

**Zoning Board of Adjustment
August 13, 2007**

**Members Present: Elizabeth Ashworth, Chair; Katheryn Holmes, Vice-Chair;
Steve Russell; Helen Wright; Barbara Richmond, Alternate**

Ms. Ashworth called the meeting to order at 7:15 p.m. and distributed notices of land use conferences coming up this fall.

MINUTES

The Board reviewed the minutes of July 23, 2007 and made corrections.

Mr. Russell made a motion to accept the minutes of July 23, 2007 as corrected. Ms. Holmes seconded the motion. All in favor.

The Board reviewed the minutes of July 30, 2007.

Ms. Holmes made a motion to accept the minutes of July 30, 2007 as submitted. Mr. Russell seconded the motion. All in favor.

Ms. Ashworth appointed Ms. Richmond as a voting member for this meeting.

At 7:30 p.m. Stephen Remen, property located at 23 Winter Lane, Newbury, NH will seek a Variance as provided for in 16.7 and 7.3.2 to permit the following: permit construction of an addition within the 75 foot setback from an existing stream. Newbury Tax Map 018-285-179.

This hearing was continued from July 30, 2007.

Present to present the application was Stephen Remen, Applicant, Derek Lick, Attorney, and Robert Stewart, RCS Designs.

Mr. Lick explained that at the request of the Board for a detailed plan showing site specifications, topography, erosion control and drainage plan, Mr. Remen has hired Mr. Stewart from RCS Designs. Mr. Lick stated that he would like to turn the presentation of the site map over to Mr. Stewart from RCS Designs to address the details of the plan since he was the engineer who prepared it, and Mr. Lick will address the five-point criteria for variance.

Mr. Lick commented that the goal of this plan is to make sure that whatever Mr. Remen does will not negatively impact Cunningham Brook. The plan ensures that sediment and surface run-off will not get into the Brook. The view of the applicant is that this is essentially a winning proposal for the Town. This plan handles the surface water better than the existing conditions.

Mr. Stewart presented a site plan of Mr. Remen's property and explained that Mr. Remen hired him to provide the additional information detailed on the plan. He stated that he has some questions regarding the interpretation of the zoning ordinance and would like to clear those up before he begins explaining the plan.

Mr. Stewart referenced Article 7.5: Alteration and Reconstruction of Non-conforming Buildings. This article references Article XV. ...'*Alteration and reconstruction of an existing non-conforming building situated all or in part within the seventy-five (75) foot setback shall be governed by ARTICLE XV.*' Article 15.1.1 states that ...'*Alteration and/or expansion of an existing non-conforming building which does not conform with the dimensional controls for building height, setback requirement, or building separation requirements is permitted as long as the alteration and/or expansion does not make the building more non-conforming...*' He commented that in the example given ...'*the alteration and/or expansion must be constructed within the approved height limitations, setbacks and building separation requirements of the district in which it is constructed, including the overlay district requirements which may apply to that location.*' is stating that if you have an infringement on the shoreline overlay district and you want to expand the existing building, you should be able to as long as you meet the height limitations, setbacks and building separation requirements. Therefore, Mr. Stewart's question was "Is Mr. Remen in conformance with the zoning ordinance and was it a permissible expansion based on the application?"

Ms. Wright commented that it was not a permissible expansion because the expansion makes the building more nonconforming.

Ms. Ashworth explained that the ordinance is saying that you can add or expand onto a nonconforming building as long as you are not making it more nonconforming.

Mr. Stewart commented that if that is the interpretation, then Article 15.1 does not give any relief so it is pointless to have it.

Mr. Stewart continued with his presentation and began by reading the purpose of the zoning ordinance. He then referred to the upper right hand corner of the plan which shows the existing conditions, including the addition. The setback from Cunningham Brook is 47.7 ft. from the closest corner of the original garage. The setback then varies to 50.2 ft. from the closest corner of the addition to the garage, which makes the addition less nonconforming because it is less close to Cunningham Brook. The area is more wooded than what is shown on the plan. Not all of the trees are shown in order to eliminate visual clutter on the plan. The plan was prepared by actual survey standards which included delineation of the edges of the brook and topography. As a part of the mitigation offer, Mr. Remen is proposing to install a French drain system around the whole perimeter of the building.

Ms. Holmes asked Mr. Stewart to explain how a French drain system works.

Mr. Stewart explained that a trench is cut a little deeper, approximately 1 – 1 ½ ft. around the footings and filter fabric, stone and a perforated polyethylene pipe with holes is laid in so that as the water falls off the roof, it then comes into the very pervious area which collects the water. Then at the front corner of the building, there is a solid pipe underground which delivers the water to a dry well. He explained that in most cases, the water is collected off the roof in gutters, but because this roof is a metal roof the buried pipe was more practical.

Ms. Holmes asked Mr. Stewart if the metal moves the water faster.

Mr. Stewart explained that the metal does not move the water faster, but what it does not do that has to be accounted for is that it does not hold water on its surface as asphalt does which enables some of the water to evaporate naturally instead of being collected. The difference between the two surfaces is approximately two gallons of water for a roof this size. The roof run-off calculations are indicated in the box written on the plan. Mr. Stewart explained that currently, if the addition is removed, there would remain an existing building with no runoff protection for the brook. The drywell is located near the gravel driveway on the southerly side. Only half of the run-off from the roof is really a concern because the other half runs off the southerly side, pitched away from the brook.

Ms. Holmes asked Mr. Stewart how often a drywell needs to be cleaned out.

Mr. Stewart stated typically never. There may be some silt buildup over time, but that is not usual.

Ms. Richmond asked Mr. Stewart how far away is the drywell from Cunningham Brook.

Mr. Stewart measured 85 ft. – 90 ft. He showed photographs of the site to the Board members which showed the berm between the garage and Cunningham Brook.

Ms. Richmond asked Mr. Stewart if there was any hot top in the driveway.

Mr. Stewart explained that there is no hot top in the driveway and it will stay gravel to help facilitate the absorption of surface water.

Ms. Holmes asked Mr. Stewart if the drywell will be in danger of damage if inadvertently driven over by a vehicle.

Mr. Stewart explained that the drywell is in a landscaped area and is not in any danger of being driven over. He stated that if for some reason a vehicle did drive over it, the well is deep enough at 3 ½ ft. – 4 ft. down to not be compromised.

Mr. Stewart explained that Mr. Remen considered another location for an additional garage if the variance is not approved. This only other alternative location that would respect the 75 ft. setback from Cunningham Brook requires tree cutting and earth disturbance. There is no natural berm between the secondary site and Cunningham

Brook and the topography slopes at approximately 33% toward the brook. Since this site is outside of the 75 ft. setback, no drainage system would be required. However, in order to stay out of the 75 ft. setback, the garage may not meet the 30 ft. setback from the right of way which means another application for variance. Currently, there is a well established riparian buffer along the brook in the area of the secondary location. This balance would be upset and the wild life corridor will be interrupted if the secondary site becomes necessary.

Mr. Stewart stated to the Board that if he could not make the project work environmentally, he would not have taken the job. In his professional opinion, keeping the addition as is with the installation of a French drain is better for the environment than not having it at all.

Mr. Russell commented that if this proposal came before the Zoning Board of Adjustment prior to its construction, there would have been great difficulty in approving the size of the garage. There appears to be no compelling need to double the size of the garage. To satisfy Mr. Remen's desire to park a plow truck inside is not justification to approve the application.

Mr. Stewart suggested that the Board members keep in mind that the vehicle is a plow truck which requires bigger tires, more fluids and maintenance. When trucks sit for any length of time, fluids will leak which is worse for the ground runoff if they are not housed in a garage. The truck could be parked outside where the addition currently stands, but then the salt from the road, oils from the truck, etc. will be discharged into the ground water right close to the brook. Environmentally, putting the truck under cover will certainly diminish the potential impact of pollutants from the truck.

Mr. Lick gave the Board members a written narrative addressing the five points of criteria for granting a variance. He addressed each point and summarized the narrative.

1. Granting the variance will not be contrary to the public interest. (16.7.1)

Mr. Lick explained that by granting the variance the Town would be able to achieve the reduction of existing and future runoff going into Cunningham Brook. This plan protects the brook.

2. Denial of the variance will result in an unnecessary hardship to the owner as proven by the following:

(a) an area variance is needed to enable the owner's proposed use of the property give the following special conditions of the property. (16.7.2.2.1)

Mr. Remen's entire intent for this addition is for storage for his plow truck in the least obtrusive manner. The secondary site will also require a variance. And, given the topography this is the best way to use the property and protect the brook. A 24 ft. x 26 ft. garage as proposed in the secondary location would actually be too small for the purposes of housing a plow truck. By adding this amount of room onto the original garage, Mr. Remen is able to use a portion of the original garage in addition to the addition to accommodate the plow truck.

(b) the benefits sought by the applicant cannot be achieved by some other method reasonable feasible for the owner to pursue. (16.2.2.2)

The addition cannot be placed on the other side of the garage because of encroachment onto the road way.

3. The use will not be contrary to the spirit of this Ordinance. (16.7.3)

This proposal is not contrary to the spirit of the ordinance. It will further enhance the spirit of the ordinance because it will protect the brook even more than the current conditions.

4. By granting the permit, substantial justice would be done. (16.7.4)

This will allow Mr. Remen to extend the building, to be able to keep the plow truck inside instead of outside and will avoid having to cut trees and interrupt the wild life corridor. There is a plan in place that will solve the runoff problems.

5. The proposed use will not diminish surrounding property values. (16.7.5)

This proposal is not impacting the neighbors. Statements of support from the neighbors have already been submitted. The property is in a private area and not seen from the road.

Mr. Lick commented that if the goal of the Zoning Board of Adjustment is to follow the ordinance and to protect the Brook, then the Board members should keep in mind that they can 1. Grant the variance with conditions and divert the water from the Brook or 2. Deny the variance and the runoff from the truck and surfaces may get into the Brook which is not in the spirit of the ordinance. Mr. Lick stated that Mr. Remen has already planted grass on the inside of the berm in an effort to promote absorption of surface water.

Ms. Holmes commented that stronger planting than grass will need to be planted and maintained in order to be effective in the absorption of surface water.

Mr. Lick commented that if the variance is granted, some earth disturbance will have to be done in order to install the French drain. During that short period of installation time, best management practices will be adhered to and erosion control measures will be taken short-term and long-term.

Ms. Ashworth opened the meeting to the public.

Suzanne Levine, abutter, commented that she is concerned that this hearing is taking such a long time to resolve especially since there was not building permit. She commented that it took a long time to have the ordinance in place to have Cunningham Brook designated as a permanent stream. Things need to be done properly and this kind of a situation should not happen again.

There was no further comment from the public. Ms. Ashworth closed the hearing to public input and the Board began deliberations.

Ms. Wright commented that she had questions and issues with both scenarios. The runoff from the second plan will make more runoff toward the brook without the protection of a berm. If Mr. Remen was really concerned with protecting the Brook, the French drains will be put in no matter what, but he has not offered to do anything to protect the Brook if the plan is not approved. Perhaps everyone in Town should be required to garage their vehicles under cover to avoid polluting the surface water. Ms. Wright stated that she does not see that this proposal meets the hardship requirement. Mr. Remen has a self-created hardship and is making a nonconforming situation more nonconforming.

Ms. Holmes commented that Mr. Remen has stated that there was a misunderstanding between him and his builder. It is a situation where the Board of Selectmen told Mr. Remen to tear down the addition. She stated that she thinks Mr. Remen made a good faith effort to hire a professional to meet the Board's concerns with an erosion control plan. Mr. Stewart has helped his client with this piece of property and a good mitigation plan. The Board still has its back against the wall.

Mr. Russell pointed out that any project within 300 ft. of a permanent stream would still be required to provide temporary and permanent erosion control measures.

Ms. Holmes commented that the existing building has no erosion control measures at all, so this proposal would be a benefit to the environment. The Town's regulations were not followed due to a lack of communication, but Mr. Remen has tried in good faith to fix the problem. If this application is approved, stronger plantings than grass will need to be placed between the garage and the brook. The Board should consider this plan as a solution to this problem. Hopefully more people will educate themselves as Mr. Remen has done.

Mr. Russell commented that he agrees with Ms. Wright that this project is making a nonconforming building more nonconforming. He asked how the Board will know that the mitigation plan will be followed.

Ms. Ashworth explained that there will be conditions of approval and those conditions are passed along to the Building Inspector/Code Enforcement Officer. He will make sure that these conditions are followed.

Mr. Russell commented that he feels caught between a rock and a hard place. It is obvious that effort has been made to address the erosion issues at the original garage site; and if the addition gets torn down and erected in a different location, that creates other problems. He commented that he is struggling with the fact that this is a nonconforming building becoming more nonconforming but would be more in favor of approval if the addition weren't so big.

Ms. Ashworth pointed out to the Board members that the reason for denial of an application has to be based on the variance criteria.

Ms. Richmond commented that she is in agreement with Ms. Holmes and could not justify making more destruction. Mr. Remen is willing to dig a drywell and address the erosion and runoff and it is done right, then the Board can only do what it can to make sure the situation is better. She explained to the Board that an addition that size is justified for storage of a plow truck because a truck that size and its equipment requires an excessive amount of space.

Ms. Ashworth commented that if this application came before the Board for the variance before it was built, the Board would be looking at alternative sites. She commented that what Mr. Remen did makes sense and it would be appalling to see all of those trees taken down if the second site was utilized. Without further study, there is no way to know if the garage could have been built in another location and avoided the Zoning Board altogether. Ms. Ashworth stated that she is happy with the erosion control plan that has been proposed and is not sure that taking the building down is not causing Mr. Remen an unnecessary hardship.

Ms. Holmes asked if it would be appropriate to put a condition on the approval that no hot top will be allowed on the driveway in order to avoid further impermeable surfaces.

Ms. Ashworth commented that the approval is based on the plan as it is presented, which is a gravel surface.

Ms. Richmond commented that hot top would be a waste of money for Mr. Remen because given the nature of a driveway; there will be a lot of turning which will dig up hot top.

Ms. Holmes made a motion to vote on the completion of the construction of an addition on a preexisting garage that is within the 75 foot setback from Cunningham Brook with the existing siteplan prepared by Robert Stewart, RCS Designs that shows temporary and permanent erosion control measures with the condition that stronger plantings be planted between the garage and the brook. Mr. Russell seconded the motion. All in favor.

Ms. Richmond voted to grant the variance as presented and with the conditions stated.

Mr. Russell voted to grant the variance as presented and with the conditions stated.

Ms. Holmes voted to grant the variance as presented and with the conditions stated.

Ms. Wright voted to deny the variance because the hardship requirement was not met.

Ms. Ashworth voted to grant the variance as presented and with the conditions stated.

Ms. Ashworth informed Mr. Remen that there is a 30-day appeal period in which an abutter may appeal the Board's decision. Any work or improvements on the site are done at his own risk during that time.

Mr. Lick informed the Board that as a result of the Board's decision, Mr. Remen would like to withdraw his request for An Appeal to an Administrative Decision that was scheduled to be heard after this application.

Mr. Lick asked the Board to stay Mr. Remen's request for a rehearing of the Zoning Board's decision to deny the Equitable Waiver of Dimensional Requirement until the 30-day appeal period has passed.

Ms. Ashworth denied Mr. Lick's request to stay the request for rehearing and informed Mr. Lick that the Board discussed the request for rehearing at it July 30, 2007 meeting and felt that the request for rehearing should be denied because there was no new information in the request to support a rehearing.

Ms. Levine stated that she is not going to appeal the Board's decision but would like to make it clear that the Town needs to be more forceful in protecting its water ways.

Ms. Wright commented that the Board of Selectmen and the Planning Board understands this problem and has tried to address the problem by requiring the property owner to sign the building permits. It is no longer permissible for the contractor to sign for permits. This policy should avoid future situations like this one.

Mr. Russell made a motion to adjourn. Ms. Wright seconded the motion. All in favor.
Meeting adjourned at 9:00 p.m.

Respectfully submitted,

Linda Plunkett
Recording Secretary