

DRAFT MINUTES NEW DURHAM ZONING BOARD OF ADJUSTMENT OCTOBER 19, 2011

(Please note: These are draft minutes prepared by staff from notes taken at the meeting. They have not been reviewed by the Board for accuracy, and should not be relied upon for accuracy. Reviewed, corrected, and approved minutes will be available at Town Hall and on the Town's website following the next scheduled Board meeting.)

Chairperson Larry Prelli called the meeting to order at 7:00 PM.

Roll Call: Larry Prelli (Chair), Wendy Anderson, Mike Hoffman (Vice-Chair), Helen Wellman, Joan Swenson

Others Present: Doris & Charles Healey, Amy Manzelli, John Sevee, Joseph Fillion, Amy Fillion, Cathy Box, Jess Box, David Nelson, Mike Clarke, Arthur Capello, Mary McHale

Healey Driveway Permit Appeal: Chair Larry Prelli stated this was a continuation of the public hearing regarding the appeal by Charles & Doris Healey of the Road Agent/Code Enforcement Officer decision to grant a driveway permit to Gullmar & Shirley Nelson. Mr. Prelli noted that the Board had heard considerable evidence on the issue at its September meeting and did not want to rehash the same information. He insisted the parties limit their remarks to new information, and keep them brief.

Attorney Amy Manzelli spoke on behalf of the Healeys. She said she had 4 new documents to add to the record. The first she said was the lot plan submitted by Gullmar & Shirley Nelson to the ZBA in 1988 when they applied for three variances (none related to the driveway). She emphasized that this plan did not show the driveway on it, and referenced case law that says that nothing that is not on a ZBA variance application plan can be placed on the lot in the future.

The second document was a copy of the ZBA decision in 1990 which said the Nelson's had illegally placed Turfstone pavers on the driveway. The third document was the notice of appeal filed on behalf of the Healeys by their attorney when they appealed to the Supreme Court. Ms. Manzelli pointed to sections of the document which supported her case. In addition, the last item was the ZBA application filed by the Nelsons in 1988.

Ms. Manzelli noted that some ZBA members had expressed concern about setting a precedent that any driveway modification would require that the entire driveway be brought to date with

current ordinance and regulation requirements. She argued that the precedent would be very narrow because the unique features of this lot and its history would probably not be found on any other lot.

She also argued that the legal principle of estoppels meant that because the ZBA in its 1990 decision had said that no pavement could be placed in the area of the lot where the gravel driveway exists, that the Town was prohibited from allowing anything to be constructed or placed in that area.

She then asked Mr. John Sevee, licensed engineer, to speak to some technical issues. Mr. Sevee said that his primary concern was the potential for water erosion damage to flow onto the Healeys' property. He said that the permeability of Subterra is not in the blocks themselves, but in the spaces between the blocks. These spaces are filled with pea stone which allows infiltration of water. However, the blocks cover 93% of the area, meaning the driveway will only be 7% pervious. In contrast, a typical gravel driveway is around 45% pervious, and sand is about 30% pervious.

He noted that the Subterra works only in soils with good drainage. He has looked at the soils on the Healey property and they are heavy silt which does not have good drainage. His concern is about erosion at the "toe" of the driveway (bottom) because water from above that is not infiltrated will flow to the bottom and then stream on to the grass and lake. The design supplied by Mr. Nelson is not specific enough to know how it might actually work.

In addition, South Shore Road slopes downward toward the Nelson lot, and from there further downhill to the Healey lot. This increases the likelihood of water from the road crossing the Nelson property onto the Healey property. He said the catch basin that Mr. Nelson has proposed at the top of the driveway is a good part of the plan, but it too lacks detail. As with any permeable pavement system the water and wind deposit dirt particles which clog the system. Mr. Sevee said there needs to be a maintenance plan.

Chair Prelli called on Mr. Nelson. Mr. Nelson distributed 4 new items. He gave the board a color copy of the Subterra brochure which had earlier been distributed in black and white. He felt the color brochure made the benefits of the Subterra system more clear. He distributed copies of two academic and professional studies of the functioning of Subterra over time. Both studies found that when properly designed and maintained, the product functions effectively for many years. Mr. Nelson also gave the board website references to two videos on YouTube that show how the system works in a storm.

Mr. Nelson read to the Board from RSA 483-b which states that "gravel driveways are impervious." This was added to the statute in 2008. Mr. Nelson emphasized that the law has no shades of gray in this regard. It is specific and clear. His understanding is that from a legal perspective, this means that any alternative ground cover is an improvement over a gravel driveway.

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Mr. Nelson strongly challenged what he feels is the implication made by the Healeys that the ZBA and the courts said the driveway was illegal in the 1990's and ordered it removed. He said that in all the references given by the Healeys to those decisions, the wording of decisions says clearly that the pavement is illegal, and the pavement must be removed. If the Healeys or the court had thought the driveway itself was illegal, they would have said so at the time. Nevertheless, they did not. Mr. Nelson said that nowhere did anyone declare the driveway illegal, including the Healeys who never challenged the fact that the driveway was there, only the pavement. In addition, they have stated several times during this hearing that they are not asking for the removal of the driveway.

Mr. Nelson closed by saying that the only reason his parents want to put in the paving is that their health has deteriorated significantly, reducing their mobility. The flat firm surface of the Subterra will increase their mobility.

Amy Manzelli gave her closing arguments. She said that David Nelson has no engineering expertise and his comments do not compare with those of Mr. Settee. In relation to the legislation regarding gravel as him permeable she said that that was a policy decision and not a detailed analysis of the permeability. This is not an application for a variance so the hardship described for Mr. Nelson's peer parents is irrelevant she referred to the notice of appeal to this New Hampshire Supreme Court on page 37 and it says that the Nelsons should not be able to profit from having submitted different plans at different times. She again referenced her earlier discussion regarding variance law that prohibits the addition of new features that are not identified on the original plan submitted to the ZBA.

Chairman Prelli closed the public hearing at 7:45 PM. Mr. Prelli said that there appear to be two issues before the zoning board. 1) Is there a legally existing driveway; and 2) is the proposed new driveway permeable or impermeable; and specifically is it a different product than Turfstone.

Joan Swenson said she had reviewed all of the material carefully and at no point in any part of any of the materials does she see anything that indicates that the spot in question is not a driveway. In all the court hearings the issue was pavement not a driveway. All decisions are written in terms of removing the pavement. The applicants have specifically said that they are not asking the Nelsons to remove the driveway. Together these factors indicate that there has never been a serious question about the legality of the driveway itself.

Mike Hoffman said he agreed totally with Ms. Swenson's comments. He added that there never had been any directives which said the driveway was illegal.

Larry Prelli agreed and underlined the point that the Healeys have acknowledged their concern related to the surface of the driveway not the existence of a driveway. Mr. Prelli said he believed the board was in consensus on this question. All board members agreed.

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Wendy Anderson says that she can agree that Subterra is a different product than Turfstone. The Subterra product is based on a complete system of underground preparation as well as the surface product. Turfstone is a standalone product. Board members agreed with Ms. Anderson by consensus.

Mike Hoffman said he believes there is not enough information to approve the plan. Mr. Nelson has not provided enough site-specific information as is called for in the documentation for of the Subterra product. Larry Prelli added that all of the experts have agreed on the need for more specific design based on site factors such as erosion, slope, and soil. He said the board needs engineering plans a site-specific design plans for how the installation will be implemented, inspected, and maintained.

Mike Hoffman said he would want the town engineer to review the plan submitted by Mr. Nelson and he what lot the plan to include action to restore the system if it becomes degraded. All of this information should be included in a deed restriction so that it carries on to future owners of the property.

Mr. Prelli said the board wanted to see the plans in 30 days. The plans should include the design plan, details about product design, how it will be maintained, and a plan for restoration if it fails. It must be a site-specific design and Mr. Nelson may use the town's recently adopted storm water management ordinance and regulations as a guide for the information needed after the board receives the plan will need time to review it and time for the other parties in the case to review it as well chairman probably continued the issue until the next meeting of the zoning board.

Fillion Variance: Mr. Joseph Fillion presented his request for a variance that would allow the civilians to rent out the guesthouse located on their property. The guesthouse has been there for several years and predates the Fillion's ownership of the property he believes that he has documentation at home that the town approved this second building

Chairman probably opened the issue to public comment several abutters spoke in opposition to the request. They said the ordinance was clear that there could not be to dwellings on one lot and that approving this variance would be a bad precedent for future situations. Kathy box asked why the Filions could not accomplish the same goal by subdividing property to separate the two dwellings.

Helen Wellman asked if the two dwellings had separate septic and electric systems. Mr. Fillion said they do. Mike Hoffman said that he could not see that this request met the requirement for a hardship and he asked Mr. Fillion to describe the hardship as he understood it. Mr. Fillion said that he believed it created an inequality if other people in town could rent auxiliary apartments and he could not. Larry Prelli said on that basis it would be reasonable to consider the request to be in the spirit of the ordinance. Mike Hoffman countered that if voters had

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wanted to allow the rental of separate dwellings they would have included that in the recent amendments

Helen Wellman and Larry Prelli agreed that the Filions had not established a hardship according to the terms of variance law. Mr. Prelli said that equity was a consideration but it was a different standard in all standards must be met Joan Swenson said that in many variance cases the applicability of the ordinance is somewhat vague. This ordinance is very clear in this situation that to dwellings are not allowed on a single property

Larry Prelli moved to approve the variance. Helen Wellman seconded. The board voted unanimously to defeat the motion. Mr. Prelli announced that she variance request had been denied.

Minutes of August 11: the board identified a few errors in the text. Helen Wellman moved to approve the minutes of August 11 as amended. Wendy Anderson second. Joan Swenson abstained because she was not present at the meeting. Approved 4-0.

Minutes of September 14: board members identified a few errors in the text. Joan Swenson moved to approve the minutes as corrected. Helen Wellman seconded. Approved unanimously

The board scheduled its next meeting for December 14 at 7 PM in the public library.

Joan Swenson moved to adjourn. Mike Hoffman seconded. Approved unanimously.

Respectfully submitted,

David Allen
Land Use Administrative Assistant