

ZONING BOARD OF ADJUSTMENT MEETING MINUTES

Meeting of September 10, 1997

Attendance: R. Jeppesen, M. Iafolla (Chairman), A. Brandt, T. Mackin, M. Johnson. S. Zarlengo took minutes.

Case 97:20 Rehearing of Turner Porter, for Rocky Ledge Subdivision off North Road, Article IV, Section 409.9 and Article III, Section 302, definition 32.

Previously, at the June meeting, the ZBA ruled in favor of petitioner, David MacArthur, North Road, who argued that the Planning Board misinterpreted the zoning regulations for isolated, non-bordering wetlands. At the June hearing, it was also determined that the ZBA did not have jurisdiction over Article IV, Section 409.10, Conditional Use Permit issued by the Planning Board. Turner Porter appealed this decision and a rehearing was granted.

Present was Court Recorder, Sandford Roberts, atty., Ken Berry, Jones and Beech, and Turner Porter, developer.

Roberts began with a correction to the letter previously submitted to the ZBA dated June 10, 1997. The change was that the identified wetlands requiring a setback were wetlands identified as A, B, and C.

Roberts identified that there are three issues associated with this case.

1. Jurisdiction. The June 11, 1997 hearing was based on fact of wetlands characteristics as identified by wetland and soil experts and the existing ordinance. Statute RSA 676R:3 states that appeals of planning boards decisions should go directly to Superior Court. He asked that the ZBA agree that the issues before the ZBA is to determine if the Planning Board was correct in their decision.

There are certain methods to follow in this role. If the case is brought to Superior Court, the court decides if the decision made was contrary to law or was unreasonable. Therefore, the ZBA scope of decision making should not be any broader. Consequently, the Planning Board was correct in their decision.

Zoning was adopted by the town. Everyone must conform to the same standards and rules. An ordinance can be changed only by the Town. Section 409.9 was validly enacted and the terms are clear and unambiguous. There are specific criteria in the definition for the wetlands. The Planning Board based their decision on expert opinion on the definition. Forest Griffin, Planning Board Chairman, had previously submitted to the ZBA a packet on the experts opinion on the definition and wetlands on site.

M. Iafolla interjected that the Planning Boards decision was not the issue. The issue was the definition of the wetland.

Roberts continued and asked that the ZBA look at how the Planning Board made their decision on the interpretation of the ordinance and did they do their job with sufficient evidence and not erroneous.

Mackin interjected and stated that they are not here tonight to correct or judge the Planning Boards decision, but are here to define the definition. IT is not a Planning Board issue.

Roberts asked if the ZBA overruled the Planning Board's decision.

Iafolla responded that they are here to reinforce the intention of the definition.

Roberts asked if the ZBA could agree that this legislative body passed this ordinance.

Iafolla stated that yes, however, the voters have spoken. The original petitioner stated that the ordinance was not interpreted correctly. Appeals of the Planning Board go to Superior Court, and the ZBA hears appeals of the interpretation of the ordinance.

Roberts agreed.

Iafolla stated that they are here tonight to interpret the intent of the ordinance, whether the Planning Board interpreted the ordinance correctly.

Mackin stated that the petition was on the definition of isolated wetlands, and not the planning Boards decision.

Roberts stated that the definition is not ambiguous. There is not question on good faith in judgment, but on the criteria of which the Planning Board made there decision. Do we usually ask the ZBA for an interpretation of the law first before any decisions are made? NO! Only after someone else makes a decision and it is appealed do we go before the ZBA.

Iafolla responded that after minimal research, he believes that the ZBA's position is to interpret the zoning ordinance. The ZBA had asked the Planning Board to write an ordinance and provided them with the criteria for the ordinance. What was written did not meet the intent of the ZBA's original request.

Roberts stated that the ZBA recommends to the Planning Board an ordinance and it is the Planning Board who has recently changed the definition to a particular size. This will be voted on and if passed, will become an ordinance. But you can't change the verbage of the ordinance before that takes place.

Brandt stated that Article I, "Purpose", of the ordinance states that the ZBA shall "promote health, safety and the general welfare of the community..." and Article 1001 states "...the provision which imposes the greater restriction or the higher standard shall govern". The intent of the Board is to act in a broader sense to protect the safety and health and welfare of the town.

Roberts asked Therefore, if the zoning is not in the best interest of the town, the ZBA can change the ordinance? If the town votes to change the ordinance, do the town employees have the right to change to meet there individual intent?

Brandt summarized that the "higher standards shall govern". The problem with 409.9 is the definition found in Article Iii, section 32. The ZBA is saying the 6 acres is not an isolated wetlands.

Roberts stated that society can't function if people interpret laws in different ways. You can't change an ordinance or a law. Why can't anyone else interpret the zoning? Legislative makes mistakes often because this happens. Superior Court looks at history of ordinance when it is unclear. Please reconsider the original decision.

Mackin stated that they are appointed by the Selectmen to essentially allow residents to break the law. The petitioner is asking for the board to defend the ordinances. It was original intent of the writing of the ordinance that the isolated wetland be of small size. The ordinance as written does not meet this intent. The intent of the ordinance must be upheld.

Roberts questioned if T. Porter had this issues in 10 years and the members of the ZBA were different would they come to the same conclusions.

Mackin responded that if the subdivision is approved, the problems associated with the wetlands and drainage will end up being the town's, and not the developers. In 10 years the town will be stuck with it.

Iafolla asked is it true that although the legislative body passes a law,, it's not really a law until it's been tested?

Roberts responded that when the President signs the law, its a law. The interpretation of the law is tested after.

Iafolla said is there ever a clear law that does not get tested?

Discussion opened to public for anyone against the petitioner.

David MacArthur, 2 North Road. Original petitioner. The ordinance does not allow for the filling in of wetlands. The Office of State Planning, based on scientific research, recommends that the buffer from a wetland be 100 feet, and that wetlands under 3,000 square feet be excluded. The wetlands in question are 260,000 SF. This is simply an exploitation of a significant wetland.

John Hudson, 5 North Road. Against subdivision, and supports what MacArthur stated. He feels the town passed the wetland ordinance without really understanding it. The town would be for the interpretation that the petitioner originally brought forward.

Discussion opened to anyone for the petitioner.

Forest Griffin, Planning Board Chairman. Planning Board acted prudently but reluctantly. Their decision was based on experts advise and was discussed for several months prior to voting. Packet of information documenting the experts opinions was previously submitted. Please review and reconsider. The subdivision was approved 5 to 2. The two “no” votes were from the newer members who had not been here in 1992 when the initial hearings for the ordinance were held. The definition is broad but is on the books and was approved by the town. We did not change the ordinance, but changed the definition by limiting the size of the wetland. The existing definition of isolated non-bordering wetland is well defined. We request after hearing the additional evidence and personal review since the last ZBA meeting that the ZBA not overturn the seriously considered decision of the Planning Board.

Brandt asked for wetland sizes: wetland “A” - 211,896 SF (4.6 ac.), wetland “B” - 62,809 SF (1.45 ac), wetland “C” - 73,869 SF (1.7 ac), wet; and “D” - 983 SF, and wetland “C” - 657,163 SF (15.1 ac). These areas represent only the wetland located on the property in question. The actual area of the wetlands may be larger but is not known. Wetlands A, B and C are isolated wetlands in the opinion of the certified soil scientist.

Johnson asked if the term “isolated non-bordering wetlands” is used anywhere else? Is it a definition widely known? If the town created this term, how can an expert define it?

Berry read the ordinance 409.1 (g) indicating that the intent of the wetland ordinance was to “provide a single and consistent approach for identifying and delineating wetlands based on the most advanced professional standards and scientific analysis”.

Close the public hearing portion.

Iafolla began the deliberation. He indicated that the ZBA does not imply that Forest Griffin or the Planning Board did anything wrong. Research was conducted pertaining to the duties of the ZBA which involve the interpretation and construction of the town ordinance.

Jeppeson stated that if the existing definition does not meet the intent and spirit of the original creators, then it needs to be changed to reflect it properly.

Brandt thought the size of the wetland is significant and believes that the entire area of the wetlands, both on and off the subject property, is germane to the discussion. He finds it difficult to see the wetlands of this size isolated. However, wetland “D”, 983 SF, could be isolated because of its size. If its greater than 50,000 SF its significant. He discussed the three points Roberts brought up in the beginning of his

argument, 1. Jurisdiction of Board, 2, Scope of review -wetland size is an issues, and 3. validity of decision, which Brandt believes their decision was valid and based on fact.

Mackin said in 1992 the ZBA asked the Planning Board to draft an ordinance to make it more palatable to fill in buffer areas around relatively small wetlands, such as the wet area created when a tree falls over.

Johnson agreed that not stating a size limitation in the definition is a weakness. His feelings have been aired previously and by the Board. His decision will not change.

Iafolla said the definition has not been challenged or brought before the ZBA before. The ZBA has a right as a quasi judicial board to interpret the intent of the ordinance and request that it be polished to better meet the intent after it has been challenged.

Jeppeson made the motion to uphold the previous decision. Brandt seconded it. Motion carried.

Mackin steps down because he is an abutter. Kelleher (alternate) sits on board.

Case 97:23 Rehearing for Variance to Turner Porters Rocky Ledge Subdivision.

Berry (Associate from Jones and Beech engineers), presenter. Summarized previous discussion and subdivision. Original 20 lot subdivision, 20,000 SF wetland impact. Change to 17,500 SF wetland impact. State approved for 17 lot subdivision. Wetlands board approved 13,570 SF wetland impact. Planning Board approved conditional use for filling in over 3,000 SF of wetland near the road. Developer eliminated one lot to accommodate abutters concern. Proposed to donate 18.9 ac. to conservation. Final Planning Board approval was for 16 lots. Number of lots presented in June to the board has not changed.

Brandt asked for, and received, clarification on the two lots fronting South Road in Rye, that have a portion of their property in North Hampton, abutting Rock Ledge.

Berry showed plans of wetland buffer impact. There is 15,146 SF of fill in the buffer area, and 5,078 SF in the wetland. The impact to the wetland is the same as it was presented in June.

What is new for this meeting includes the design of a cross culvert, or equalization culvert, at station 9+50, to allow for water to flow either direction under any drainage condition. Also, in response to last meetings concerns, a new cross section for the roadway is proposed. The road is elevated, unsuitable materials will be removed. Water from wetlands should not drain under road because a clay barrier is proposed. The engineering intent was to keep water where it is.

The five criteria for a variance:

1. Hardship. Access to lot does not conform to required frontage for a building lot.
2. Property values. The properties will be of similar or better in value. Convenents are proposed which will limit visual impact to abutters.
3. Public Interest. The Hampton Water Works (HWW) has a water storage tower proposed for the area. This subdivision will grant them access with water pipes. Otherwise, the pipe would go through the existing easements off Mill Road, and cause a lot of wetland impact. North Road will be improved in conjunction with Highway Agent Bob Stroudt.
4. Substantial justice. This subdivision is productive use of good, uplands (39 ac).
5. Spirit.

The board asked Iafolla if he thought the new road cross section was acceptable and addressed earlier concerns. Iafolla thought it was much less intrusive and a better design.

Kelleher asked if the road could be redesigned to lessen the impact?

Berry responded it could not unless the board granted variances for curvature etc. The existing design is the best scenario in adhering to the towns road design criteria while trying to minimize wetland and wetland buffer impact.

Jeppesen asked Iafolla if this road design would dry up the wetlands as previously discussed. Iafolla said this design is less intrusive, and has a lot less chance of drying up the wetlands than the previous design.

Open discussion to Public.

David MacArthur, 2 North Road. Presented his version of the plan and wetlands. Conservation commission unanimously voted no to this project. They would allow for one house only. This is not a reasonable use of the property Case Law questions reasonable use vs. productive use. Asked questions about HWW water tower. No hardship in this property except for financial gain to developer. Office of State Planning recommends a buffer of 100 feet to any wetland. Town ordinances should be a minimum and a variance not granted.

Charlotte Cox, 4 North Road. Pointed out that this is a sophisticated developer, sophisticated attorney and sophisticated engineer telling us it is OK. It is not the best use of the land, it is a wetland and should remain a wetland.

Ken Snee, Park Circle. Asked why if there is a restriction (imposed by developer) to not put any homes within 600 feet of North Road, this restriction couldn't be put on Park Circle? He would like to see a buffer of no homes between his house and any building in this subdivision.

Mac Arthur. Two other lots will need variance for their driveways. He can't see expensive homes comfortable with gravel drives.

Engineer and Board discussed redesigning the road to lessen impact on wetland and wetland buffer. Variance would be necessary to design a road not according to town subdivision regulations.

Discussed the HWW water storage tower and advantage of the subdivision for access.

Berry mentioned there is a 10 foot wide buffer with plantings between Snee's property. Snee mentioned that they had discussions, but he has no signed contract. Porter said there is a "no cut" zone along the property line also. Clarified that lot 1 has been eliminated.

Brandt asked if the access to lot 2 would need a variance to pave the drive? Berry responded yes.

Jeppeson asked for clarification of the ZBA role pertaining to access off North Road. Appears Planning Board granted approval through conditional use, and the State granted approval for wetlands crossing. Where is the v variance being requested?

Roberts said five areas. Porter added that the conditional use permit granted by the Planning Board is not in question.

Brandt asked then these five areas along the road need a variance, but do the lots need a variance for drives? Berry responded no, the drives remain gravel and would not need a variance.

Brandt does not want to see any part of this subdivision before them again for a variance from wetlands for anything. Porter mentioned this could be put into the Convenents. Brandt wants to make sure that the agreement between Porter and Snee is real and acceptable to both parties. Snee asked about the 600 foot buffer. Porter said this was never mentioned by Snee before as a concern.

Mackin said there would be no hardship in the individual lots for a granting of a variance to wetland buffer.

The subdivision plan would have to go back to planning board for approval, which would involve a review by Appledore.

Porter said whatever the ZBA would like in the covenants regarding any variance etc. he would be happy to include.

MacArthur concerned that restrictions such as those could be considered unconstitutional.

Board discussed that 409.10 is not appealable, and discussing the conditional use permit and the wetland crossing at the entrance of the property is not to be conducted. Board received legal opinion and determined it is not an issue.

Iafolla said that he has a problem with the hardship issue and feels it is an economic hardship which is not an issue to deal with. Also, "quality lots". People here and in the town believe wetlands have a value.

Berry mentioned that the developer is giving 18.9 acres of wetland to the conservation commission. Thirteen acres of headwater of North Brook are protected. Covenants on homes will promote protecting the wetlands. There is beautiful buildable lots in back that need access. The subdivision size is 65.8 acres (total)

Roberts mentioned many of the individual lots Porter has purchased or has an agreement with are landlocked and could not be productive otherwise.

Iafolla took exception to this statement. Most of the remaining land in town is like that.

MacArthur stated that access could be granted from Park Circle and no wetland impact would be impacted. Porter mentioned that the covenants of Park Circle preclude this.

Public session closed.

ZBA deliberation.

iafolla. New roadway design much better. Culvert a good idea.

Brandt. Voted in favor of variance before. He sees nothing besides the roadway has changed. Hardship is that there are 39 acres of dry land on a 60 acre parcel. Building won't occur in the wetlands. A reasonable use would be a subdivision. Inclined to vote in favor of variance conditional on Snee's approval of buffer.

Kelleher. Voted no last time. Has problem with hardship. Trying to define hardship and follow guidelines of ZBA's responsibilities. This land is not different than other land in area. There are no specific conditions which make it different, i.e. a hardship. Would granting this variance mean all other land could be subdividable? Read from Master Plan questionnaire with respect to residents response to saving open space and wetlands.

Johnson. Voted no before. Feels direct invasion of wetland at front of property in unnecessary. Land can be used as a single building lot with a gravel drive.

Jeppeson. Last time hardship was unclear. Can see the hardship with this land now. No other access from anywhere else. Allowing access to property is possible, but meandering the road through the wet areas is not.

Iafolla. Approach is better with the new road and culvert design. Hardship still a problem. Hardship is self imposed. Petitioner has done a good job in trying to engineer around situation.

Brandt. The road is only encroaching on the 50 foot setback, Our old setback used to be 75 feet and we changed that because it was unworkable. Entrance is not the issue.

Johnson makes motion to deny variance. Jeppeson asks cant we change the variance request? Iafolla states the board must look at what is before them only. Kelleher seconds. Motion carried 3 to 2. Iafolla, Brandt opposes.

Case 97:31 Lamprey. Lot is less than 2 acres by 0.1 acres. House and addition meets setbacks.

Case 97:32 Sanborn. Sign is less than 6 feet from the ground, as required, but it will not visually impact site distance.

Case 97:33 Wilson for apartment in house. Tabled until October 15, 1997.

Case 97:36 Auto Shine signs. Frank DiTomaso presented. Showed pictures of old signs and new signs. See's the new signs as an improvement. Old signs 72 SF, new signs 42 SF. Had problems with customers finding vacuum pumps located in front of property. Added new yellow and red awnings. Favorable response from customers.

DECISIONS

Case 97:31 Motion made by Brandt, seconded by Mackin to approve. Motion carried.

Case 97:32 Motion made by Johnson, seconded by Jeppeson to approve. Motion carried.

Case 97:33 Motion made by Johnson to approve. Seconded by Mackin. Carried 3 to 2, Iafolla and Brandt opposed.

OTHER BUSINESS

Read rehearing request for Don Little for home occupation on Birch Road. Rehearing granted.

Read letter from D. Kohlhasse regarding status of Atlantic Ave and Planning Board approval for new site. Board directed building inspector to prepare a letter stating that once he legally owns this new property, he must move everything out of Atlantic Ave.