

Town of Lyme
LYME ZONING BOARD OF ADJUSTMENT
Minutes – January 25, 2012

Board Members: Present - Ross McIntyre, Frank Bowles, Alan Greatorex, Rob Titus, Walter Swift

Staff: Adair Mulligan, recorder

Public: David Roby, Wayne Bates, Robb Day, Margaret Bates, Lois Stanhope, Ivan Stanhope, Geneva Menge, Richard Menge, Sara Day, John Stanhope, Carol Alden, Steve Alden, Ben Nichols, Matt Brown

Chairman Ross McIntyre called the meeting to order at 7:35 pm.

Minutes of the meeting of January 19, 2012 were amended by Walter and Rob and then approved unanimously on a motion by Frank, seconded by Rob.

Application #2011-ZB-102, John Stanhope (Tax map 401 Lot 17) 60 Dartmouth College Highway in the Rural District. Ross recognized David Roby, who noted that the previous meeting had been contentious and that he hoped the board would decide to rule that the proposed use is not agriculture, and that the project cannot go forward until the Zoning Ordinance is amended to allow it as a proper use. This, he said, would allow Town Meeting to address the multiple issues here, regarding agricultural use in Lyme, and puts the issues before the town rather than an appointed board of five. Hearing no other public comments, Ross invited a motion to enter deliberations.

Deliberations: Frank distributed copies of his original draft notice, and a revised notice that is based on the comments of members, the Zoning Administrator, and town counsel. He noted he had asked counsel the extent to which conditions could be applied. Frank reported that town counsel believes that the application is unequivocally for an agricultural operation. Ross invited the board to read the draft notice closely.

Ross noted that the minutes of previous meetings indicate how the board reached the decision that the retail issue is invalidated by the wide number of farm stands in town. He observed that since producers and consumers are both involved in transactions at farm stands, they could be considered wholesale businesses. Walt disagreed that this led to the decision that the application is for an agricultural use, but because the RSA says that a farm stand is an agricultural use. Frank agreed that the RSA and counsel were in complete agreement about this, adding that without the greenhouse intrusion into the wetland conservation district, the board would have had no say in the project. Walter thought that if the zoning administrator had issued a permit, others would have appealed his decision to the board.

Rob thanked Frank for his two days' effort on the notice and expressed concern about issuing a waiver. While it is easier to use because it is a simple standard, a waiver requires due notice and hearing, and this application was not noticed publicly as a decision on a waiver. Frank said that counsel had advised that if a waiver is contested, the variance would still stand. The RSA says that a waiver is an appropriate method of relief. Ross advised including in the findings of fact that the board did not originally notice the hearing as a waiver so chose not to apply that remedy. Walter turned to the language of RSA674:32-C, which does not refer to conservation districts, but Frank pointed out that a waiver can be allowed for issues "such as" ...which appeared to include conservation district conflicts. Walter then considered the question of whether a farmer owning two farms would be required to sell 35% of products of both at the farmstand, no matter where it was raised. Ross explained that the farmer must demonstrate that 35% of sales sold at the farm stand were the product of the farmer.

Alan asked if traffic could be addressed. Frank said it could not, and that counsel had advised that only conditions relative to agriculture could be placed. Walter noted that if the greenhouses were proposed elsewhere, the applicant would have no need for a permit and would have control over the project. Conditions can, however, be placed relative to wetlands, and town counsel has approved of those proposed. Frank noted that the board has given this application deeper consideration than any other he recalls. Rob said that others could take comfort in

the things the applicant said he would do even though the RSA does not require them. Frank said he visited the property again, and noted that the Menge rental home across the road is down behind a berm, and there is a retail tractor sales operation next door to it.

The board discussed how to vote on the variance, and it was agreed to vote on the package of sections, and revisit with individual votes on each section if concerns become apparent. Walter asked whether the draft notice had been provided to the applicant, and urged that he be given the chance to express concerns about any conditions. Ross asked if the board felt that this application should wait for Town Meeting action. Rob said yes, if there were any uncertainty, but he felt that David Roby is wrong on his interpretation of the RSA. Frank and others agreed that the board has duly considered the application and consulted counsel, and should move ahead. Ross asked Frank to read the draft notice of decision, as follows:

You are hereby notified that your Application for a variance to encroach up to 50' into the wetland setback to construct three agricultural greenhouses, a portion of a compost mulch and topsoil bin, the utilities for the greenhouses, a well and alteration of the terrain to construct gravel infiltration surfaces for water runoff on the property at Map 401, Lot 17 (60 Dartmouth College Highway) in the Rural District has been Approved, based on the following findings of fact by the vote of five members of the Zoning Board of Adjustment.

Findings of Fact:

- The proposed location is within the Rural District, which allows agriculture, which term includes, pursuant to RSA 21:34-a, III, farm roadside stands provided that at least 35 percent of the product sales in dollar volume is attributable to products produced on the farm or farms of the stand owner. See also Section 4.51 of the Lyme Zoning Ordinance, RSA 21:34-a, RSA 672:1, RSA 674:32-a and RSA 674:32-c.
- The proposed development of the site is to consist of a farm stand and attached greenhouse, three greenhouses for growing plants and a separate maintenance and product preparation area uphill from the main site. The details of the proposed layout are shown on Drawing Z-1 by James S. Kennedy, NH Certified Wetland Scientist #118, Titled 'Zoning Map Stanhope Property' and dated 10/05/2011, revised 11/19/12 (should be 1/19/12).
- The activities at the site of the proposed development are to consist of the growing and sale of plants and shrubs, sale of soil and much, sale of gardening supplies and implements and other sales associated with horticultural and greenhouse activities.
- The applicant has presented sales data to substantiate the claim that the income from this agricultural activity, as practiced at their existing site in Hanover, is derived largely from the sale of plant material that is grown, matured or processed on site. Non-agricultural items, such as tools and seeds are a small fraction of their income. The applicant has stated that this mix will not change at the proposed site.
- The activities and structures for the proposed development are therefore agriculture as defined as by both the Lyme zoning ordinance and RSA 21:34-a.
- The site of the proposed development includes wetland areas and the proposed development intrudes into a wetland buffer. Jim Kennedy calculated that the intrusion into the buffer was approximately 4% of the buffer area. The gravel buffers, the part of the compost/mulch bin and the well add slightly to this area.
- The applicant has applied for a variance for the intrusion into the wetland buffer; RSA 674:32-c II provides for a waiver when an agricultural use would violate dimensional requirements. The board has chosen not to apply RSA 674:32-c II because the public notice issued for the hearing did not refer to a waiver.
- Testimony regarding the requirement that the variance will not be contrary to the public interest: The proposed construction is an agricultural activity, which is encouraged and protected under both Lyme and NH state ordinances. The applicant's expert testified that the violation of the required wetlands setback will have no detrimental impact on the wetlands. It is therefore not contrary to the public interest.
- Testimony regarding observance of the spirit of the ordinance: Agricultural activity is allowed in a wetland area as long as it follows best management practices. Right to farm is encouraged by town ordinance.

Greenhouses and their associated utilities are defined as integral to agricultural activity and the wetlands will be protected despite the intrusion.

- Testimony regarding substantial justice: The siting of the greenhouses is integral to the agricultural activity planned for the property. The planned agricultural activity cannot be economically carried out without the greenhouses being erected in the location shown on the site plan. The town and the state give agriculture a privileged position. Substantial justice is done because the aims of both the town and the applicant are realized. Failure to grant the variance would render the property effectively useless for the applicants' intended purpose and thwart the town's stated goal of encouraging and increasing agricultural use of the lands of the town.
- Testimony regarding values of surrounding properties: Surrounding properties include fields and woods, the Menge sugar house (retail syrup sales), Maxfields' farm equipment sales and repair, Nichols' Christmas tree farm (retail sales of Christmas trees), Bailey farm (poultry processing and retail poultry and poultry products sale), Pond View Motel, a multi-residence housing complex with commercial office space, two schools and playing fields, an earthmoving construction company and, formerly, an antique shop and a ski sales shop. The proposed agricultural use is privileged by ordinance and is in keeping with the level and type of use in the area. No evidence was presented to the board that the proposed project would diminish the values of surrounding properties. Factual data were presented that the property was heavily impacted by previous uses and that it has been substantially altered by construction, demolition of construction, fill, ditches, culverts, abandoned foundations and a network of roads. Data were also presented that the Stanhope family, who propose the project, have run a model agricultural operation at their original site in Hanover. They have provided landscape plans that suggest that the proposed site will be significantly improved in appearance.
- Testimony regarding unnecessary hardship: The property is distinguished from other properties in the area by topographic conditions that severely limit the placement of the structures required to execute the agricultural activities planned for the site. There is no fair and substantial relationship between the purposes of the ordinance provision and the specific application of that provision to this application because the integrity of the wetlands will be preserved despite the intrusion of the greenhouses into the buffer. Jim Kennedy, a licensed wetland scientist, was asked about the proposed development's long term impact on agricultural soils and wetlands, and stated it would be minimal given the design of gravel beds and buffer areas. The proposed use is permitted and therefore reasonable under the relevant ordinances.
- Evidence regarding placement of structures on the property:
 - The intent of the proposed layout of this operation is to be compact, efficient, and accessible to staff and customers while minimizing the overall impact on the site by not being spread over a large area.
 - The majority of the propagation and preparation for the traditional planting season takes place in the late winter and early spring.
 - Seedlings are started in a special area in one building and as they mature they are transplanted into larger containers and moved to heated greenhouses where they are displayed and cared for until sold.
 - It is imperative that seedlings and potted plants be kept from prolonged exposure to temperature extremes. Protecting plants from freezing while moving them to and from more remote greenhouses would require additional time and employees as well as expensive, heated, motorized equipment greatly increasing the cost per unit.
 - Locating these greenhouses further from the Farmstand or any other location on the site would require duplication of utilities (electrical, water ,heat, etc.) as well as having to expand provisions to widen and maintain access drives and parking for customers. The installation and operating costs would be greatly increased and the agricultural use would effectively be prohibited.
 - The proposed layout would allow the staff to be able to monitor critical irrigation, heating and cooling conditions while still being close enough to assist customers with sales and questions.

- Providing all customers including the handicapped, disabled, and elderly easy access to retrieve products from the greenhouses without having to traverse long distances or navigate challenging site conditions is extremely important to their experience and safety.
- The Menge family, who are abutters, oppose the project and expressed concern that the proposed agricultural use would reduce property values. No data were presented to substantiate this claim and the board finds that the agricultural use would not reduce the value of the property owned by the Menge family.
- David Roby, a member of the public and chairman of the Lyme Planning Board, but not an abutter, spoke against the project, arguing that it is not an agricultural use and so not allowed in the rural zone. The board disagrees and finds that the uses as proposed fall within the definition of agriculture.
- The zoning administrator has received letters of support for the proposed project from Nancy Allison, Bob Couture, John Corson and Mary Schneider and Margaret Baxter and Wayne P. Bates. Numerous positive comments were also placed on the Lyme listserve and are on file with the Zoning Administrator.
- The conservation commission has provided a statement to the effect that the project “could go forward as planned without major impacts on wetlands.”
- Jim Kennedy, a licensed wetland scientist, was asked about the proposed development’s long term impact on agricultural soils and wetlands, and stated it would be minimal given the design of gravel beds and buffer areas.
- John Stanhope described plans and discussed layouts and protection for the wetlands on the site. His answers to questions from the board are titled “Questions from the zoning board” and are attached to and made part of this document.
- Robb Day, Mr. Stanhope’s licensed pesticide applicator stated that they use integrated pest management and that only very minimal amounts of pesticides are used.
- Mr. Stanhope stated that fertilizer is use sparingly and that their application system has little to no runoff. He stated further that tests made for the sale of their current location did not encounter pesticide contamination or excess levels of fertilizer runoff.

Conditions

- Construction shall be executed in conformance with the site plan submitted to the board and dated 1/19/2012 and shall include infiltration control using gravel strips and vegetated areas in all locations where runoff might flow into wetlands.
- Construction shall follow best management practices with particular attention to controlling silt and runoff into the wetland areas and Hewes Brook.
- An erosion control plan to protect the wetland area shall be submitted to the Planning and Zoning Administrator and implemented prior to the start of construction.
- Monitoring wells shall be installed at the existing ground surface and brought up to the new ground level behind each structure encroaching into the wetland area. Wells shall be sampled annually for nitrogen and pesticides. The monitoring schedule may be amended at the owner’s request if regular sampling for four years indicates that neither nitrogen nor pesticide levels are above NH state-mandated limits. In the event that elevated nitrogen or pesticide levels are detected, owner shall submit and execute a remediation plan.
- A NHDES septic system permit shall be obtained before a building permit is issued. The septic system shall be located substantially as indicated on the site plan.
- The conduct of the business shall be organized to ensure that at least 35 percent of the product sales in dollar volume is attributable to products produced on the farm or farms of the stand owenr.

- Owner shall maintain records to show the percentage of sales in various categories and shall make these records available to the Town's designated agent on an annual basis.
- Pesticide applications shall follow integrated pest management guidelines as established the USDA Northeast Integrated Pest Management Center and all pesticide application shall be made by a pesticide applicator holding the appropriate license or certification issued by the State of New Hampshire.
- Both pesticide and fertilizer application shall follow best management practices and application schedules shall be set up to ensure minimum application levels of fertilizer and pesticide products.
- Owner shall maintain means of collecting any spill or overspray from fertilizer application.
- Owner shall allow inspection of the property by an officer designated by the town of Lyme to verify that the best management practices mandated by both ordinances and this decision are being followed.

Several edits were made and are incorporated above. Regarding a condition requiring that the conditions would apply to future owners, Walter questioned whether their actions could be predicted. Ross pointed out that if sales of products from the farm or farms of the owner become less than 35%, of the total it constitutes a change in use which would trigger review.

Out of Deliberations: Ross invited public comment. John Stanhope said he thought the conditions were understandable under the circumstances, and reaffirmed his answers to the board's prior questions about property management. Rich Menge said he hoped that the condition requiring future owners to be bound by the conditions would remain. Alan and Frank pointed out that that condition was redundant. Carol Alden asked if the town had been given an architectural description of the project. Ross said that artist's renderings had not been provided but that the board had been told dimensions and been given a description. Frank added that the board does not have architectural design remove capability, although an attractive landscaping plan has been presented. He explained that in New Hampshire, farmers are encouraged to do what they need to do to be successful. Ross pointed out that it will be important to the owner to make the property attractive.

Steve Alden asked why the well monitoring requirement did not include phosphorus. Frank said that nitrogen is a good proxy for other such contaminants because they are generally applied together. Steve asked if testing for salt should be done. Frank said the area where salt might be placed is well outside the wetland buffer and the board has no jurisdiction there. There will also be a large dilution factor. Steve asked if the public would have access to the sales figures. Frank said yes, but asked whether this would prompt measurement of others' sales records. Steve asked about the basis for finding that the project would have no impact on the Menges' property values. Ross said that no data had been presented to show it would lower these values. Rich asked if the burden of proof of that is on the applicant or the abutter. Walter cited the ordinance and said no evidence had been presented. Frank observed that agriculture has privilege over other land uses in New Hampshire, and Ross added that the view of those crafting the statute is that agriculture does not lower property values. Walter said that the existing property is in bad shape in some ways, and that the applicant will improve the property and likely raise the value of surrounding property. Geneva Menge said her daughter is more concerned about traffic. Ross said that the board has considered that and has accepted that the project is unlikely to cause problems.

Deliberations: Walter moved to grant a variance in accordance with the findings of fact and conditions and other relevant attached documents. Alan seconded the motion. Frank moved to amend this to say that all the variance clauses will have been considered individually in a collective vote. Alan accepted this amendment and it was approved unanimously. The variance was then unanimously approved. Ross noted that there is a right to appeal for the next 30 days. Walter read section 10.80, which covers the conditions for a motion for rehearing.

Meeting adjourned 9:41 pm
Respectfully submitted,
Adair Mulligan, Recorder