bark at 3:00 a.m.

Dave Lundberg, an abutter for 3 years, expressed concern about noise, especially barking at 2:00 or 3:00 a.m.

R. Scaramelli, speaking on behalf of his wife, said that the ZBA faced the hazard of spot zoning, with potential effects on neighbors and successor owners, and creating a policy issue for the Town.

Abutter Pat Clark spoke about changes to drainage in the area that had taken place subsequent to site work for what was to have been a tennis court on the McClure parcel (which was, in the end, never constructed). She expressed concern about contamination of shallow wells by dog waste.

Abutter Matt Clark expressed concern about the construction and stability of the proposed fence.

Richard Scaramelli, an abutter for 40 years, provided background on the Residential District, which was established in the mid to late 1970s by Town vote. The 500' deep district is located on either side of maintained stretches of Town road. Scaramelli said that his family and Jim and Betsy McClure did not oppose creation of the district, and said that the district had existed without contest since its creation.

Scaramelli said that use of the farm during Jim and Betsy McClure's tenure had not been intensive, but in recent years R. McClure had initiated intensive uses in the Residence portion of the land, stocking 4 cattle, 2 horses, 8 sheep, goats, pigs, geese and chickens in an area with marginal fencing. Large animals escaped and damaged the Scaramelli vegetable garden. Scaramelli suggested moving livestock to the Rural/Ag portion of the property, and limiting agricultural uses of the Residence portion to growing and/or selling plants and plant products.

Because the farm was used for non-agricultural purposes for five years, Scaramelli objected to granting grandfathered status to agricultural operations in the Residence District. He said that business uses must accommodate the 19 abutters now in the neighborhood. He also said that Aldrich Road is insufficient for traffic currently being generated by the dog breeding business.

Robert Winkler, an abutter for 22 years, spoke in favor of the McClure's business, and expressed hope that the neighborhood could help to support the McClures. Winkler said that the horse he boards in the McClure pasture

produces a volume of waste in excess of that generated by ten dogs.

Mike Maher, husband of Katherine McClure Maher, spoke in support of the application, and in favor of doing everything possible to help the McClures make the business work. He described past use of the property as a chicken farm, prior to its 1948 purchase by Jim and Betsy McClure. He said that it would be difficult to make a living from crop-based agricultural uses. He said that moving the dog breeding business into the Rural/Ag portion of parcel would put the business closer to many other people.

Hutwelker said that nothing in the zoning ordinance requires soundproofing of a kennel. However, the ZBA must consider the impact of a kennel on abutters, and on their property values. He said that the proposal would concentrate an intensive business in the Residence District.

R. McClure said that he had not considered situating the dog breeding business on the Rural/Ag portion of the parcel because he felt he could better control sound and take care of the dogs closer to the center of activity.

D. McClure spoke about the property as an asset to the community. She said that she has reference letters from families that have enjoyed visiting the property.

ZBA members discussed conducting a site visit, and determined that a visit would not be necessary. Members agreed that, while the application drawings were not adequately detailed, the applicant is responsible for providing information sufficient to base a decision. Hutwelker said that the applicants could ask the Board for a continuation, if they felt that extra time would make it possible to secure additional information. The applicants did not choose to ask for a continuation.

With respect to the request to operate a farm on the premises, which may include the raising and on-site sale of livestock and produce, R. McClure stated that he did not wish to conduct a farm on the premises other than to continue raising and selling Christmas trees. Based upon testimony provided, ZBA members determined that the raising and sale of Christmas trees has been on-going for over 25 years, and felt that it is a grandfathered use.

Hutwelker closed the public hearing at 10:16.

REVIEW OF CRITERIA

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?

Board members agreed in the negative, referring to public testimony regarding noise and loose animals, and noting that the applicant had acknowledged an inadequate level of soundproofing.

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

Board members agreed that granting the use variance for the dog breeding business would be contrary to public interest.

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?

- a. 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;

Board members agreed in the negative, referring to statements by the applicants that conducting a dog breeding business is not the only possible use of the parcel. The restrictions of the Residence district are not unique to the applicants, because the Scaramellis experienced the same impact of the mid-70s zoning change.

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

Board members agreed in there is a fair and substantial relationship between a residence district and the expectation of quiet at night. Members said that the Residence district does allow certain types of farming, thereby giving latitude for agricultural activities by right.

- c. The variance would not injure the public or private rights of others.

Board members agreed that they had heard testimony that the variance would injure the rights of others – specifically, the right to quiet.

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

Board members agreed that the spirit of the ordinance would not be observed by granting the variance. Members said that the ordinance suggests appropriate locations for farming, and agreed that the occasional sale of a farm dog's puppy is a customary aspect of a farm operation. Members felt that an AKC-registered dog breeding business does not constitute the core of a New Hampshire farming operation, and agreed that other "crops" are more appropriate, given the parcel's location.

6. Would granting the variance do substantial justice?

Board members agreed in the negative, citing externalities of the dog breeding business that would create an injustice to the neighbors.

MOTION by Gregory: Having found that the application fails to meet all five criteria, motion to deny the use variance from Section IV.B. to permit the operation of a business consisting of the breeding and sale of dogs. Second by Mitchell. All in favor.

Hutwelker told the applicants that they have 30 days to file for a re-hearing. He said that the Town's zoning manual describes what must be included in the request, and advised the applicants to contact Carbonneau for information as to how to request a re-hearing.

ADJOURNMENT

Motion by Mitchell to adjourn. Second by Beauregard. All in favor. Meeting adjourned at 10:40.

Submitted by

Victoria Reck Barlow, Recording Secretary

Swansey Zoning Board of Adjustment minutes – September 22, 2008

Page 8 of 8