

Zoning Board of Adjustment Meeting

October 16, 2019

Members present: Rick Ferreira, Chairman, Susan Arnold, Charles Burnham, Jean Chartrand Ewen., and Scott Hodgdon and Ashley Rowe, Alternate members.

The Chairman called the meeting to order at 7:05 PM and introduced the Board members present. Noting that a Board member is absent this evening, Mr. Ferreira advised that Scott Hodgdon, Alternate member, would be voting on the first case this evening to bring the Board up to a full five members. Ashley Rowe recused himself for the first case and stepped off the Board; Mr. Rowe rejoined the Board for Case #416.. Notice for Cases Number #415 and #416 was published in Foster's Daily Democrat on or before October 3, 2019. Notices for tonight's meeting were posted at the Strafford Post Office and the Strafford Town Hall. There were a number of abutters and interested parties present for both cases.

Case Number #415

Petitioner: James & Stephanie Mahon are requesting Special Exceptions under Article 1.7.1 of the Zoning and Land Use Ordinances in order to construct a new 18 foot by 32 foot addition to the westerly side of their existing non-conforming home on the shore of Bow Lake, which is an expansion of non-conforming use. The proposed addition will meet all setback requirements to the front and side boundaries and to Bow Lake. Also, a new 14 by 16 foot screen room on the easterly side of the existing structure comes within 40.6 feet of Bow Lake, which is up to 9.4 feet closer to Bow Lake than ordinances allow, but comes no closer to Bow Lake than the existing non-conforming structure at its closest point. The screen room meets side and front boundary setback requirements. Location: 177 Brown's Pasture Road (Tax Map 33, Lot 16)

Stephanie Mahon, petitioner, was present. Tim Taylor was also present. Pam Constance and Stephanie Meehan, abutters, were also present.

Stephanie Mahon presented her plans for constructing an addition to their existing non-conforming camp located on Bow Lake. The easterly corner of the old camp lies within the 50 foot setback from the lake; the proposed new addition to the opposite/westerly side of the camp is set back farther from the lake than the existing structure and is more than 50 feet from the lake. They are proposing to demolish a small section of the structure and replace it with a larger two-story addition; there will be no increase in bedrooms. The application also includes a request for special exception for a screen room on the easterly side of the camp that was permitted and built earlier this year. The screen room comes within the 50 foot setback from the lake, although it comes no closer to the lake than the corner of the old camp. Ms. Mahon noted that the state had approved the screen room addition under the Shoreland Program.

Board members reviewed a letter from Sally Cobb, an abutter, who expressed concern about the height of the proposed addition and whether it would block the view of the lake from the property across the road. Stephanie Mahon submitted photos of the property to help her neighbors and Board members evaluate the concern with the proposed height of the structure. Tim Taylor advised that the proposed height would be a maximum of 24 feet to the ridge line; the existing camp is 13 feet. Rick Ferreira called on the abutters, who agreed that they are concerned that the addition not come too high. Pam Constance and Stephanie Meehan advised the Board that they are part of the same family as Sally Cobb. Ms. Mahon shared the photos and explained her proposed addition.

Discussion then turned to the screen room. Stephanie Mahon advised that she had a Shoreland Permit and a building permit for the work. Susan Arnold explained that the project should have come to the Zoning Board of Adjustment for review because the existing camp is non-conforming, and they have added to the camp, although they have not necessarily made the camp more non-conforming. Ms. Mahon reviewed the plans submitted for the Shoreland Permit. Board members asked if all the proposed mitigation measures had been completed. Ms. Mahon said that they are partly done.

Board members then turned to the Special Exception worksheet. There is nothing within the 50 foot setback area for the proposed new addition but the porch does lie within the setback lines. Board members agreed to run through the Special Exception worksheet separately for the two different projects. First, Board members worked through the worksheet for the addition. 1) the proposed addition is not within the 50 foot setback; 2) one abutter has concerns relative to the height, although that seems to have been mitigated by the information provided this evening. Rick Ferreira noted that many homes around the lake are getting taller. Scott Hodgdon noted that the problem is that the camps are on small lots. Board members agreed that the proposed addition meets setback requirements, coming within 36 of the side boundary and within 56 feet of the lake at the closest point. 3) The use is unchanged, and the structure will remain a private residence. 4) The structure will remain 2-bedrooms; Board members reviewed the floor plans and both bedrooms will be located upstairs in the new addition.

Susan Arnold said that the concern of the abutters regarding the height is the only glitch, but she noted that it seems to be resolved. Agreeing to a separate vote on the proposed addition, Susan Arnold then made the following motion:

To approve a Special Exception to allow the construction of an 18 foot by 32 foot addition, with a maximum height of 24 feet, as proposed in the plans submitted to the Board, to the westerly side of the existing structure, as all setback requirements will be met.

Jean Ewen seconded the motion, there was no further discussion, and the Chairman called the vote. The vote was unanimous in the affirmative.

The Board then turned to the screen room addition, and worked through the Special Exception worksheet for the screen room. 1) Additional square footage has been added within the 50 foot setback area. 2) Susan Arnold said that since criterion 1 has not been met, the screen room does violate zoning. Jean Ewen suggested that the screen room would not have been approved by the Board as is, and asked how the Board could approve it now. 3) The screen room does not meet criterion 1, and 4) the septic disposal requirements would not apply. Susan Arnold said that the Board would not have approved the plan 'as is' if it had come before the Board, and said that the Board would likely have imposed conditions of approval. She said that we believe that the Building Inspector erred in approving a building permit on this, and noted that if it had come to the Board, the Board would have required that it stay open. Charles Burnham agreed, saying that he feels that too many things have been approved, and that it all comes back to the Building Inspector.

Susan Arnold then made the following motion:

To grant an after-the-fact Special Exception, noting the following. The Board is retrospectively reviewing the screen room and recognizes that it is non-conforming. Had it come before the Board as it should have, at a minimum, the Board would likely have required that the structure remain open and not roofed.

Charles Burnham seconded the motion. There was no further discussion, and the vote was unanimous in the affirmative. Ms. Arnold noted that the Board understands that people think that they are doing the right thing, but she noted that they are misinformed. Ms. Arnold said that the Board would like the Building Inspector to know that the Zoning Board of Adjustment is concerned about his actions in this case and maybe others. She asked that a cover letter be drafted addressing this issue. Jean Ewen said that it is important to make clear, also to the Selectmen, that the Board is not setting precedent here; the Board just did not have the opportunity to review this case. The Chairman then advised the applicant and audience that the Special Exceptions have been granted, and he advised that there is a 30-day appeal period for decisions of the Board

Case Number #416

Petitioner: Philip Auger is Appealing an Administrative Decision of the Building Inspector dated 8/15/2019 allowing the issuance of a building permit to Michael Witcher for construction of a residence to

be located on a parcel identified as Tax Map 35, Lot 1. The applicant alleges that an error was made in the interpretation of the zoning ordinance, with particular reference to the frontage requirements of the Zoning and Land Use Ordinance Article 1.14.5. Location: Tax Map 35, Lot 1, Northwood Town Line & Bow Lake; property owned by KRJ Finance LLC

Philip Auger, petitioner, was present. Michael Whitcher, owner of the property, was present accompanied by Atty. John Bosen. There were a number of abutters and interested parties present.

The Chairman invited Philip Auger to speak to the appeal, and noted that the Board had been asked to record the session; Board members agreed. Mr. Auger thanked the Board and said that he was glad that the case was coming before the Board. He said that Map 35, Lot 1 is a back land parcel that has frontage on Bow Lake. The closest road in Strafford is Lake Shore Drive. Michael Whitcher/KRJ Finance LLC has recently purchased the land. He had his attorney write to the Selectmen requesting a building permit, citing RSA 674:53 as the reason that the Strafford frontage ordinance would be null and void. The statute also sets out the practice for consulting neighboring towns. Northwood has said that there are no issues on their end; the roads are all approved—they are private roads within the Gaviat Green subdivision. It is about 2300 to 2400 feet to the closest Class V road in Northwood—a section of Bennett Bridge Road. Mr. Auger advised that he had filed the appeal shortly after the building permit was issued. He said that he is an abutter and has been talking to the Selectmen in Strafford and to Planning in Northwood. He said that the basis for his appeal is his belief that procedurally, the application should have been before the Zoning Board of Adjustment from the beginning. He said that he wishes that the Selectmen had included the Board from the first, and noted that there had been another opportunity when the letter came back from Northwood. Why is there an ordinance for frontage? He noted that the frontage requirements in Strafford had been tightened up years ago when there was building on Wild Goose Pond Road before it was fixed up, and the School District had to bus children out around through Northwood, and the taxpayers then had to upgrade Wild Goose Pond Road. He said that the frontage ordinance is strongly supported by the community. He said that you have to think about the number of miles of town line and the number of parcels on the town boundaries, and he said that allowing this kind of development seems scattered and premature. He said that he is not an attorney, but in reviewing RSA 674:53, he does not see where the statute says that Strafford must grant the permit, and he noted that only Section II applies. He noted that there has been one Supreme Court case on 674:53, but on his read, there are not many similarities with this question.

Ashley Rowe said that it is not up to the Board to interpret the RSAs. Claire Emond, from the audience, advised that there is no access from Northwood—she said that it is all forest, with a gate. Ashley Rowe said that in this case, granting of the permit was supported by legal counsel and the Selectmen. Susan Arnold said that the Board does have a letter regarding the process and the conflict between town regulations and state statutes, and that she finds the letter persuasive that the Selectboard followed the process. Ashley Rowe said that the appeal is based on the argument that the building permit should be denied because there is no frontage, but that he thinks that the building permit is allowable because the ordinance would allow it under Article 1.4.1 D (2), the town's grandfathering clause. Mr. Rowe said that he believes that it meets the ordinance because the lot is a lot of record prior to the enactment of the ordinance, because he has researched the lot and it was created in 1958. Susan Arnold said that she feels powerless based on the town's interpretation of the statutes, and the argument that state law preempts the local.

Phil Auger said that he has spoken with a planner who works in many communities who said that the RSA 674:53 provides an orderly way to connect with other towns, but that they routinely deny permits if they cannot provide police, fire, school transportation, etc. Shouldn't fire trucks, life safety be required to sign off because there is no access from Strafford? Homeowners are going to expect services, not relying on different towns and private roads.

Atty. Bosen, representing Michael Whitcher, addressed the Board. He said that Mr. Whitcher had already vetted his proposal through fire/safety, and he said that there is no question that state law pre-empts local zoning. He said that the town attorney supports the position that the building permit was properly granted. He said that he feels that the ordinance has already been interpreted by town counsel. Susan Arnold said

that the application should have come to the Board, but it is not required by statute. Reading the town attorney's opinion, she said, it is probably the case that there is nothing that says that the Board must be involved, but it is unfortunate.

The Chairman opened the public hearing. Donald Coker asked about the impact if this lot is serviced by a road in Northwood. He said that while he respectfully disagrees, he accepts the attorney's suggestion, but asked about the future and said that if the lot is further developed, he has to assume that it would come before the Strafford Planning Board. Ashley Rowe said that subdivision would require a variance. Charles Burnham noted that this lot is accessed only by private road, and that the Town of Strafford would have to provide services, which is why RSA 674:41 requires review of lots without frontage and requires a notice of limits of municipal liability. Where is Strafford being protected here, he asked. Michael Whitcher said that the Fire Department is okay because today all the towns operate together. It was noted that Northwood would not pick up school students. Michael Whitcher again said that today Map 35 Lot 1 is all one building lot and that 9-1-1 is reciprocal response.

A Northwood resident then spoke, saying that all Gaviat Green had been required to sign a statement of the limits of municipal liability. Michael Whitcher said that he has agreed to that, so he can do it, but he noted that the building permit has already been issued. Donald Coker said that he did not hear that the Fire Department had signed off on the width of the ROW, the turn-outs, etc. and asked where is the sign off from the Fire Department and Police, saying that 9-1-1 is irrelevant. He asked if the information provided was sufficient to issue the building permit, and said that in his opinion, it was not. Ashley Rowe responded that only the issue of 674:53 was noticed in the appeal. Michael Whitcher said that he feels that Northwood has issued a letter so they do not need anything further. The Northwood resident said that Northwood is requiring their own residents to sign off, but not Strafford? Michael Whitcher said that Northwood had not asked them to sign off. Ashley Rowe asked if the Strafford Fire Chief did a safety check, and if so, said that there was no need to sign off. Mr. Rowe continued to speak about the role of the ZBA and noting that the town attorney had issued an opinion.

Phil Auger said that the key word is opinion. He said that the ZBA can get their own attorney, a second opinion. He noted that the town attorney had said in his letter that he is representing the Selectmen, not the ZBA. He said that he also feels that the attorney is correct that the key issue is 674:53. He said that he feels that Strafford's frontage requirement under Article 1.14.5 of Zoning is an ordinance worth fighting for. He said that Strafford has a large land area and many parcels only accessible from other towns, and he said that the ordinance has been enforced on at least one other resident. Ashley Rowe continued to argue for his interpretation of Article 1.4.1 D (2), again saying that he has done all the deed research and the lot is part of a subdivision from 1958. Charles Moreno, the Planning Board Chair, noted that this is a public hearing and that the public has a right to speak. He said that this situation happens over and over in NH, and that allowing development is very expensive. He said that you have to be even for everybody, and that the rules are in place because of the expense to the community/taxpayers. It is a commonsense rule, and said that he is concerned about the precedent here and the impact on the frontage ordinance. Carolyn Auger noted that she has been a title examiner for 30 years and asked Mr. Rowe for the information that he had found about the lot. Atty. Bosen said that he has a high regard for Ms. Auger and said that in his opinion Strafford's ordinance is fine. He said that 674:53 lays out a path for approval, and that the town did everything right here. If the Board denies the appeal, as they should as a matter of law in his opinion, the issue is that Northwood allowed this. You cannot ignore the statute, the statute pre-empts. The statutory methods for the issue of the building permit were followed here. Scott Hodgdon noted that the issue is the cost to the community. Rick Ferreira turned to Board members and asked them whether they would want to reach out for a second opinion. Jean Ewen said that she would like to do so.

Ashley Rowe then returned to his question about 1.4.1 D (2). The Northwood resident again asked about the Fire Department, and asked if Strafford had said yes or no about whether they would service this new house. Charles Burnham said that the ability to service the lot is out of the Board's control and said that he thinks that the application should have gone to the Planning Board. Michael Whitcher suggested that a decision could be made on the appeal, subject to a letter from the Strafford Police and Fire. Susan Arnold said that she would like to see the private road agreement that Northwood requires of the Gaviat Green residents. Charles Burnham said that the concern is the liability to the town. Michael Whitcher said that he

agrees to sign the private road release, and Ashley Rowe said that it is a standard form. Rick Ferreira said that the Building Inspector did not seem to have all the information when the permit was issued. Donald Coker again urged the Board to seek an opinion from a second independent attorney. Rick Ferreira said that he would like a second opinion. Ashley Rowe and Rick Ferreira then entered into discussion on Mr. Rowe's suggestion regarding Article 1.4.1 D (2). Charles Burnham said that the whole point is that the state supersedes. Susan Arnold noted that the Board can ask for a second opinion from someone who is not the town attorney, noting that there is no rush here. The payment question was raised. Atty. Bosen noted that this is not a special study, and then evoked his client's property rights. Susan Arnold noted that the Board can go to the municipal association. She said that the Board has heard from the town's lawyer, but that the Board needs a legal analysis from somebody who is not already vested, noting that the town attorney is defending what the town has already done. Michael Witcher suggested that he feels that waiting for another meeting is causing distress, and said that Mr. Rowe has already pointed out that the grandfathering clause should have allowed the issuance of the permit. Mr. Rowe said that he wants people to address his point. Donald Coker noted that Article 1.4.1 D(2) is under the "minimum land area" section of the ordinance. Mr. Rowe continued to argue his point. Rick Ferreira asked if Article 1.14.5 would then be another provision of the ordinance that would apply under 1.4.1 D (2), thus disallowing the issuance of the permit under 1.4.1 D (2). Susan Arnold noted that 1.14.5 requires frontage in Strafford, and she said that the appeal is about frontage in Strafford. The challenge is the safety issue. Susan Arnold noted that on the face of it, Article 1.4.1 D (2) applies, but it applies to lots with frontage in Strafford, so then how does the state statute apply. She said that there are thus two questions. Mr. Rowe said that it can be seen as two things, but that in his opinion the grandfathering clause was put there for lots like these. There are letters from the town attorney, he noted again. Ms. Arnold then asked why the town attorney had not mentioned Article 1.4.1 D (2) if it was so clear, so she noted that perhaps getting a further legal opinion would be a good idea. She said that she now feels that there is a real ambiguity here. Jean Ewen agreed. Rick Ferreira also agreed. It was agreed that the ZBA is in a difficult situation without legal representation, as the town attorney has indicated that he is representing the Selectmen and not the Board.

Susan Arnold then made a motion to continue the hearing on this grievance and for the Board to seek a second legal opinion because of the ambiguity in the application of our existing ordinance on frontage and in Article 1.4.1 D (2), because the ordinance is referring to frontage in Strafford but the issue here is that there is no frontage in Strafford.

Atty. Bosen said that any second opinion should be focused on the appeal citing Article 1.14.5. He said that he feels that it is dangerous if you go beyond the appeal. Ashley Rowe agreed that the Board should just go for a second opinion on the overall appeal.

Susan Arnold then made a revised motion to continue the hearing on this grievance to the November meeting and for the Board to seek a second legal opinion on the situation writ large. Jean Ewen seconded the motion, there was no further discussion, and the vote was affirmative in the majority of the regular members present with no nay votes.

Board members then consulted their calendars and set the November meeting for Wednesday, November 20th. Board members agreed to accept the new pending application from Berry Surveying and to schedule the new case for 7:00 PM and the continuation of Case Number #416 for 7:30 PM.

There being no further business before the Board, a motion to adjourn was made and seconded. There was no further discussion, and the vote was unanimous in the affirmative. The meeting adjourned at 9:30 PM.