Town of Northwood
Zoning Board Adjustment
April 25, 2016

Chairman Roy Pender calls the meeting to order at 6:32 p.m.

PRESENT: Chairman Roy Pender, Vice-Chairman Curtis Naleid, Tom Lavigne Doug Pollock, Alternate Thomas Johnson; Board Administrator Linda Smith; Attorney Jed Callen.
ABSENT: Matthew Fowler, Alternate Bruce Farr, and Alternate Robert Bailey

VOTING DESIGNATION: All members and alternate present.

VISITORS: Town Administrator Joseph Gunter; Planning Board Member Lucy Edwards.

MINUTES:
February 22, 2016: Motion is made by Doug Pollock, second by Curtis Naleid to approve the minutes as written. Vote: 5/0.
March 28, 2016: Motion is made by Curtis Naleid, second by Doug Pollock to approve the minutes as written. Vote: 5/0.

INTERNAL BUSINESS:
Chairman Pender welcomes Attorney Callen. He states that there are a number of small lots in Northwood that people wish to develop. They are seeking relief from the zoning ordinance in order to build on the undersized lots. He asks Attorney Callen to explain how the board can take action to deny without it being considered a taking. Mr. Naleid adds that many of the small lots were developed years ago as tenting or camp lots. He adds they are often close to the lakes/ponds. There are a number of different concerns including the number of septic systems and wells that are in close proximity that may impact the quality of the lakes. He adds that it has been a snowball effect where the number of small lots being developed has become a major concern. Mr. Pollock adds that he looked at one area near Harvey Lake where there are over 200 small lots in a relatively small area (600' x 600') and are within 600' of the lake. Mr. Johnson notes that 'contrary to public interest' is one of the five criteria for approving a variance and that could prove difficult in this situation due to the potential impact to the environment. He adds that if the board votes no on one condition, then the variance is not approved.

Attorney Callen, BCM Environmental Land Law, introduces himself and states he will do his best to answer the questions. He states that his opinion does not become the board's opinion; that he is here to give advice to the board for their consideration. He reviewed the e-mail he received from Ms. Smith in order to prepare for the meeting. He states that he believes this is not simply a question of variances or non-conforming uses; he states that the question is how does the board take action on substandard lots, what are the landowners rights vs. the town's land use boards' right to regulate. Attorney Callen states he would

like to address each area separately-variances and non-conforming uses. He summarizes the history of the small lots, how they came to exist and that there is now a desire to develop the lots. He states that there is no one single answer due to the fact that each application comes with a specific set of facts and each must be looked at as an individual set of facts. There may be ways for other boards-planning or selectmen to make suggestions/changes to the zoning ordinance (ZO) for better guidance, which is another question for the future. Attorney Callen states there is a concept called vested rights or "grandfathering". He states that the purpose of it, codified in NH RSA 674:19, is that if you have a property right and you rely on it and its legal, the town cannot make it illegal because it is taking a vested right from you. He adds that it is necessary to look at which of the substandard lots are "grandfathered". If they are a legal lot, they do not require a variance. He states that the analysis starts by looking at whether it qualifies as a "grandfathered". He refers to NH Supreme Court case Cohen v. Henniker, 134 NH 425, 1991, which is the first case which clearly defined it. It is a piece of land, and the use of the land, which at the time the zoning restriction is enacted it can be grandfathered if it was lawfully being used at that time; he notes a nuisance is not a lawful use. He adds that the use cannot have been abandoned; it cannot be a use that previously occurred but is no longer in place. Discussion is held on timing of abandonment and refers to the ordinance for determination of time frame. Chairman Pender asks about a lot that has not been developed. Attorney Callen states that his discussion to this point is relative to a use such as an existing camp on a lot. Additional discussion is held on potential scenarios of a camp that is in disrepair and building new where a camp had existed. Attorney Callen states that each application would be considered on the specific facts; a structure that has caved in over time or an expanded use would not qualify as "grandfathered". Attorney Callen states that another principal of zoning and land law is that the sale of property has no bearing on rights of the land; the rights of land attach to the land and not the owner. Mr. Pollock asks about vacant lots which are being requested to be developed. Attorney Callen states that it is important for the board to start the analysis by looking at whether it is a grandfathered situation, not based on the owner. He adds that the board should not consider whether someone will sue you for a taking. Mr. Naleid adds there is little to differentiate between the lots. Attorney Callen notes this is something to consider for a variance. Mr. Naleid asks about character of the neighborhood and the fact that there have been others that have been approved previously. Attorney Callen responds that it is necessary to meet all of the criteria in order for a variance to be approved. If it is not in the public interest or if it affects surrounding property, the variance is not granted. Mr. Naleid speaks to the concern of a cumulative effect that occurs over time that based on past approvals it has reached a point where the health and safety of the community is being adversely impacted. Attorney Callen states it can also affect the ability to obtain a septic permit due to required well radii.

Attorney Callen goes back to defining the criteria for "grandfathering": it must be lawfully established; there is now a restriction prohibiting the use; and it must not have been abandoned. If it meets those standards, the use can be continued unless doing so presents a nuisance or is a harmful to public safety and health. Even grandfathered uses are not immune if they impact the neighborhood; it is not grandfathered and may not be continued if it is harmful. He gives the example of an inadequate or failing septic system. Attorney Callen states that if you feel it is a nuisance you can determine and declare the property is not grandfathered. The building inspector can make this determination when the building application is filed. A person may appeal his decision; and the zoning board should uphold the decision if there is facts developed to determine that the lot is not viable for the use proposed. He notes several conditions as examples including septic and well concerns, or too much impervious surfaces which may cause erosion and runoff onto neighbors land or to the lake. Mr. Pollock notes that many of the roads in this area are in deplorable condition. He states that board looks at whether there is a road association in place but this does not always determine that the road is properly maintained. Attorney Callen notes RSA 674:41 and that this may affect the ability to develop the lot.

Attorney Callen states that because these small lots were developed without adequate lot size, frontage, adequate road maintenance and ability to support septic & well; he states that the board should not be granting variances when it is not in the interest of the public. He states that the board has a serious obligation to public health and safety; it is not the board's overriding obligation to the individual property owner, but rather it is to the public. He emphasizes the role of the zoning board is to the public health and safety. He adds that it is not the job of the board to champion individual property rights, but to protect the interest of the public. He states another important aspect of grandfathering is that if it meets all other criteria, the use cannot be changed or substantially expanded; what is grandfathered is exactly and precisely what was lawfully in effect when the restriction was put in place. He gives the example of expanding from a seasonal fishing camp to year round use, and the building inspector should say that is not allowed. Chairman Pender asks about square footage. Attorney Callen states that it may not be expanded substantially and uses the examples of a small bump out for a stairwell as opposed to increasing the living space. He emphasizes that the conversion from seasonal to year round residency is considered a substantial change. He adds that when someone wants to convert to year round, the building inspector should deny unless it meets the current zoning requirements, as it is not grandfathered. He adds it is an important concept to understand that the town is not obligated to approve a conversion from seasonal to year round; the property is grandfathered as seasonal only. Chairman Pender asks about the building code; he understands that the code requires that if a building is being rebuilt it must be insulated,

heated, etc. Mr. Johnson states he believes if it is grandfathered as seasonal, it could be rebuilt without insulation and heating system. Attorney Callen agrees. Further discussion is held on building codes; Attorney Callen states it is dangerous to allow a grandfathered use to be upgraded to a structure that could support year round. He suggests that the board can condition a variance to be seasonal use only; the board may condition the variance based on the specific facts of the case.

Attorney Callen emphasizes that he feels that it becomes an environmental disaster to allow building on small lots that cannot adequately handle the additional septic system being placed on it. He describes that it becomes a real disaster when the septic systems are too close together, and the lake becomes affected by it. He adds that it becomes a disservice to everyone when additional impacts are added. He states that as a society we no longer can exist on substandard lots that require septic and well. He suggests the substandard lots may be combined with existing lots.

Attorney Callen states that the zoning ordinance does offer guidance under Section VII C, pg. 45. He refers to C 2 which states dimensionally non-conforming *lots of record and duly recorded*. He states that unless a lot is a lot of record and recorded at the Rockingham Registry of Deeds, it is not grandfathered. He notes there is also *a size requirement (80,000 sf)* and date *(1984-2005)* that the lot was created. If it does not meet the criteria, it cannot be built on.

He reads VII. C. 2 and notes the criteria in this section that requires lot creation *(prior to Dec. 31, 2005)* and size *(not less than 80,000 sf)*, then it may be granted a special exception when conditions noted in the ordinance *(a-c)* are met. He adds that this section provides the board with specific criteria for the granting of the special exception, and notes the items required. He states that the special exception provides the criteria for the board to consider, if it meets them, the board approves; if it does not, the board cannot approve.
Attorney Callen mentions a court case that involves property in Epsom to point out that the court sided with the town regarding an undeveloped lot. He adds that the court made a distinction and determined that there is still use of the land, even though it cannot be built on, and notes examples it can be used for including picnic, recreation, etc. He states he feels that courts today are not as likely to support individual property rights on undeveloped lots as they are public health and safety

Attorney Callen states that if it is determined to be grandfathered, then the board will not need to act. If it is not, then the board may be hearing a variance application. He adds that if someone applies for a variance, at that point, the board should hear the variance and not question if it is grandfathered. It is the

obligation of the property owner to determine how they chose to proceed and whether they chose to apply for a variance, and seek their own legal advice if needed.

Attorney Callen states that one of the more important criteria is whether the lot is similar to all others; these should not be approved. He adds that what variances are for is allowing someone to violate the zoning ordinance and should be given only for special circumstances; every single criteria should be proven and some of the criteria are difficult to prove. He adds that the most critical one is the special conditions provision of the hardship. He reads from the NHMA zoning handbook on the explanation of hardship noting that *it is not enough to demonstrate that the property would be difficult to use for other purposes or that it is uniquely suited for the applicants proposed use; the applicant must still demonstrate that the property is different in a meaningful way from other properties in the area.* He adds *"the property must be burdened by the zoning restriction in a manner that is distinct from other similarly situated property".* He then reads the criteria on hardship:
Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;

If everyone in the neighborhood is burdened in the same manner, it does not meet the criteria. A variance is for a situation that is different and unique such as geography (wetlands); or very close to the standard in the regulation. There are other potentials including forming an association to purchase the remainder of the lots to keep open; more housing is not reasonable. Mr. Lavigne states that approximately half of all the lots have been built on over the past 25 years. He expresses concern over the fact that the board has reviewed many cases, applied the criteria and now want to take a different view on the process; he asks how does the board go forward? Attorney Callen states that you admit it honestly; merely because the board has been liberal in its views in the past, does not require the board to review future cases the same. He adds that it is the board's responsibility to do the best job they can with what is now known: better case definition of the criteria, current legal advice, better knowledge of what is in the public interest regarding septic treatment, and a better understanding of not diminishing the value of surrounding properties as each approval can diminish the property around it (air, light, septic etc.) The areas with small lots have become denser over time.

He states that the courts do not support the concept of reviewing a case by looking at past decisions over a period of time but review the law, based on the specifics of the case. He mentions the concept of "administrative gloss" which relates to an area of an ordinance that is vague/ambiguous and there is a pattern over time of how the board has interpreted that regulation. This cannot be used for comparison of "similar property" arguments. He adds that it the responsibility of the board to make the best decisions now based on the regulations and the interest of the public. Mr. Pollock notes that there are a lot of factors, such as density, that are looked at by the zoning board and he feels they should also be looked at by the planning board and building inspector. He also mentions the loss of tax revenue. Attorney Callen responds that he agrees it is the responsibility of the zoning board to protect the lakes; however, the tax revenue is not the responsibility of the zoning board.

Attorney Callen reviews the criteria for issuance of a variance under public interest. He states that the public interest is not what the zoning board believes is public interest as that can vary; the courts have determined it is what the public voted when they approved the zoning ordinance. He states that public interest (goals and criteria) is stated within the language of the ordinance. He adds that the board should point out where in the ordinance it does not meet public interest, and to state that it the board's job to protect the public interest. He adds that continued development diminishes the surrounding property and the public interest, particularly on small lots around the lakes. He states that situations that are very close to the 2 acre standard may be acceptable to the board; however, 50'x100' is very far from the standard.
Mr. Pollock provides a map showing Harvey Lake Estates, noting the amount of small lots located in this area. Mr. Lavigne states that there have been many cases that the board has looked at in this area where the applicant wants to tear down a ramshackle camp and replace it with a small residence that meets today's building codes, making it much safer/affordable housing. Attorney Callen states he is not unsympathetic to what the board has been dealing with but it is imperative to look beyond the one case in front of them and look at the overall picture of the cumulative effect, to the environment, fire safety, etc. If it is necessary to have affordable housing, this should be put in place (by the planning board) where the public interest is addressed in the ordinance.
Chairman Pender states that Ms. Edwards had the suggestion of applying for grants for community septic system for areas that have small lots. Attorney Callen suggests this may be something the town wants to looks into; however, it is not the responsibility of the zoning board to do so. He adds that may address one part of the public interest but the road network also needs to be looked at for access by ambulances, fire trucks, school bus, etc.
Chairman Pender asks planning board member Lucy Edwards if she has any questions. Ms. Edwards asks about road networks and if the zoning board considers roads in its deliberations. She notes there are areas in town that

have associations where the private roads are maintained and others that are not. Mr. Pollock adds that there are no standards for road maintenance based on having an association. Attorney Callen states that generally it has been a failure over the long term when subdivisions are created with private roads, even with an association. He adds the best model is when roads are built to town standards and dedicated as public roads. Chairman Pender notes that there is one district in town where the town taxes the property owners and then returns the funds back to the district to maintain the roads. He asks what needs to be done for other areas to create a village district. Ms. Smith states that it requires a certain percentage of the property owners within the district to vote to set it up, create a budget, and follow the statutory requirements as a village district. Mr. Naleid states that if the board considers lack of road maintenance for a denial, it may be a catalyst for such a village to be created in the future. Attorney Callen adds that to the extent that variances are granted when road criteria is not met, it becomes an escape valve, and residents may not choose other available options. Attorney Callen is thanked for his advice and expertise.

INTERNAL BUSINESS:

1. Office of Energy and Planning conference. Ms. Smith notes the upcoming OEP conference on June 4. Members may contact Ms. Smith for registration.

Mr. Naleid makes a motion, second by Mr. Johnson, to adjourn.

Motion passes unanimously at 8:12 p.m.

Respectfully submitted,

Linda Smith

Linda Smith, Board Administrator