

Applicant: Chisholm Farm Development, LLC
41 Chisholm Farm Drive

Members Present: John Dold, Neil Rowe, Bruce Barker, Arol Charbonneau and
Brad Owens

The Board of Adjustment held a Public Hearing on Tuesday, May 26, 2009 at 7:30PM in the Municipal Center to consider the request of a Variance to the terms of Article XI, Section 11.5.3 of the Zoning Ordinance. Applicant asks that said terms be waived to permit the placement of a home which would result in an encroachment by 25 feet into the 50-foot wetlands setback.

Secretary Brad Owens read the notice, the application, the denial letter from Terry Barnes, Code Enforcement Officer, and a letter from Pat Elwell, Chairman of the Stratham Conservation Commission, recommending that the Board of Adjustment allow the proposed building.

Chairman Dold asked the applicant to present his case. Attorney Bill Tanguay, of McNeil, Taylor and Gallow, stated he is representing the applicant. Attorney Tanguay stated the file should also contain two plans. The first plan was the one submitted to the Conservation Commission which requested the creation of wetlands. The second and final plan, which is the site plan, shows the location of the house. Attorney Tanguay stated on the plan there is an outline as to where the building could be located and not require a Variance and then where the building is actually located which does require a Variance. It shows that it is encroaching 25 feet into the buffer, which is 50 feet.

Attorney Tanguay stated that Tim Noonan, Project Manager, has been shepherding this project from the beginning. He has met with the Code Enforcement Officer, the Planner and was directed to the Conservation Commission. Attorney Tanguay stated he suggested creating more wetlands to mitigate the situation and the Conservation Commission looked at the plan and did not like that option. They preferred that no new wetlands be created. It is okay to be 25 feet into the encroachment of 50 feet as long as the applicant creates a clearly delineated line at the wetlands so that it will be clear and the inadvertent intrusion into the wetlands won't occur if the applicant creates the kind of buffer the Conservation Commission suggests.

Attorney Tanguay stated Stratham's Zoning Ordinance pertaining to the Wetland Conservation District Overlay starts out by stating it is intended to provide guidance for the use of the areas of the land with standing water over extended periods of time, to control the development of structures, to prevent destruction of natural wetlands and to encourage those types of uses that can be appropriately and safely located. Attorney Tanguay added they believe that what they propose to do is consistent with the Zoning Ordinance and meets all the criteria for a Variance. If the building were to be placed closer to the road they wouldn't need a Variance, but then the house would be out of line with the other houses on the street. He added our courts have said that esthetics is an

important consideration when it comes to Variances. This house, if placed closer to the road, will not be esthetically pleasing as opposed to the proposed location.

Neil Rowe asked if the adjacent houses were already built, to which Attorney Tanguay responded yes. Neil Rowe asked when the subdivision was done was the placement of the houses included in the subdivision. Tim Noonan responded there were preliminary placements of houses on the original subdivision plan but these three houses that abut are on a common leach field and the driveways could be either on the left or the right since it isn't dictated by a leach field. Mr. Noonan added the house that is to the left, Lot 23, is reverse of the actual location to where the driveway is.

Chairman Dold asked Charles Grassie, Town Planner, if house locations on a subdivision plan submitted for approval to the Planning Board can change. Mr. Grassie responded most certainly, particularly in a subdivision where people can put their houses just about anywhere as long as they meet the setbacks that are required. Mr. Grassie added in a condominium or cluster type of development they can also move within the house lot as long as they meet the setbacks. He explained even though there is a location of a house that has been put on a plan, all it does is shows that it can fit, there is a building envelope and anywhere within that envelope the home can be placed. Attorney Tanguay stated on the subdivision plan it shows that there is a location where a house can be located but it doesn't mean that the house will be located in a particular foot, it will be somewhere within the footprint.

Attorney Tanguay stated the first criteria for a Variance is that the proposed use would not diminish surrounding property values. Attorney Tanguay stated the placement of the house as proposed would keep it set back from the road a similar distance as surrounding houses. This would be consistent with the uses in the neighborhood. It would then serve to promote surrounding property values. He added if the house were to be placed closer to the road, he feels it would diminish surrounding property values. Attorney Tanguay then discussed the second criteria which is granting the Variance would not be contrary to the public interest. He stated the purpose of the Zoning Ordinance is to promote general health, safety and welfare in the community. The purpose of the Wetland Conservation District Overlay is to provide guidance for the use in the area so as to prevent the destruction of natural wetlands and to encourage those uses that can be appropriately and safely located therein. He added this proposal has been reviewed by the Conservation Commission which has recommended its approval with a clear delineation at the wetland. The third criteria is that the denial of the Variance would result in unnecessary hardship. Attorney Tanguay stated this is a new development of larger homes. This particular lot has a small finger of wetlands that juts out in the rear of the lot and the 50-foot buffer would require that the home be placed closer to the road than would be consistent with others in the neighborhood. The fourth criteria is that granting the Variance would do substantial justice. Attorney Tanguay stated that with a clear delineation recommended by the Conservation Commission no harm would be done to the wetlands and no harm would result to the community. The fifth is that the use must not be contrary to the spirit of the Ordinance. Attorney Tanguay stated the courts have said that the public interest criteria and the spirit and intent criteria

are somewhat the same and they overlap. The purposes of the Zoning Ordinance and the Wetland Conservation District Overlay are satisfied, so this application meets the spirit and intent criteria as well. Attorney Tanguay asked that the Variance be granted with the two conditions that there be a clear delineation as to the wetlands and that it be indicated that no further Variances will be granted any closer to the setback than is currently being proposed.

Bruce Barker asked where the delineation will be. Attorney Tanguay responded the delineation will be at the wetland itself, adding that a delineation 25 feet from the wetland would be on the deck. Pat Elwell, Conservation Commission Chairman, stated they recommended pine trees as a buffer since they would grow larger and they would grow in the shade that is already there. The large rocks would be boulders that are already on site that would prevent someone from mowing further into the wetlands. Ms. Elwell stated the buffers exist for a reason which, in this case, is for runoff which will come off the roof and deck and go into the wetlands. The more buffer that you have the better it is for the wetlands.

Neil Rowe stated by moving the proposed house back, the buffer area between the construction site and the existing wetlands is going to shrink. He asked how important is the buffer zone during construction. Ms. Elwell responded it is very important, it needs to be marked and they will be required to put up a silt fence to prevent any drainage from going into the wetlands. Mr. Noonan added they have the wetlands delineated by Jones & Beach and they will put the silt fence up according to the layout of the wetlands. The silt fence is on the certified plot plan that Mr. Barnes receives and inspects. Neil Rowe asked if they would have to put additional silt fence since they are 25 feet from the wetlands rather than 50 feet. Mr. Noonan responded they could put in retainage such as hay bales if that was a request of the Zoning Board or the Town. Mr. Barnes stated in the Zoning Ordinance under Section 11.5.3, it states there shall be no disturbance in the buffer zone within 25 feet of Hydric B soils. He added that construction vehicles would drive right up to the wetlands. Neil Rowe stated the applicant would need two Variances, one to allow the finished product to exist within 50 feet and the other to allow him to get within 25 feet to build it. Brad Owens stated that the application is actually looking for a Variance from Section 11.5.3 which pertains to the 50-foot setback. Arol Charbonneau asked if the Conservation Commission was aware of the fact that it would include disturbing within the 25-foot area. Ms. Elwell responded no, adding that that was not a consideration of theirs. Ms. Elwell questioned the definition of no disturbance. Brad Owens responded the area will remain in its natural state and will not be subject to grading, excavation, filling or other activities associated with the development of land. Mr. Barnes suggested putting the silt fence in the middle of the 25-foot setback. Mr. Noonan stated if they are going to plant pine trees and move large boulders, they will need to use an excavator or a piece of equipment of fairly good size. Ms. Elwell added they will not be grading, excavating, digging or filling within the 25-foot setback, and suggested some type of stipulation as to how it will be corrected if there are ruts that end up being created next to the wetlands. Mr. Noonan said after the finish grade is set and they rake any ruts or anything that is disturbed the entire area is sod, so they are not

waiting for seed and having erosion issues as far as the wetlands are concerned. Ms. Elwell suggested the Board stipulate what size trees will be planted.

Mike Makabali, 43 Chisholm Farm Drive, said his propane tank is in the back of his house and asked if that's where it will be for this house. Mr. Noonan responded they cannot be within ten feet of the sideline setbacks for the gas tanks, so they would probably put it on the other side of the house.

Chairman Dold asked if anyone would like to speak in favor of or in opposition to the applicant. Mike Makabali, 43 Chisholm Farm Drive, stated as long as it is not going around his lot and is going straight back it is fine with him. Mr. Noonan stated they are not asking to change the size of the lot just the location of the home.

Chairman Dold asked if the benefit sought could not be achieved by some other method reasonably feasible to pursue. Attorney Tanguay responded they could place the building such that they don't need a Variance, but they seek the Variance because they think this is a better location. He added it meets all the purposes of the Zoning Ordinance, it meets the purposes of the Conservation Overlay District and to place it in a location which would satisfy the Zoning Ordinance doesn't create a reasonably feasible alternative. He added it can be done but it creates a situation in which the house is too close to the road, it's out of step with the neighborhood, it's too close to the swale and it creates an awkward situation. He added it's possible but it's not reasonably feasible.

Brad Owens expressed his concern with the 25-foot, no-disturb zone. He feels it will be difficult not to disturb it. Ms. Elwell stated they hadn't actually considered how they would dig within the 25 feet. She added when they do no-disturb in wetlands, it means they can't be digging in and actually changing the wetlands, they are basically on top of the ground. Ms. Elwell said in the end it will be a better buffer when they are done with it.

Attorney Tanguay stated this project was started by another developer and approved around 2001 and purchased by Eric Katz around 2003. When the plan is submitted and accepted as complete, the Zoning Ordinance that exists at that time is the Zoning Ordinance that will apply to that subdivision through its build-out. Subsequent changes to the Zoning Ordinance won't affect it.

The Board then discussed what conditions they would impose. They agreed with the creation of plantings and large rocks. Chairman Dold stated the project was approved in 2001 and there was no requirement in 2001 for a no-disturbance buffer zone. Because of the proximity to the wetlands, Brad Owens mentioned the need to protect that during construction with some additional barriers.

Chairman Dold stated in order to grant a Variance the following conditions must be met: A) No diminution in value of surrounding properties would be suffered. All Board members agreed there would be no diminution in value of surrounding properties. B) Granting the permit would not be contrary to the public interest. Bruce Barker and

Neil Rowe agreed granting the permit would be contrary to the public interest. Chairman Dold, Arol Charbonneau and Brad Owens agreed granting the permit would not be contrary to the public interest. C) Denial of the Variance would result in unnecessary hardship to the owner seeking it as defined by the following: 1. An area Variance will be needed to enable the proposed use of the property given the special conditions of the property. Bruce Barker and Neil Rowe felt an area Variance will not be needed while Chairman Dold, Arol Charbonneau and Brad Owens felt an area Variance is needed; and 2. The benefit sought cannot be achieved by some other method reasonably feasible to pursue other than an area Variance. Bruce Barker and Neil Rowe agreed the benefit sought could be achieved by some other method while Chairman Dold, Arol Charbonneau and Brad Owens felt it couldn't be achieved by some other method. D) By granting the permit substantial justice would be done. Bruce Barker and Neil Rowe both felt substantial justice would not be done while Chairman Dold, Arol Charbonneau and Brad Owens felt substantial justice would be done. E) The use must not be contrary to the spirit of the Ordinance. Bruce Barker and Neil Rowe felt the use is contrary to the spirit of the Ordinance while Chairman Dold, Arol Charbonneau and Brad Owens felt the use is not contrary to the spirit of the Ordinance. Brad Owens motioned to approve the Variance for Case # 536 Article XI Section 11.5.3, Items A through C. The Board recognizes that Section 11.5.3 Item D did not exist when the subdivision was approved. The Variance is granted with the following conditions: 1) The applicant shall plant evergreen trees and place large rocks to clearly delineate the existing wetland as directed by the Stratham Conservation Commission; and 2) The applicant shall install silt fence within the no-disturb zone as directed also by the Stratham Conservation Commission. Arol Charbonneau seconded the motion with Chairman Dold, Arol Charbonneau and Brad Owens voting in favor and Bruce Barker and Neil Rowe voting against the motion. Chairman Dold advised the applicant of the thirty-day appeal period and called Case # 536 closed.

Respectfully,

 Norma Corrow
 ZBA Clerk

The tape of the meeting is available at the Town Office Building for review during regular business hours.