

Zoning Board of Adjustment Meeting

November 20, 2019

Members present: Rick Ferreira, Chairman, Susan Arnold, Charles Burnham, Jean Chartrand Ewen, Herman Groth, 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. Notice for the continuation of Case Number #416 and Case Number #417 was published in Foster's Daily Democrat on or before November 11, 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 #417

Petitioner: Christopher Berry, Berry Surveying and Engineering is requesting a Variance to Article 1.4.1 C of the Zoning and Land Use Ordinances in order to construct a 12 foot by 24 foot garage and overhangs along the northeasterly side of their existing home in the place of an existing shed and overhangs. The new garage will total 336 square feet, which is an increase of 257 square feet within the side setback area. The new garage would come within 10.9 feet of the northeasterly side boundary and within 35.9 feet of a structure on the abutting lot, which is up to 14.1 feet closer to the side boundary and 14.1 feet closer to an abutting structure than current ordinances require, although no closer to the side boundary and abutting structure than the existing home and shed. (Owners: Daniel & Elizabeth Gagnon, 120 Bow Lake Estates Road, Tax Map 23, Lot 24)

Christopher Berry, petitioner, was present accompanied by Joe Berry of Berry Surveying and Engineering. Dan Gagnon, the owner was also present. There were no abutters present.

Christopher Berry presented the Gagnons' plans for constructing a garage at their home located on a non-conforming lot in Bow Lake Estates. The proposed garage would be closer to the side boundary and to the structure on the abutting lot than the 25 foot setback to the boundary and 50 foot setback between structures that current ordinances require, but the garage has been designed to come no closer to the side boundary or the abutting structure than does the existing home. The Gagnons' lot is only 90 feet wide on both the lake and the road. Maintaining full side setbacks would leave only a narrow building area in the center of the lot. The structure is an older building, shifted to the north side of the lot. In making an analysis of where they might put a small garage, it made sense to put the garage in an area that is already impacted by development. The proposal does comply with Shoreland rules. They are proposing a modest garage of only 12 feet in width, which will allow them to garage one vehicle. The garage will be located at the top end of their existing driveway; they will remove a small shed in that location. The existing home is an "L" shape coming within 10.9 feet of the side boundary. They are looking to encroach no farther toward the boundary with this project. They will extend the non-conforming side line, maintaining the plane. Although this increases the non-conforming area, it will be no more intrusive. They are sensitive to the shoreland zone and feel that trying to place the garage elsewhere on the lot would create more disturbance and would also require a variance. This proposal actually reduces the impervious surface by 1.5%, Mr. Berry noted. They will be offsetting the shoreland impacts with best management practices and by removing the shed. They also plan to replace their raised wooden patio near the water with a less impactful surface. All of these measures combine to slightly reduce the impervious surface area and reduce runoff directed toward Bow Lake.

Mr. Berry asked the Chairman if the Board would like him to work through the variance worksheet, and the Chairman indicated that he should do so. Mr. Berry then summarized their responses to the questions on the variance worksheet in order. 1) The project is not contrary to the public interest because the rules relate to overcrowding of boundary lines and the structure has existed for some time, and perhaps predates zoning, and they are keeping the proposal reasonable and holding the plane seems the most reasonable solution. He noted that the primary entrance to the home is on the side, directly opposite the proposed

garage. 2) The proposal is in keeping with the spirit and intent of the ordinances because it maintains the uniformity of development and allows for the same separation as the existing, keeping the plan against the boundary and home to the north. 3) Substantial justice would be served because the proposal allows for a reasonable garage while providing environmental betterments, reduced nutrient loading of surface runoff, etc. 4) There would be no diminution in nearby property values because, although it is hard to provide proof, most of the surrounding homes have garages, and by increasing the value of this home, it maintains the value of the surrounding properties. 5) The special conditions of the property are the existing structure and proximity to the lot line and abutting structure. Hardship is that the existing structure is as close to the lot line as the proposed, and the due to the special conditions, there is no other place to put the garage without a variance and other state permits. In summary, they feel that their request is reasonable and that the proposed location is the best location on the lot.

Ashley Rowe asked about the proposed roof pitch for the new garage. Mr. Berry said that the existing house would pitch toward the garage. Board members asked if there was a second egress from the home in case of snow blockage, and Mr. Gagnon noted that they have a back door. There were no abutters present. Chris Berry noted that Mr. Gagnon has spoken to all the neighbors and they are not in opposition. The Chairman then opened the floor to discussion. Ashley Rowe said that the proposal seems fairly cut and dried but said that he is concerned with snow and roof pitches. Herman Groth noted the issue of water management off impervious surfaces, and noted that these homes were probably not planned for year-round use. After it rains, it all drains to the road in this neighborhood, he noted. He asked if we should be looking at the water coming off the roofs and BMPs for catching the runoff. He noted that the Board has asked people to have driveways taken up and converted to pervious surfaces. Mr. Rowe noted that the new garage will be located over what is already an impervious surface. Susan Arnold said that the Board can suggest plantings. Herman Groth suggested asking that 2 feet of crushed stone be placed around the whole foundation of the home to catch runoff. Susan Arnold agreed that this could be a condition of approval. Mr. Rowe asked about the topography around the house. Mr. Berry said that the Gagnons would be okay with drip edge BMPs around the whole foundation. Mr. Groth said that homeowners around the lake should be doing this voluntarily. Susan Arnold asked if other sheds on the lot would be retained, and Mr. Berry indicated that they would. Mr. Berry said that if they undertake placing the crushed stone around the whole foundation, that they would effectively be making much more of the total site pervious, which would have huge benefits. Mr. Rowe suggested rain gardens in the swales as an alternative, while Susan Arnold suggested that the Gagnons do both. Mr. Berry noted that if they do the drip edge work, a rain garden in the swales would only be catching off-site flows and he noted that the swales might be located in a flood zone. Mr. Groth agreed that the topography is flat, with not much elevation except around foundations. The Chairman then closed the public hearing.

Herman Groth then made the following motion:

To grant the Variance to the northerly side setback requirement as requested, with the condition that a drip edge of crushed stone be placed around the entire building to catch roof runoff and to minimize the flow to the lake, following Best Management Practices for water to catch the runoff with crushed stone to extend from 6 inches to one foot beyond the drip edge, or approximately two feet off the foundation, all the way around.

Jean Ewen seconded the motion. There was no further discussion, and the vote was unanimous in the affirmative of all regular members of the Board. The Chairman advised the applicants that the variance has been granted and that there is a 30-day appeal period for Board decisions.

Continuation of 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.

Mr. Ferreira advised that Mr. Groth has indicated that he would not be voting because he missed the first meeting on this case, so Mr. Ferreira is designating Ashley Rowe, Alternate member, as a voting member on the first case this evening to bring the Board up to a full five members.

Mr. Ferreira then briefly summarized where things stand with the application. He advised that the Board had agreed to postpone further discussion and to seek a second opinion on the legal questions raised by the appeal. He said that they reached out to the Municipal Services Counsel at the NH Municipal Association. Susan Arnold noted where the discussion ended last month, reading from the October minutes, noting that the question had been the added ambiguities in the zoning and statutes. Rick Ferreira then read from the summary response provided by Atty. Greyes, the Municipal Services Counsel. Ashley Rowe said that since Atty. Greyes had said that he did not opine and because he had not been hired, that this was not an opinion. He said that he did not see that they had addressed the ambiguities in the local zoning. Susan Arnold advised that the ambiguity is in the process. Under RSA 674:53, after receiving the all clear from Northwood, and that part of the process went the way it is supposed to go, she noted, the issue is the interpretation in Strafford. Just because Northwood said okay, Strafford thought that it was okay to grant the permit, but in fact the land is in Strafford and has no frontage. As I understand it, she said, Atty. Greyes is saying that the application should go to the Planning Board under 674:41, and if turned down there, to the Board of Adjustment if a variance is needed. There is a missing step that did not happen—there should have been further review in Strafford by the Planning Board, who may have determined that there is a zoning issue. Ashley Rowe asked how the Planning Board would be involved, and Ms. Arnold said that Atty. Greyes had advised that under the statute (RSA 674:41), the Planning Board is the body in charge.

The Chairman re-opened the public hearing. Charles Burnham asked David Copeland, the Building Inspector, about his process for reviewing a building permit application. Mr. Copeland said that he got a request from Mr. Whitcher, and the package included the information on 674:53 provided by Atty. Bosen. He said that he knew the frontage issue in zoning, so he went to the Selectmen. It happened that the Fire Chief and Police Chief were at the same meeting, and they talked. They followed their procedure and sent Mr. Copeland in the direction that they did. He got everything back from the client and the lawyer and went back to the Selectmen to be sure that the application should not go to ZBA and the Selectmen said no. He mentioned a string of email exchanges with Atty. Whitley in the building permit files. (It was noted that Atty. Whitley indicated that the emails are confidential and it was noted that the emails have not been seen by the Board.) Susan Arnold asked about the required agreements regarding the limits of municipal responsibility under RSA 674:41, and noted that the permit was issued without anything as required by the statute. Michael Whitcher said that he had agreed that he would complete this paperwork at the last meeting. Rick Ferreira asked if this should have been filed before the permit was granted. There was some discussion. Scott Whitehouse, the Fire Chief, noted that there is a home on the cross road beyond Dynamite Corner that is only accessible from Farmington. He agreed that the case had gone through the ZBA. Charles Burnham advised that Farmington had provided paperwork agreeing to provide services to the home in advance of the application to the zoning board. Rick Ferreira agreed that the zoning board would have had access to all these materials in that case. In this case, the materials are not here, so was the permit issued inappropriately? Ashley Rowe said that he felt that the Board's only purview in this case is the narrow question in the appeal regarding frontage. Charles Burnham indicated that he had checked with two attorneys, who both indicated that that an appeal opens the whole case, saying he disagrees with Mr. Rowe. Michael Whitcher asked if the issue was as simple as him filing some paperwork. Susan Arnold said that it is not. Mr. Ferreira said that the limits of municipal responsibility document is only half the issue, as the case should go before the Planning Board. Atty. Bosen disagreed, saying that there is nothing that requires a variance, and returning to the fact that Atty. Whitley had written in favor of Mr. Bosen's position. Susan Arnold advised that Atty. Whitley is working as the town attorney representing the Selectmen. Atty. Bosen said that the Board of Adjustment needs a real opinion. He again argued that 674:41 should not apply, saying that he believes that the Planning Board would only be involved in the case of subdivision. He said that he disagrees with the need for 674:41, and the Selectmen's attorney disagrees, so he feels that the ZBA

is on dangerous ground. Ashley Rowe asked if the Board had requested funds for a second opinion. Susan Arnold advised that Atty. Greyes is a lawyer, and although not paid money and not paid money under a contract with the Selectmen, he did indicate a different opinion. Mr. Rowe again said that he feels that it is not an opinion.

Atty. Bosen addressed the Chairman and asked to call the question. Phil Auger said that he disagrees with Atty. Bosen and suggested that he feels that the cost of a paid second opinion should not be borne by the town, but should be borne by the building permit applicant. He said that there should be a re-examination of the permit application. Cheryl Mrozienski noted environmental concerns, saying that this property is abutting an undeveloped tract of land that allows wildlife to access the lake, and she noted that there are a lot of wetlands on the property. She said that she knows that there is process to developing a parcel and asked when that would happen. Mr. Copeland was asked about the plans for the proposed building. Mr. Copeland said that there are plans in the files. He said that he has a foundation only plan and that the applicant will decide where to put the house after. He said that he lets people go as far as the foundation and then they are required to give him a plot plan, septic etc. He said that he is sure that there is somewhere they can put a house on 17 acres. Herman Groth asked if there was a Shoreland permit. Mr. Copeland said no, nothing at all. Mr. Groth said that so, this is a trial to see if they could get a permit? Michael Whitcher agreed that it was. Rick Ferreira said that so, they did the least amount of work to get a permit? Michael Whitcher agreed, saying that they would still have to show that they were complying with all the rules to go forward.

Cheryl Mrozienski asked if there were plans for further development and whether Mr. Whitcher would consider putting some of the land into conservation. Atty. Bosen said that this is not an issue. Mr. Rowe said that subdivision would have to start from scratch with the Planning Board. Mr. Whitcher said that he thinks that he is entitled to a permit and whatever regulations go with it. He would donate the wetlands that abut Mr. Auger's property to conservation, he said. A Northwood abutter advised the Board that he has met with Mr. Whitcher since the last meeting, and that Mr. Whitcher has agreed to join the Gaviat Green HomeOwners Association and to pay for road work etc. and he again noted that all the Gaviat Green residents had been required to record the statements of the limit of municipal responsibility under 674:41. Herman Groth then noted that a building permit was denied for a lot in Strafford accessed only by a subdivision road off of Sherburne Hill Road in very similar circumstances a number of years ago. He noted that it was the same situation, with a lot on the town line and a ROW from Northwood for access.

There were no further comments and the Chairman closed the public hearing. Mr. Rowe suggested that the Board move forward. Charles Burnham suggested that the building permit should be suspended until RSA 674:41 has been complied with. Mr. Rowe said that the Board is avoiding issues if they just go to 674:41. Mr. Burnham said that if you read 674:53, whose origins are in the legislature, this situation is not covered. Mr. Rowe said that he feels that there is a conflict within our zoning. Mr. Burnham said that the attorney has indicated that this is pre-empted by the RSAs. Mr. Rowe said that the appeal is to the zoning ordinance. Mr. Ferreira said that in order to deny the appeal, you would have to say that 674:53 takes precedence over zoning. Susan Arnold said that she agrees that the statute is ambiguous. Mr. Rowe said that he is still concerned about the grandfathering clause in Strafford's zoning and if it applies to frontage. There followed a discussion of the 'current zoning' reference in Article 1.4.1 D (2). Herman Groth said that the interpretation was different before 674:41; people were allowed to build on back land in those days. Now there is 674:41, which does pre-empt local zoning. Mr. Rowe said that he thinks that the Board should get a paid legal opinion. He said that he feels that there is a possibility that this decision will be reviewed, so the Board should get an in-depth second opinion. Jean Ewen asked if you can look at the appeal without looking at everything. There was some discussion about the meaning of an appeal, and whether it triggers a review of the whole decision. Susan Arnold suggested that the Board go as a group to ask the Selectmen for funding. Mr. Rowe noted that Atty. Bosen is asking for the question to be called, but that is at his peril. Rick Ferreira agreed that it is foolish for the Board to make a decision without proper representation.

Ashley Rowe then made a motion to continue this case forward and to seek funds from the Selectmen to hire legal counsel to properly advise the Board and to have a meeting with counsel. Susan Arnold seconded the motion, noting that the challenge in an appeal to a decision supported by the Selectmen is that

it leaves other bodies without representation. Susan Arnold and Herman Groth both noted that the Board needs separate representation in this case. The Chairman then called the vote. The vote was unanimous in the affirmative of the four regular members voting and Mr. Rowe. The Chairman advised Mr. Auger and Mr. Whitcher that the Board has decided to continue discussion to a future meeting. Jean Ferguson asked how this differs from last month, and Mr. Ferreira indicated that it is one step closer to a decision. Ashley Rowe said that he would contact the Board of Selectmen regarding funding. Jean Ewen said that she would be willing to bring the matter to the attorney. There was a brief conversation about possible meeting dates in December. Several Board members will be away for part of the month, and it was agreed to wait to schedule a December meeting until there is some progress on securing funding for a second opinion on this case. It was noted that the telecommunications tower application will not be heard until December 5th by the Planning Board, and that the ZBA should wait until after preliminary site plan review before holding a hearing.

There being no further business before the Board, a motion to adjourn was made by Charles Burnham and seconded by Herman Groth. There was no further discussion, and the vote was unanimous in the affirmative. The meeting adjourned at 9:15 PM.