

Town of Northwood
Zoning Board of Adjustment
October 28, 2013

Chairman Roy Pender calls the meeting to order at 7:00 p.m.

PRESENT: Chairman Roy Pender, Bruce Farr, Doug Pollock, Alternate Robert Bailey, Board Administrator Linda Smith, and Board Secretary Lisa Fellows-Weaver.

ABSENT: Vice-Chairman Tom Lavigne, Curtis Naleid.

VOTING MEMBERS: Roy Pender, Bruce Farr, Doug Pollock, and Bob Bailey.

MINUTES:

Motion is made by Mr. Pollock, second by Mr. Farr, to approve the September 23, 2013, minutes, as written. Motion passes unanimously; 4/0.

Case #13:04: David Elliot, 8 Pleasant View Ave. Map 109, Lot 38. Applicant seeks a special exception to Article VII, Section (B)(3)(a) for an upward expansion of an existing non-conforming structure located within the setbacks; Applicant seeks relief from RSA 674:41 II to allow an upward expansion of an existing structure, with access on a right of way. ***Continued from September 23, 2013.***

Atty. Mark Hodgdon, is present along with Mr. Elliot.

Atty. Hodgdon explains that the notice references two items of concern for hearing. He states that the first item is the application for special exception for an upward expansion. He begins to address the criteria required to be met in order for a special exception to be granted. He references abutter's letters showing support as well as comments of concern.

Mr. Farr states that it was his understanding that the board has not begun to act on the application. He states that he believes that the case was continued based on the fact that the application was deemed to not be complete and the board was awaiting notification of an approved septic design. Mr. Pender adds that additional information was also requested relative to the right of way (ROW).

Atty. Hodgdon addresses the right of way issue, RSA 674:41(II). He explains that this right of way has been in existence since 1912. He refers to a plan from 1964 of Albert Zent, which shows the lots being created with a right of way. Copies are provided for review. Atty. Hodgdon states that this statute provides for the type of improvement being proposed on a pre-existing right of way that pre-dated the zoning ordinance, and was built. He adds that there are other properties on the ROW that pre-date 1970. Atty. Hodgdon refers to 674:41 (I)(e)

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and states that Pleasant View Avenue meets the definition within section (e), the road pre-dated the subdivision ordinance, which was adopted in 1995. He adds that since it pre-dates this, the plan was approved, and buildings have been built along the ROW; it falls within the exception to the ordinance. He states that there is no violation of the statute.

Atty. Hodgdon states that the lot is 21 and Ms. Smith states that the lot is 3200 sq. ft. Mr. Farr asks where the right of way was on the lot and adds that the 3200 sq. ft. includes the right of way.

Mr. Bailey notes that there are no pins or markings shown and he asks where the boundaries are. Mr. Elliot states that there are pins on the back of the lot, but there are no existing pins on the front as the lot is rectangular and goes right out to Pleasant View Ave. He adds that the ROW is a dirt road. Mr. Bailey states that the road is really only a channel that goes down through the area and nothing is really showing where the right of way is located, only one drill hole. Mr. Pender states that there is really no indication of where the right of way is located.

Atty. Hodgdon explains that based on the measurements provided, which he feels are precise; however, he does not believe that there is an issue as Mr. Elliot is going up from an existing structure that has been there for a considerable time.

Mr. Bailey states that the septic designer would need to know the corners to develop that system. Atty. Hodgdon states that will be an issue for the State of NH.

Mr. Pender asks if the right of way is encumbered in any of the lot. Atty. Hodgdon replies that as drawn it is not encumbering the lot; however, the traditional rule would be that owners own to the center of the right of way. There is no indication that it would be anything other than the traditional rule.

Mr. Farr asks about the status of the septic system application. Mr. Elliot replies that the septic designer, Carl Sherbloom of Sunset Hill Design, was to drop off the plans to the town hall. Staff indicates that nothing has been received to date. Mr. Elliot states that tests have been done and a design has been completed. He states that the actual design has been filed with the state. He adds that the application to the state has not been submitted as the design was not approved by NHDES because there was not enough property to install a leach field or a holding tank. He states that the design would be done only if the current system failed.

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Mr. Farr states that the septic design needs to be approved by the state in order for the ZBA application to be deemed complete. Ms. Smith replies that the board requests that this item be provided, it is on the application checklist, and is one of the items that the board's attorney has said that if the proposal is to expand on a non-confirming use, the board needs to know what the lot can or cannot handle. She states this information is typically requested up front. However, due to an enforcement issue that was going on, the application was processed without the septic design included.

Charlie Smart, code enforcement officer/building inspector, states that he has met with Mr. Elliot and his septic designer. He looked over the proposed plan for the septic system and what he found was a holding tank that was not able to be outside of the 75' well protective radius on his property. Mr. Smart states that the state grants waivers for this; however, since this is listed in the development ordinances, a variance is needed in order to allow the septic to encroach into the well radius.

Mr. Pender states that the state will need to grant approval. Atty. Hodgdon states that they have had discussion with Dick De Seve from NHDES and are quite confident that it will be granted. He adds that there is no possible way to get the distance onto this lot due to the size. He explains that with a small lot it can be reasonably regulated; however, if there is no way to comply with the regulation, then there is a taking issue, which is a serious matter for any entity to encounter. He states that there has to be a reasonable way for Mr. Elliot to reach the accommodation.

Atty. Hodgdon states that he believes that they have a legal basis to keep the septic system in its location as well as legally establish rights to do so and replace in kind, in the future, if necessary, because the lots were granted from the same party at one time. He explains that law presumes that when someone grants a right to use the next door property, there is an implication of an easement to continue the use, otherwise, the grant is invalid or compromised. Atty. Hodgdon states that they are working through the state and believe that the holding tank will solve the state's concerns except for the well radius.

Ms. Smith addresses the location of items on the 40' x 80' lot. She states that it is within the board's purview to ask for a certified plot plan so that the board can make a judgment based on the actual lot lines. Mr. Bailey states that he would like to see where the lot is. Ms. Smith refers to the special exception criteria and states that a plan is required to be filed with the code enforcement officer when a setback is in question or proposed to be diminished.

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Atty. Hodgdon states that he does not believe that the proposal is diminishing the setbacks and there is not a question that the building is within the setbacks. He adds that the septic plan does show measurements and locations.

Abutter Mr. Brown reviews the plan. Mr. Farr asks if the septic tank is on the Brown's property. Mr. Elliot replies yes; it is about 5' onto the Brown's property. He adds that the septic design proposed is for the new design.

Mr. Brown states that the original plan was for a cottage not a year-round residence. He adds that Mr. Eliot has added a ½ basement and an addition upwards, as well as an enclosed porch. Mr. Brown states that he does not feel that this is reasonable or suitable. Atty. Hodgdon states that there is nothing being proposed to increase the capacity. Mr. Pender asks if the proposal is only building up on the existing structure. Mr. Elliot replies yes.

Mr. Brown notes that the porch is being enclosed. He adds that should the Elliots sell the property, changes may occur and express concern over what will happen at that time. Mr. Pender states that all parties could sell to larger families and at this time the board needs to decide on what is being proposed.

Mr. Bailey states that the board's approval is for the property only, not the owner. He notes that the plan only shows the septic tank not what it goes into. Mr. Smart states that the proposal is for a holding tank only. Mr. Elliot states that the holding tank will only be installed if the current system fails. He states that two inspectors have been out to the property and both indicated that the current system is working fine and should it fail the new tank would be installed. He provides pictures of the current system and a letter from the septic inspector.

Mr. Pender asks what needs to happen as far as the state is concerned relative to the well radius. Mr. Smart explains that the town would need to stamp the plan first before it goes to the state. He notes that he did not stamp it when it came in due to the well radius issue. He states that the state would look at it and issue a waiver for the 75' waiver for the protective well radius. Mr. Smart states that the state does this often due to small lots. He states that this is a sealed tank, sealed only by the manufacturer; it will need to be pumped regularly and will have an alarm system. Mr. Smart states that this is the only solution; however, Mr. Elliot will need an additional variance in order for the plan to be approved and then would need relief for structure. He states that he cannot stamp the plan until the variance is granted.

Discussion is held regarding the next step and the process. Mr. Farr states that the board cannot act on the variance request applied for as it is not complete; the applicant will now need to apply for a variance for the well radius issue,

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which must be done before the applicant can get a plan to the state. When the state has acted, then the board can act on the first variance request, which will then be a complete application.

Victoria Parmele states that she understood that there was to be an innovative system designed. She states that they have spoken to Dick De Seve who said that any expansion, just as in the special exception provision, that a holding tank is not acceptable. Atty. Hodgdon states that Ms. Parmele's statement is not consistent with Mr. De Seve's letter, which is read by Mr. Farr, dated September 24. The letter explains the approval of a plan and that the option available is to apply for approvals. Atty. Hodgdon states that he believes that a holding tank is valid with proper approvals and maintenance, should the current system fail. Ms. Parmele states that this letter does not reflect a holding tank.

Mr. Farr states that Mr. Elliot needs to complete the application to the board for a variance for the well radius, as is the protocol, and then apply to the state.

Discussion is held regarding an additional meeting. The board agrees to schedule an additional meeting, if needed. Mr. Farr states that he will be making a motion, to continue the case to the regular monthly meeting, or to add a special meeting to be held on November 13, 7:00 p.m. for the new case. Discussion is held regarding whether to hear both cases on the same night. Ms. Parmele states that this is difficult. There is a lot of information and more to be heard. She expresses concern with possible impacts with the septic holding tank. She states that she and Mr. Brown may find attending an additional meeting within two weeks difficult as she believes they should now be contacting an attorney as well. Mr. Farr states that he understands the issues; however, **Mr. Farr makes a motion, second by Mr. Pollock, to continue case 13-04 to November 13, 2013, at 7 p.m., if an application for a variance for the well radius is received by noon, October 31.** He adds that it is the intent to hear the new case that night whether or not at that point we will continue the first case one more time.

Mr. Smart asks if the board will be addressing the current application on the same night. Mr. Farr states that the well radius issue will be addressed November 13. He adds that it is the intent to grant no other application as state approval is necessary. Mr. Farr states that the effect will still be the same, we are still looking at the end of November, if the state moves that quickly.

Mr. Bailey asks if the shoreland protection act is relevant to this area. Mr. Pender states that the footprint is not moving; therefore, the shoreland will not be affected. Ms. Parmele states that there could be an issue. Mr. Pender states

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that the people that will issue the permit will address the shoreland protection act. Ms. Parmele states that they have spoken to someone at NHDES who was explicit of the shoreland aspects as it is close to the water.

Vote on motion:

Mr. Bailey – in favor

Mr. Farr – in favor

Mr. Pollock – in favor

Mr. Pender – in favor.

Motion passes unanimously; 4/0.

CORRESPONDENCE

Law Lecture Materials – distributed

Ms. Smith states that at one of the law lectures a discussion was held regarding voting on each section. She explains that there was a way that a vote could be taken separately and the outcome could be different. She explains that this is contrary to counsel's advice. It is now being advised that the board go through and get evidence on each criteria, then discuss the criteria, and continue in the manner at which the board has been doing. She states that it was thought that by voting on each criteria, it would create a better source of evidence of the rational. She adds that it is still critical that the board continues to explain why things are being approved or denied.

Ms. Smith offers to forward the material to the board's counsel for an opinion. The board agrees.

INTERNAL BUSINESS

December Meeting – December 23, 2013.

A discussion is held regarding scheduling an additional date for the ZBA should it be necessary. The board agrees to schedule December 17.

ADJOURNMENT

Mr. Farr makes a motion to adjourn. Mr. Pollock seconds. Motion passes unanimously at 7:54 p.m. 4/0.

Respectfully submitted,

Lisa Fellows-Weaver
Board Secretary