

DRAFT MINUTES

NEW DURHAM ZONING BOARD OF ADJUSTMENT

DECEMBER 14, 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 8:12 PM.

Roll Call: Larry Prelli (Chair), Wendy Anderson, Mike Hoffman, Dave Shagoury, Helen Wellman

Others Present: Chris Berry, Les Turner, Arthur Capello, Ron Gehl

Turner Variance Requests: Chair Prelli noted that Mr. Les Turner had submitted a request for four variances related to his desire to subdivide Map 257-007 into two lots that do not meet all the current requirements for subdivision. The four requests are:

1. Variance to Article III.A.3 to allow septic within 40' of front boundary in order to locate it as far from wetlands as possible
2. Variance to Article VI.C Table 4 to allow septic components within 75' of wetlands in order to allow subdivision of lot 257-007
3. Variance to Article III.A.7 to allow upland flood zone to be counted in lot size
4. Variance to Article IV.B to allow a lot size 3386 square feet less than the 60,000 required by the ordinance and the soils.

Mr. Prelli asked if any of the applicant's team, any member of the public, or any board member saw any potential conflict of interest on the part of any board member. No one did. He then asked Mr. Turner and his agent Chris Berry to present the application.

Mr. Turner described the background of the request. The property consists of two segments, connected by a narrow upland link. A commercial garden center is located on the roadside section of the lot. This center is currently leased to a third party who operates it during the summer. A shared driveway leads to the back of the lot where a dwelling is located. His daughter Amanda Turner purchased the property from Mr. Turner. When she was unable to maintain payments to her father on the lot, the property reverted to his ownership.

Mr. Turner would like to sell the commercial property and keep the dwelling in the family. He has had discussions with several commercial bankers to see if any would offer a mortgage to support such a sale. They have all told him that even with a willing buyer

they cannot offer a mortgage for a mixed use property in this economic situation, and do not foresee a time when they would be able to do so. They have also said that if the dwelling and garden center were on separate lots, they could consider a mortgage for each part separately.

Mr. Berry described the physical nature of the lot in more detail. There is a total of 7.97 acres on the lot. Approximately 2.19 acres (95,584 square feet) are upland soils of types that require a minimum lot size of 60,000 square feet. 11,000 square feet of the upland lies within the 100 year flood zone. The subdivision could be drawn so that both lots have the required 60,000 square feet of land (allowing 25% or 15,000 square feet of wetlands to be counted toward the minimum lot size as allowed by Article IV.B. The house has a relatively new septic system and a well. The garden center has neither. Because of the layout of the uplands surrounding the garden center it is not possible to construct a septic system and leach field that meets required setbacks from both the wetlands and the property lines.

Mr. Berry's recommendation is to site the septic system at the point furthest from the wetlands (about 70' rather than the required 75') and only 10' from the Route 11 property line, rather than the required 40'.

Mr. Berry pointed out that it would be possible to divide the lot so that both new lots have the required square footage. The property line instead is drawn to separate the lots in accordance with their function (one is residential, the other is commercial); and in conformance with the lay of the land. It would require moving a section of land from the residential lot to the commercial lot, but the section would be inaccessible to the commercial business.

Mr. Turner does not intend to install a septic system in the area identified for septic. It works quite well for the flower business to install a porta-potty during the business months. Because of the smaller lot, and the environmental fragility of the lot, it will require a state of the art system, with the lowest possible footprint.

Chair Craycraft opened the proposal for public hearing at 8:40 pm. Mr. James Jones, the immediate abutter to the east. Mr. Jones asked if all requirements for subdivision had been met. Chair Craycraft said the board would be determining that in its discussion. He expressed concern about going from the town's stricter regulatory standards to the less restrictive state standards. He asked on which property the driveway culvert would be located, and was told the residential property. He noted that the culvert had backed up and caused flooding over the river bank. Mr. Turner pointed out that the flooding had never come close to the house. Mr. Jones acknowledged that the septic system for the commercial lot would have to be installed with a change in business which would require a site plan review. Given the amount of the flood zone that is being included in the lots,

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he cannot see any reason to grant the variance other than the financial hardship of the applicant.

Mike Hoffman said he sees this case involving a very unique site: one in which the development and structures are already in place. Therefore he sees no impact of the proposed subdivision on surrounding property values. Larry Prelli noted that he was impressed by the care that was exercised in the planning of the two lots. He did not see any indication of the application being contrary to the public interest.

Wendy Anderson noted that as a landscape architect her profession looks for the most compact use of the land as an important design factor. From her perspective, it would be very poor planning to take an inaccessible section of the property and attaching it to the commercial lot where it would be of no value. In this sense, the unique layout of the land does create a hardship separate from any financial considerations.

Board members agreed by consensus that subdividing the lot would create no new opportunities for development than what already existing, and would in fact be an appropriate recognition of the status quo. With or without the subdivision, any further commercial development of the commercial section of the lot would face the same constraints as it does now and would require the same Special Exception and Site Plan review approval. Likewise with or without the subdivision the residential section of the property would need to meet the same requirements for further development as it does now, with the added restriction of setbacks from a new property line. Board members also agreed that allowing the counting of land in the flood zone for subdivision purposes did not imply approval for construction on land in the flood zone.

The board agreed by consensus that the variances were not contrary to the public interest, that they maintained the spirit of existing ordinances, that they were not contrary to the public interest and would not negatively impact abutting property values. They also agreed that allowing the lots to be subdivided would do substantial justice because the two areas of the lot operated independently of each other and new or different uses were not proposed. Board members felt that not allowing the subdivision would prohibit the owner from separating the residential and commercial uses which would in turn create significant financial hardship.

Larry Prelli moved to grant variance to Article III.A.3 to allow the placement of the septic system 10' from the front boundary, rather than the required 40' in order to locate the septic system as far from wetlands as possible. Mike Hoffman seconded. Approved unanimously.

Mr. Prelli noted that the hardship was created by the fact that there was no location on the commercial segment of the property that would meet both the boundary and the wetlands setbacks.

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Mike Hoffman move to grant a variance to Article VI.C. Table 4 to require a septic system to be set back at the state guideline of 50' from the wetlands rather than the Town requirement of 75', and the leach field to be set back the state requirement of 75' instead of the Town requirement of 125' in order to make a septic system feasible. Wendy Anderson seconded. Approved unanimously.

Mr. Hoffman noted adding a septic system to the existing garden center commercial use would be an improvement over the existing use of portable sanitary systems, even though that system has been used for many years without problems. The same variances would be required before subdivision as after subdivision.

Mike Hoffman moved to grant a variance to Article III.A.7 to allow the upland area on the lot that is located within the 100 year flood zone to be counted in lot size calculations instead of excluded, with the stipulation that no new construction will be located within the flood zone. Larry Prelli seconded. Approved unanimously.

Larry Prelli moved to grant a variance to Article IV.B to allow a lot size 3386 square feet less than the 60,000 required by the ordinance and the soils. Wendy Anderson seconded. Approved unanimously.

The Board thought understood that the lot line could have been drawn so that the square footage requirement was met, but doing so would contradict the natural division of the lands dictated by the layout of the lot, and could lead to future difficulties regarding the lot line.

Healey Appeal: Chair Prelli noted for the record that the Board had received a letter from Mr. David Nelson withdrawing his application for a driveway permit. Because he was withdrawing he would not be completing the engineering plan for the driveway requested by the ZBA. Mr. Prelli stated that this action eliminated the approved driveway permit, and therefore made the appeal against the driveway permit moot. Board members agreed by consensus that this closed the case.

Minutes: Wendy Anderson moved to approve the minutes of November 8, 2011 as amended. Joan Swenson seconded. Approved unanimously.

Joan Swenson moved to adjourn at 10:20 pm. Mike Hoffman seconded. Approved unanimously.

Respectfully submitted,

David Allen, Land Use Administrative Assistant