

**SWANZEY ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
AUGUST 20, 2012**

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, Vice Chair; Charles Beauregard, Sr., Jerry Walker. Alternates Sarah Tatro, Jim Vitous. Town Planner Sara Carbonneau also was present.

MINUTES

Motion by Walker to approve the minutes of the May 21, 2012 regular meeting. Second by Vitous. Walker, Tatro and Vitous in favor. Beauregard and Thibault abstained due to absence from the May 21 meeting. Motion passes.

1. Variance (Public Hearing)

Applicant: Timothy Tabor

Property owner: Timothy Tabor

Property location: off Old Homestead Hwy Map 9, Lot 9

Zoning District(s): Rural/Agriculture & Wetlands Conservation Overlay Districts

Request: Variance from Section VII.E to permit the installation of a septic system that does not meet the required setback from wetlands.

Members seated: Thibault, Beauregard, Sr., Walker. Tatro was seated for Hutwelker. Vitous was seated for Mitchell.

Representing the application: Tim Tabor

Interested parties present: Swanzey Conservation Commission (SCC) chair Deb Crowder

Thibault opened the public hearing at 7:06. Carbonneau reviewed meeting notice posting dates and locations, and stated that the property not served by public water or sewer. Carbonneau reviewed the criteria of Section III.A.E., noting that the 3-acre lot has 186' of road frontage.

Tabor said that he seeks to sell the property as a buildable lot. Existing on the property is a 12' x 17' accessory building (a single room storage shed) which is served by electrical power, Tabor said. Board members reviewed a sketch of the lot prepared by Carl Hagstrom as part of his septic design, considering the proposed location of the septic system relative to a possible house site, well and well radius.

Speaking on behalf of the SCC, Crowder stated that the SCC has consistently defended the Town's wetlands ordinance since its adoption by voters in 1990. Crowder asked the ZBA to support the 125' setback.

Members of the audience expressed opinions regarding topics including construction on wetlands, SCC membership, Section III.A.E., the effect of the economy on property owners, the public value of wetlands, and wetlands mitigation. Carbonneau reminded those present that Tabor does not propose construction within a wetland.

Board members noted that Hagstrom's sketch fails to show the location of a well and well radius to illustrate the required 75' separation between water supply and septic system. Tabor said that he will provide information about the proposed well location.

Motion by Walker to continue the public hearing without further notice to a site walk to take place on September 17 at 6:00. Second by Vitous. All in favor. Thibault reminded Board members not to discuss the still-open application.

Thibault called for a break in the meeting at 7:42 p.m. Business resumed at 7:45 p.m.

2. Request for an Equitable Waiver (Public Hearing)

Applicant: Andrew & Rene Bosworth

Property owner: Andrew & Rene Bosworth

Property location: 91 Wilson Pond Rd Map 19, Lot 23

Zoning District(s): Residence and Shoreland Protection Overlay Districts

Request: Equitable waiver to retain an existing improvement constructed without permits or a variance from Section XI.B.1 of the Zoning Ordinance.

Members seated: Thibault, Beauregard, Sr., Walker. Tatro was seated for Hutwelker. Vitous was seated for Mitchell.

Representing the application: Attorney Jeremy Hockensmith

Abutters and interested parties present: Chris Cowling (builder), SCC Chair Deb Crowder, Richard Dell'Erba, Wayne Lechluder, Charles Glimenakis, Bruno Kosheleff, Susan Perry, Neil Boyd

Thibault opened the public hearing at 7:45. Noting that the Board receives few applications for equitable waivers, Thibault encouraged questions regarding the process.

Carbonneau reviewed meeting notice posting dates and locations, and stated that public water and sewer is available to the property; later, Carbonneau corrected her statement to say that the property is served by a private septic system. Carbonneau said that an approved septic design on file indicates that the deck was in place as of July 2, 1999; there is no indication as to when the deck was built. In their meeting packets, members received a copy of a May 30, 2012 letter from Code Enforcement Officer Greenwood advising the applicant that enclosure of the deck is in violation of the Zoning Ordinance.

Hockensmith presented photographs of the deck prior to porch construction, drawing to the Board's attention railings and roof areas that were retained. Given that the porch was built within the footprint of the pre-existing deck, Hockensmith submitted that the porch is a grandfathered non-conforming use. Hockensmith said that former Code Enforcement Officer Weston told Cowling that a building permit would be unnecessary so long as the footprint of the new structure did not exceed that of the existing deck. Hockensmith presented the Board with an August 13, 2012 letter from Cowling addressing his reasons for

not applying for a building permit. Hockensmith said that the property owners had received no complaints during construction, receiving CEO Greenwood's May 30, 2012 letter six months after the project was complete. Hockensmith said that the deck does not create a nuisance, or interfere with neighbors' use of their properties. Hockensmith said that removal of the porch would result in minimal public benefit. Hockensmith said that the property owners made mistakes, but made them in good faith; his clients would not have invested \$10,000 had they thought they weren't in compliance.

Dell'Erba asked whether the property owners had reported the structure on their 2012 PA-28 Annual Inventory of Taxable Property. In her capacity as Assessing Coordinator, Barlow determined that the PA-28 form had not yet been returned to the Town.

Dell'Erba said that the property owners should have had knowledge of the 125' setback, given that a member of the household signed a 2011 petition in favor of changing the setback to 75'. Cowling said that the petition had to do with new construction on a new footprint, and was irrelevant to the topic at hand. Dell'Erba referred to a denied request for a variance at 81 Wilson Pond Road for a deck that had been built without a building permit. Presenting photographs, Dell'Erba said that the porch is highly visible from the road and from Wilson Pond. Dell'Erba said that the porch improves the property values of the owners, but does not improve property values for neighbors. Dell'Erba asked why voters had approved the Shoreland Protection District, if not to protect property values? Dell'Erba said that, while the application claims no encroachment beyond that of the previous deck, the application fails to include the staircase. Hockensmith said that the staircase existed prior to construction of the porch.

Glimankis said that properties on Wilson Pond Road have been much improved over the years, so that now the neighborhood is a place where people like to walk. Glimankis said that, in his opinion, the deck was beautiful and has been improved by the addition of the porch.

Crowder said that the SCC does not object to the porch, because the deck has been there too long. To avoid the trouble of trying to make corrections after the fact, Crowder said that she hopes all residents try to educate themselves before undertaking projects.

Carbonneau said that a building permit is required for any construction in excess of 100 sf. Carbonneau expressed skepticism that a code enforcement officer would say that a permit was not required for construction of a 182sf structure. Carbonneau said that a variance is required to expand the cubic volume of a structure, and stated that the Town had not yet received a building permit for the porch. Cowling said that he had been told "point blank" that no permit was required so long as the footprint size was not increased.

By bringing his concerns to the ZBA, Dell'Erba said that he is doing his job as a neighbor. He said he has no animosity towards the property owners. Rather, Dell'Erba said, there is a sense among Wilson Pond property owners that one can ask for forgiveness rather than permission. Dell'Erba said that not following the rules and allowing the current situation to happen invites something similar to occur in the future, leading to property owners building "helter skelter" on the Pond.

Hockensmith submitted a memo version of his argument for the record. Carbonneau said that the ZBA's Rules of Procedure call for presenting documents prior to the meeting.

Vitous asked Cowling whether he had submitted any plans to the code enforcement officer. Cowling said that he had prepared plans (he had given a sketch to the property owners) but did not submit them because the CEO told him he didn't need a building permit. Cowling said that he had assumed that everything needed to be built according to basic construction codes, and said that the porch does not have plumbing or electricity.

Several interested parties spoke in favor of granting the equitable waiver.

Hearing no further comments or questions, Thibault closed the public hearing at 8:50. Members reviewed the criteria for granting the requested equitable waiver.

1. Was the violation not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed?

Following discussion, members agreed that the violation was discovered some time after completion of the structure.

2. Was the violation not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but instead caused by either a good faith error in measure or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority?

Members agreed that they did not know what the property owners' agent had presented to or asked of the former code enforcement officer, and regretted that the former CEO was not present to speak to the case. Members agreed that it appeared that the property owners' agent had acted in good faith by asking the municipal official about the need for a building permit, and agreed that it appeared that the CEO made an error in interpreting the ordinance.

3. Does the nonconformity constitute a public or private nuisance, or diminish the value of other property in the area, or interfere with or adversely affect any present or permissible future uses of any such property?

Members agreed that the porch footprint is no larger than the footprint of the deck it replaced, thereby not increasing the encroachment into the Shorelands Protection area. Members noted that, while there is no evidence that the porch was not built to code, there also is no evidence that that porch is built to code. Members agreed that the porch does not diminish the value of other property.

4. Due to the degree of past construction or investment made in ignorance of the facts constituting the violation, does the cost of correction so far outweigh any public benefit to be gained that it would be inequitable to require the violation to be corrected?

Members agreed that the issue was not one of tearing down an eyesore, noting statements from neighbors that the porch is well-built and matches the

existing construction. Members agreed that the cost of correction would outweigh any public benefit of correction.

Board members discussed the function and outcome of the equitable waiver process relative to the function and outcome of a variance. Members agreed that a denial of the equitable waiver would leave open the route of appealing the denial decision, as well as the option of applying for a variance.

Motion by Vitous at 9:09 to re-open public hearing to ask the Town Planner for clarification. Second by Beauregard, Sr. All in favor. Carbonneau stated that, if appropriate, applicants may apply for an equitable waiver--if the application meets the criteria, the waiver must be granted; if the application does not meet the criteria, the applicant may apply for a variance. **Motion** by Beauregard, Sr. at 9:11 to close the public hearing. Second by Tatro. All in favor.

Following a second review of the criteria, **motion** by Beauregard, Sr. to approve the equitable waiver. Second by Walker. Beauregard, Sr., Walker, Vitous and Tatro in favor. Thibault opposed. Motion passes. Thibault advised those present that any aggrieved parties have the right to request a re-hearing.

ADJOURNMENT

Motion by Tatro to adjourn. Second by Vitous. All in favor. The meeting adjourned at 9:38 p.m.

Respectfully submitted,

Victoria Reck Barlow
Recording Secretary