

Town of Swanzey, New Hampshire
Swanzey Zoning Board of Adjustment
Meeting Minutes – December 17, 2012

Note: 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.

The regular meeting of the Swanzey Zoning Board of Adjustment (ZBA) was called to order at 7:07 p.m. by Chairman, William Hutwelker. Present were Chairman Hutwelker, Keith Thibault, Vice Chair, Bob Mitchell, Charles Beauregard, Sr., Bryan Rudgers, alternate, who was seated for Jerry Walker and Beverly Bernard, Recording Secretary. The Recording Secretary called the roll and read the Agenda for the meeting.

Absent: Jerry Walker, Sarah Tatro, alternate, Charles R. Beauregard, Jr. alternate, and Jim Vitous, alternate.

Others Present: Attorney J.R. Davis, representing the law firm of Sheldon, Davis, Wells & Hockensmith, PC, Andrew and Rene Bosworth, Town Planner Sara Carbonneau and several residents of the Town of Swanzey.

Chair Hutwelker entertained a motion to continue to January 21, 2013 the request of Richard Duquette for variances from Section IV.B.3. and IV.B.1. to permit the construction of a building that does not meet required setbacks and to operate a business from the premises situated at 38 Swanzey Factory Road at Tax Map 18, Lot 280. **Motion** made by Rudgers, seconded by Beauregard. All in favor. **Motion passed.**

Chair Hutwelker entertained a motion to continue to January 21, 2013 the request of Timothy Tabor for a variance from Section VII.E. to permit the installation of a septic system that does not meet the required setback from wetlands on property located off Old Homestead Highway, shown at Tax Map 9, Lot 9 situated in the Rural/Agriculture and Wetlands Conservation Overlay District. **Motion** made by Beauregard, seconded by Rudgers. All in favor. **Motion passed.**

Minutes: **Motion** by Thibault to approve the Minutes for the meeting of September 17, 2012, seconded by Beauregard. All in favor. **Motion passed.** **Motion** by Mitchell, seconded by Thibault to approve the Minutes for the meeting of November 26, 2012; all in favor except Beauregard who abstained. **Motion passed** by majority vote.

- 1. Public Hearing (Request for an Equitable Waiver)** Andrew & Rene Bosworth request an equitable waiver to retain an existing improvement constructed without permits or a variance from Section XI.B.1. of the Zoning Ordinance. The property is located at 91 Wilson Pond Road, shown at Tax Map 19, Lot 23 situated in the Residence and Shoreland Protection Overlay Districts.

Applicant: Andrew and Rene Bosworth

Property Owner: Andrew and Rene Bosworth

Property Location: 91 Wilson Pond Road, Tax Map 19, Lot 23

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

Chair Hutwelker opened the Public Hearing at 7:10 p.m. and reminded those attending the meeting that he expected the behavior of the participants to be civil and courteous. He also confirmed that the discussion would be limited to the four criteria for an Equitable Waiver as defined in RSA 674:33-a.

Chair asked Carbonneau to review the dates for legal notices for the Public Hearing, which she read aloud. She also noted that the deck at the Bosworth residence was in place as of July 2, 1999, and there was no indication of when it was built.

Chair recognized Attorney Davis. Attorney Davis pointed to a memorandum dated August 20, 2012 which the Board had received, and which stated that the Bosworths were seeking an Equitable Waiver. He said that under the RSA 674:33-a statute there is a 4-part test for determining eligibility for granting an equitable waiver. This statute is one the legislature adopted because of stringent standards to meet a variance and which made it difficult for residents to obtain relief. The RSA relates to all cases where an error is made. The following is a discussion of the four (4) requirements that must be met in RSA 674:33-a in order for a Board to grant an Equitable Waiver:

- Part (a) - the Bosworths completed the structure in question in early December, 2011. In May of 2012 they received the letter that there was a violation. Therefore, part (a) requirement which states that the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official until after a structure in violation has been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value has been met.
- Part (b) states that the violation cannot be 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 was instead caused by either a good faith error in measurement 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. Attorney Davis submitted that the builder, Mr. Cowing, did not know that he needed a building permit. Cowing contends that he went to Mr. Jim Weston, Town Code Enforcement Officer at the time, and Weston said that the building permit was not

needed. Chair Hutwelker asked if there was a date of discussion with Weston. Cowing said he thought that it had been at least a year before the building was constructed. Cowing said he verified with Weston that he did not need a permit a couple of times. Attorney Davis submitted that if the builder is advised that he doesn't need a permit then it is not a failure to inquire and he can reasonably rely on the official who had authority. Attorney Davis said that this test has been met.

- Part (c) of the test states that the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property does not provide a public nuisance. Attorney Davis submitted that the screen porch which is the structure in question doesn't provide a nuisance and is typical of others in the neighborhood, and throughout Swanzey. He stated that there had been a screen porch at one time in the past. Cowing interjected that there were bits of screen and nailing left against the house. Attorney Davis said the finished structure is no closer to Wilson Pond than the original deck and the clients believe there is no negative impact on neighbors, and the structure doesn't change the view of neighbors. Attorney Davis contended that the structure doesn't constitute a public or private nuisance.

Attorney Davis passed out four (4) photographs of the existing deck, and the new structure on the deck. He noted that the same decking is there. He provided two (2) additional photos showing that the deck does not extend closer to the pond. He provided three (3) additional photos showing existing boards being tight enough to provide minimal run-off. He also provided a photo of the open addition showing no insulation. Rudgers asked about lower left photo on the four (4) photo copy. Attorney Davis explained that the bottom two (2) photos are at a 90 degree angle to each other. Attorney Davis said the structure is preferable to portable cabanas and it doesn't affect abutting property owners. He also contended that the structure doesn't change the run-off of drainage since the boards on the deck are narrow. He stated that this criteria has been met.

- Part (d) states that due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected. The Bosworths paid \$10,000 for the structure and they would have to pay for demolition and disposal of the porch would be additional dollars. Attorney Davis said he saw no benefit for the public to tear the structure down. The mistake doesn't harm anyone in the public or abutters and the cost of removal would be prohibitive.

Attorney Davis said that he has met all four (4) criteria to meet the statute requirements.

Davis also provided photo copies of pages from the New Hampshire Office of Energy and Planning to Zoning Boards and Planning Boards Handbook for Local Officials that had a discussion of the Equitable Waiver of Dimensional Requirements. Then he was ready to answer questions.

Mitchell asked Davis if he had any contact with Weston so he could speak for himself. Attorney Davis said he had spoken to Mr. Weston and Weston could not remember this specific application. Davis said Weston said he could remember Cowing asking for permits and sometimes saying yes or no depending on the situation but he could not remember this specific instance. Chair Hutwelker asked if a plan was submitted. Attorney Davis said Weston didn't ask for any plan or application so none was provided. Cowing said he came in with a plan, along with some other plans, but Weston said he didn't need to submit it. He said the whole conversation lasted less than 3 minutes. He said at one point Weston consulted with a woman in the office, but he doesn't know what was said.

Chair Hutwelker asked the purpose of Attorney Davis for making the reference to the deck as an impervious surface. Attorney Davis responded that the Overview District adopts provisions for the protection to the pond. Under ENV-W1402.25 no permit is required under the Shoreland Protection Act if you are not increasing permeable area. He pointed out that the structure is not winterized, nor insulated. It would be different if the porch had windows instead of screens. If there had been no structure there prior, the new structure would be covered by the Shoreland Protection Act. No questions from the Board.

The Chair recognized Carbonneau, Town Planner. She said that during Cowing's statement earlier in the proceedings he said there was woman sharing the office with Weston. Carbonneau stated that would have been her since she did share an office with Weston, but has no recollection if it was her. The last working date for Weston was March 3, 2011. That would have been several months before construction began. She noted that there were zoning changes in that year. She said that any builder building in the State of New Hampshire should be familiar enough to know there should have been a building permit required. According to the State building code, a detached 200 sq feet or less structure does not require a building permit. But the structure in question is an attached structure. In March 8, 2011, there were zoning changes made. She suggested that the builder should have inquired after March 8, 2011 if there were any changes that may have affected permitting requirements. As of 2006, under the State building code an attached structure required a building permit. Weston got building permits for 100 sq feet structures and larger. Carbonneau stated that the comment that it might have been her present when the Cowing was in discussion with Weston about the structure cannot be confirmed. She doesn't remember whether she was there or not. She has no recollection. Chair Hutwelker asked if was common practice to seek her advice when a building permit was needed. Carbonneau responded that Weston might ask about the Shoreline Protection Act and how it might impact on a construction project if he thought it was near a waterway. Chair Hutwelker said that based on the state building code, the builder would need a building permit and Weston would know that.

The Chair asked if anyone on the Board had questions. At the moment, no one did.

The Chair then asked residents if they had questions or comments. Bruno Kosheleff asked to be recognized by the Chair. He said he had two points to make. He also pointed out that he doesn't know the Bosworths or Cowing. His two points: It is plausible that Weston said there is no need for a building permit - these things do happen. The other point: there is a matter of justice versus matters of law.

Since this is a quasi-judicial group, he wants the Board to consider the point of justice to the Bosworths who he didn't think acted out of maliciousness. They made a mistake. Rudgers asked Kosheleff why he came to the meeting since he doesn't know the Bosworths and Kosheleff responded that he lives on the pond and he is interested in what happens there.

Cowing said that it wasn't long ago when Swanzezy had no building permit process and there was a time when he got a permit over the phone, built the structure, and the owner called him to say the code enforcement officer had stopped by and all was okay. At least two times he was told he didn't need a building permit. It could have been in March just before Weston left. Cowing felt the building permit codes were lax prior and he said he builds structures to code. He contended that the Town of Swanzezy created some of this problem by having a lax attitude toward building permits. Cowing said that Mr. Bosworth did ask if a building permit was needed. He said further that making an example out of these people it isn't justice. Everything about the structure is an improvement. The house is little, so the screen porch is very valuable to them.

Rachel Elkins who lives on the pond was recognized by Chair Hutwelker. She said that she thought it was reasonable for the Bosworths to rely on the contractor to get permits.

Carbonneau stated that she has been employed with the Town of Swanzezy since May 1998. She said the Town always had code enforcement officers to meet with customers and she feels Swanzezy was on the forefront of building permit requirements. Carbonneau stated that the Town had a building code prior to her starting in 1998. She also stated that Swanzezy adopted the International Residential Code before the State did.

Attorney Davis said he thinks that isn't the issue and that the state statute is about the four (4) criteria. Any of the zoning issues would be moot since the deck was already there. The issue isn't whether a violation of the zoning, he said, we know that it is. The issue is that there is a mistake and the criteria for granting an equitable waiver have been met.

Chair Hutwelker said the issue does have to do with administrative decisions. The point of credibility is paramount. The experience of Hutwelker tells him that a permit is necessary but he questioned if the mistake was made in good faith. Hutwelker said he doesn't have enough to hang a hat on based on the conversation between Cowing, Weston, which Weston and Carbonneau don't remember. Based on Cowing's experience, he should have known that a building permit was required for a building of that size.

Attorney Davis said that there is a lack of uniformity as to when you need a building permit and when you do not. There is a lot of variation. He insisted that the issue is whether or not there are reasonable grounds for making a mistake. Hutweker said a knowledgeable builder will know a building permit is needed. Mr. Cowing is a reputable builder. Plans should have been provided so that the building permit discussion could take place. Attorney Davis said his experience is that there is variability in requiring a permit. He said this is a perfect example of where the statute should apply. The preferred procedure is not always what is employed. Hutwelker asked Carbonneau about a court case where the property

owner was required to cut off two feet of a house in order to comply with an ordinance. Carbonneau could not recall the specifics of the case. He said that the court ruled that the Zoning Board of Adjustment (ZBA) was correct. He hears the issue on three of the four criteria, but he is faced with a credibility problem. The community has been very conscious of water quality and historically respects that. The Board has always tried to render decisions based on what the community wants. The deck in question is 35 feet from the water with a structure that is covered, which increases shedding water from the structure. From a common man principle, a permit should be assumed for a structure almost 200 feet in scope and within 35 feet of the water. Carbonneau stated that she can't remember being party to any conversation between Cowing and Weston. Hutwelker recognized Cowing and he said the women volunteered information. Part of the problem is there were two or three projects. He repeated that he was told if he wasn't increasing the footprint, he didn't need a permit. The waterfront was never mentioned. Hutwelker said that if the Wilson Pond Rd. was raised, he would think that the code enforcement officer would have brought up the issue of the shoreland protection district and setbacks.

Cowing said he has never heard the terms "cubic density" used prior to the original public hearing on the Request for Equitable Waiver and that from a common man point of view, every man makes mistakes.

Attorney Davis said that he understands that the Board has to be aware of what the community desires. This provision of RSA 674-33-a only comes up when there was a mistake. If the requirements are met, it isn't about the desire of the community, but what the statute requires. Hutwelker asked Davis not to bring up again the Board's experience with Equitable Waivers. It is their responsibility to know the requirements and they do and are able to make informed decisions. Attorney Davis said that there isn't a lot of history for this Board on equitable waivers based on his review of Minutes. Davis said that the viewpoint is different than what the Board usually deals with. Rudgers directed a question to Carbonneau or Davis asking if there were any abutters who submitted positions in writing or verbally. Mr. Bosworth spoke with the attorney and then Davis said that one abutter was present at the first hearing and spoke in favor. His name is Jimmy Glimmanokas. Rudgers asked if there are no dissenting abutters. Davis reported, again from the Minutes, that there was one person, but he isn't an abutter.

The Chair recognized Kosheleff who spoke about the credibility of the builder. He pointed out that given his long experience in the community it would be reasonable to assume that he wouldn't make a false statement. We should assume his comments are valid.

Carbonneau noted that the burden of proof is on the applicant. She said that Attorney Davis has bolstered his arguments for several of the criteria for an equitable waiver, but the credibility of the builder needs to be looked at, along with the Town's history, the zoning ordinance changes, and the fact that builders should be coming in closer to the point in time of construction to check on the latest zoning changes.

The Chair asked for more questions and there were none. Hutwelker closed the Public Hearing at 8:34 p.m.

Very little discussion ensued and the decision was made to proceed to each of the four (4) criteria. Chair Hutwelker said that the vote must be positive for all 4 criteria in order for the equitable waiver to be granted.

- Part (a) regarding when the violation was noticed:
 - All agreed that this criterion was met.

- Part (b) regarding whether the violation was not an outcome of bad faith or misrepresentation and instead a good faith error
 - Mitchell stated that he was comfortable with builder Cowing's testimony - he can find no evidence that the conversation did NOT take place. Only evidence is that of the builder - and he is prepared to accept it.
 - Rudgers didn't think anything was done in bad faith. Hutwelker asked if he thought the others didn't apply. Rudgers said no, but that this one jumps out at him.
 - Thibault stated that the burden of proof is on the applicant - he has sat on the Board with Jim Weston sitting in the audience and the frequency for a variance for structures around Wilson Pond. He said he struggled with the fact that Weston would have said that a permit is not required.
 - Beauregard stated that he felt this criterion was met.
 - Hutwelker stated that he agreed with Thibault that they could rely on Weston in the past, and cannot believe that he would not have required a permit for this kind of structure. It's not he doesn't believe the builder. He believes the violation was a failure to inquire.

- Part (c) regarding the structure does not constitute public or private nuisance Beauregard, Thibault, Mitchell and Rudgers felt that this criterion was met. Hutwelker did not express an opinion.
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- Part (d) regarding cost for demolition outweighing any public benefit
 - Thibault stated that he isn't convinced that the correction costs would outweigh the public
 - Rudgers felt that based on a lack of evidence on what it would cost to take the structure down and no questioning by the Board of figures provided by the Bosworths –
 - Mitchell and Beauregard both felt that this criterion was met; Hutwelker did not feel that this criterion was met.

Mitchell made a **motion** that the application for Equitable Waiver of Dimensional Requirement based on RSA 674:33-a be granted, seconded by Beauregard. Beauregard, Mitchell and Rudgers in favor of the motion. Hutwelker & Thibault opposed. ***Motion passed by a 3 to 2 vote.***

Attorney Davis, the Bosworths, Mr. Cowing, and other residents present at the meeting left at 9:00 p.m.

2. Other matters discussed

Carbonneau provided dates for the ZBA members to place on their calendars: January 15, 2013 is the budget hearing. The Deliberative Session is February 5, 2013 at the Monadnock Regional High School at 7:00 p.m. The vote is March 12, 2013. Carbonneau said that the dates will also be posted online.

Carbonneau also reported that the Planning Board is planning to put up three Zoning Amendments, # 1 and #3 which are basic housekeeping items, but #2 is a proposal to decrease the wetlands setback requirement to 50 feet at Wilson Pond in accordance with the State.

Motion by Beauregard to adjourn, seconded by Mitchell, all in favor, ***motion passed***. Adjournment at 9:07 p.m.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Beverly Bernard". The signature is written in a cursive, flowing style.

Beverly Bernard, Recording Secretary