

1 **TOWN OF SUNAPEE**

2 **ZONING BOARD**

3 **MARCH 15, 2018**

4 **PRESENT:** Daniel Schneider, Chair; Aaron Simpson; William Larrow; George Neuwirt; James Lyons, Jr.;
5 Nicole Gage, Zoning Administrator

6 **ALSO PRESENT:** See Sign-in Sheet

7 Chairman Schneider called the meeting to order at 7:00 pm.

8 **CASE #ZBA18-01: APPEAL OF AN ADMINISTRATIVE DECISION: PARCEL ID 0225-0030-0000, 100**
9 **YOUNGS HILL RD., EMILIO & SUSAN CANCIO-BELLO: THAT THE TIMBER HARVESTING THAT OCCURRED**
10 **ON LOTS 0225-0028-0000 AND 0225-0027-0000 "APPEAR TO BE SELECTIVE CUTS, NOT CLEARING, AND**
11 **SO THE TIMBER HARVESTING DID NOT ELEVATE TO THE LEVEL OF BEING IN VIOLATION OF THE**
12 **SUNAPEE ZONING ORDINANCE, SECTION 3.40(N), WHICH WOULD HAVE REQUIRED ENGINEERED**
13 **SEDIMENTATION AND EROSION CONTROL PLANS."**

14 Attorney Stephen Wagner from BCM Environmental and Land Law spoke on behalf of Ms. Cancio-Bello.

15 Attorney Wagner explained that this appeal is regarding the decision that the Zoning Administrator gave
16 on January 25, 2018 regarding the cuttings that occurred on Lots 28 (Henry) and 27 (Gallup) that they
17 "appear to be selective cuts, not clearing, and so the timber harvesting did not elevate to the level of
18 being in violation of the Sunapee Zoning Ordinance, Section 3.40(n), which would have required
19 engineered sedimentation and erosion control plans." They are asking the Board to determine if this
20 was an erroneous conclusion. In an appeal, the Zoning Board has the ability to take on the powers of
21 the Zoning Administrator and issue any relief that the Zoning Administrator could have issued. Attorney
22 Wagner continued that it is their interpretation that the Zoning Administrator incorrectly interpreted
23 and applied 3.40(n) and that the correct interpretation requires that at least Mr. Gallup, if not both
24 owners, prepare engineered sedimentation and erosion control plans and, therefore, the Zoning
25 Administrator's decision be vacated. Attorney Wagner continued to explain their reasons for the
26 appeal.

27 Chairman Schneider asked if Attorney Wagner has any case precedence that supports his interpretation.
28 Attorney Wagner said that there is no direct case on point of this specific scenario of an Intent to Cut
29 being an application of 3.40(n), however, the notice of intent does go into considerable detail with case
30 law regarding the standard of review for this Board and how an Ordinance should be interpreted
31 without a definition.

32 Mr. Larrow asked if Attorney Wagner or anyone else has looked at any slopes on the property. Attorney
33 Wagner said that they currently have employed a wetlands analyst and are considering an engineer to
34 look at the property. They only have authority to view Ms. Cancio-Bello's property; Mr. Gallup would
35 have to give permission for them to view his property.

36 Mr. Larrow asked if there are any before and after photographs of the land. Attorney Wagner said that
37 he does not have any photographs of Mr. Gallup's land. Ms. Cancio-Bello said that she has a Google
38 satellite image of the land before and after the cut.

39 Attorney Wagner said that under the Ordinance, the Board would have authority to suspend the hearing
40 tonight and conduct a site analysis themselves.

41 Chairman Schneider said that while they are waiting for pictures, that he was remiss in the opening of
42 the meeting to welcome the newest elected member, Jim Lyons.

43 Attorney Wagner said that Ms. Cancio-Bello does not have the pictures of the property, but he'd be
44 happy if the Board would grant them additional time to supplement the record and the preliminary
45 information from the wetlands scientists.

46 Attorney Wagner spoke about the Memorandum written by Ms. Gage that was submitted to the Board
47 dated March 2, 2018.

48 Mr. Simpson said that Attorney Wagner submitted a lot of unmarked exhibits such as minutes that are
49 seven pages long and asked what should be referenced as relevant to his argument. Attorney Wagner
50 said that is provided in the notice of intent; though he understands that the record is voluminous. The
51 citations in the notice of appeal on page one reference each of the exhibits and he'd be happy to walk
52 the Board through each one. There was further discussion regarding this matter.

53 Chairman Schneider said that they are a Zoning Board and not a court of law; it is not in their jurisdiction
54 to determine if there were damages, the extent of damages, or the causes of damages. The appeal is on
55 the Zoning Administrator's decision of enforcement of the Zoning Ordinance. The Board is looking at
56 whether or not they agree with the decision.

57 Chairman Schneider asked if there were any comments or questions from the audience regarding the
58 case and there were none.

59 Ms. Gage said that Exhibit A of Attorney Wagner's submission is her entire file, which she gave to him.
60 The first letter the Town received was dated January 13, 2018 from Ms. Cancio-Bello and there were
61 numerous emails back and forth between herself, the Planner, the Planning Board Chair, etc. She spoke
62 to the property owner and was asked to summarize a letter on January 25th after the Peer Review
63 Meeting. She thought the decision had already been made by the Town in 2016 when the Intent to Cut
64 was issued. She thought her role was to alert the Planning Board Chair as they were considering the
65 Subdivision, which she knew was actively being considered and she wanted the Planning Board to know
66 of the concerns right away. Ms. Gage read from her Memo to the Board and distributed copies of three
67 aerial photos from the Town's GIS system from 2010, 2015, and a third image believed to be after the
68 cuts.

69 Chairman Schneider asked if anyone had any questions for the Zoning Administrator and there were
70 none. Chairman Schneider asked if Attorney Wagner had any questions or comments and he did not.
71 Chairman Schneider closed the meeting to public comment.

72 Mr. Lyons asked how much distance is between the Cancio-Bello lot and the Gallup lot. Chairman
73 Schneider reopened the meeting for public comment. Ms. Cancio-Bello said that her property is three
74 down from the Gallup property and she does not know the distance; the Henry's property and the
75 Lantz's property are between them. Ms. Cancio-Bello showed the Board the properties on a map.
76 There was further discussion regarding this matter.

77 Mr. Lyons asked where the water is running onto her property. Ms. Cancio-Bello explained that there is
78 a culvert at the top of her property. The water is coming down the hill and then straight through the
79 property, it does not run down the road at all. Mr. Neuwirt asked if Ms. Cancio-Bello's neighbors are
80 experiencing damage. Ms. Cancio-Bello said that she does not know about her neighbors. She has
81 noticed that the culvert under the Lantz's driveway is bigger, so the water does go through that but hers
82 overflows and it did not start until after the cutting. There was further discussion regarding this issue.

83 Chairman Schneider closed the meeting to public comment. The Board members each discussed their
84 thoughts about the case.

85 Chairman Schneider asked how many Board members are in favor of the appeal and there were none.
86 Chairman Schneider asked how many Board members were opposed to the appeal and it was
87 unanimous.

88 Chairman Schneider said that the Board is not engineers and hopefully the problem can be worked out
89 between neighbors.

90 **CASE #ZBA18-02: EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENTS: PARCEL ID 0114-0006-0004**
91 **19 BROWN HILL RD., MARK BRUNELLE: FROM ARTICLE III, SECTION 3.10 OF THE ZONING ORDINANCE**
92 **TO PERMIT A WAIVER OF THE MINIMUM 25' SETBACK TO 19.6' SETBACK**

93 Chairman Schneider said that the Board does not deal with a lot of equitable waivers and gave a copy of
94 the Statute to the Board and read it into the minutes (see attached).

95 Mark Brunelle presented the merits of his case and explained to the Board that they have a copy of a
96 survey of the property.

97 Chairman Schneider asked, and Mr. Brunelle said that there is no house number at the end of his
98 driveway. Mr. Lyons asked, and Mr. Brunelle said that the driveway was plowed up until this last storm.

99 Mr. Brunelle explained that he is applying for the equitable waiver because he does not meet the
100 setback requirements for the Rural Residential Zone; the side and rear setbacks for this lot is 25 ft. The
101 house is on Route 11 and has a lot of vehicle noise and he feels as though the lot should have been
102 zoned either residential or commercial because the setback would be 15 ft. Mr. Larrow asked, and Mr.
103 Brunelle said that the lot is 1.7 acres. Mr. Larrow said that leaves plenty of room to have the house
104 away from the setback.

105 Mr. Larrow asked how the house was built in the setback. Mr. Brunelle said that they are not quite sure
106 how it happened. One end of the house is at 27.2 ft and the other end is at 19.6 ft, however, he set the

107 pins in the hole at 27 ft on both ends. The hole was overdug in the area that is in the setback due to a
108 lot of rain that occurred. He was gone the week that the concrete foreman went to pour the
109 foundation. He then never measured the foundation back to the property line after it was done.

110 Mr. Larrow asked how no one saw on the lot that the foundation was laid at an angle. Mr. Brunelle said
111 that the hill and abutting lot made it difficult to lay it out. The house looks right on the lot due to the
112 contour, but it was set wrong. It was a mistake that he takes responsibility for, however, he is not sure if
113 he set the pin wrong or if the foundation was poured in the wrong location.

114 Chairman Schneider asked, and Mr. Brunelle confirmed that he is both the owner and the builder. The
115 property has been sold, they are waiting for the Board's decision to close.

116 Chairman Schneider said that the Board received a letter from James P. Aubuchon, an abutter to the
117 property, regarding this case and read it into the record (see attached).

118 Chairman Schneider asked, and Mr. Brunelle said that there is not a right of way through his property.
119 Chairman Schneider asked if Mr. Brunelle knows how granting the equitable waiver will impinge on Mr.
120 Aubuchon's desire to create a driveway to the lot. Mr. Brunelle said that he has spoken with Mr.
121 Aubuchon three times and he was in favor of the waiver because he did not want to give up any of his
122 land. Mr. Brunelle said that he is not sure what has changed with Mr. Aubuchon. Mr. Brunelle
123 continued to discuss this matter.

124 Mr. Simpson asked, and Mr. Brunelle explained the location of his driveway off of Browns Hill Rd. Mr.
125 Simpson asked, and Mr. Brunelle said that this lot was not part of the Browns Hill subdivision, it was a
126 separate subdivision done by Bob Bell.

127 Chairman Schneider asked if there was anyone in the audience with any questions or comments
128 regarding the case.

129 Derrick Schneider, James Aubuchon's son in law, said that they live at 50 Brown Hill Rd and also own the
130 property that abuts Mr. Brunelle's property. They feel as though if Mr. Brunelle had stayed out of the
131 setback then the house would not be obstructing the view from their lot as much, but it is close to the
132 property and very visible. Additionally, when Mr. Aubuchon spoke to Mr. Brunelle on the phone he said
133 that he was interested in working together and Mr. Brunelle said that he thought that he'd get the
134 waiver and was not interested in purchasing any of their property. Mr. Derrick Schneider continued to
135 explain his thoughts about the case.

136 Lynn Trainor, 46 Brown Hill Rd, asked if the waiver requirements have been met as it does not sound as
137 though there was a measuring mistake. Chairman Schneider said that that there are two things to
138 consider: one is if the violation was not discovered by the owner until the construction was substantially
139 completed; the other is if the violation was not an outcome of ignorance of the law or ordinance, failure
140 to inquire, obfuscation, misrepresentation, or bad faith.

141 Mr. Derrick Schneider said that the driveway for Mr. Brunelle's property is fairly parallel to the property
142 line and it is pretty clear that the house is not parallel to the driveway or the property line. He has heard

143 that Mr. Brunelle builds a lot of houses in Town and digs his own holes and should have known where
144 the house was on the property. Mr. Simpson asked if Mr. Brunelle has a response to this comment. Mr.
145 Brunelle said that he has been building for over 30 years and never had to file an equitable waiver. It is
146 a mistake and he is taking responsibility for the mistake. Mr. Neuwirt asked if Mr. Brunelle has ever
147 built a house in the wrong location, built on someone else's' property, or come in for after the fact
148 permits. Mr. Brunelle said that he has not. Mr. Neuwirt said that he knows the answer to that question.
149 Mr. Brunelle said that he has never built on someone else's property nor has he come in for after the
150 fact permits. Mr. Simpson asked, and Mr. Brunelle said that the site work was completed by the Bell's
151 and the driveway was already in place.

152 Mr. Larrow asked if Mr. Brunelle feels as though the only possible way to solve this is with the equitable
153 waiver instead of working with the abutter. Mr. Brunelle said that it is untrue what Mr. Derrick
154 Schneider said about purchasing the land as he spoke with Mr. Aubuchon about it and said that he was
155 open to it. He is surprised by the letter that they'd rather sell property, which is fine if they can come to
156 an agreement on the dollar amount.

157 Mr. Simpson asked, and Mr. Brunelle said that the cost of moving this house would be hundreds of
158 thousands of dollars.

159 Mr. Neuwirt said that it bothers him that in Mr. Brunelle's application there is a letter from a real estate
160 agent saying that the impact of granting the equitable waiver doesn't affect anyone's property values
161 and asked who the real estate agent is to Mr. Brunelle. Mr. Brunelle said that the realtor is his wife, who
162 sells all of his properties; she is a professional in the industry. Mr. Neuwirt asked, and Mr. Brunelle
163 agreed that it could be considered a conflict of interest but he could have had another real estate agent
164 say the same thing.

165 Mr. Brunelle said that he'd like the Board to consider an equitable waiver as it is what is fair. He
166 believes that he has demonstrated that this was a mistake and he has never had to file for an equitable
167 waiver before. He believes that it would be the best resolution to the case.

168 Chairman Schneider asked if Mr. Brunelle would find it acceptable for the Board to continue the case
169 until the next meeting, which is on April 5th. Mr. Simpson said that his concern is that Mr. Derrick
170 Schneider's comment is that he represents Mr. Aubuchon and they want to hold this up so that they can
171 take advantage of the situation, which he does not see as the Board's role. If the applicant asks to
172 continue the case, he would support it. Mr. Brunelle said that he would like to continue the hearing to
173 the next meeting.

174 Mr. Simpson made a motion to continue the hearing to the next meeting on April 5, 2018. Mr. Larrow
175 seconded the motion. The motion passed unanimously.

176 **MINUTES**

177 Changes to the minutes from December 14, 2017: The minutes were continued until the April meeting.

178 **MISCELLANEOUS**

179 Mr. Neuwirt said that it has come to his attention that the Zoning Administrator is not doing foundation
180 location verifications. Ms. Gage confirmed that she is not doing foundation inspections. Mr. Neuwirt
181 said that he'd like the Board to have a formal discussion about this issue at the next meeting. There was
182 further discussion regarding this matter.

183 Ms. Gage said that Mr. Platt said that he might want to be an alternate and the Board does need
184 alternates. There was a discussion regarding how alternates are appointed.

185 Ms. Gage said that all of the Zoning Amendments passed. Chairman Schneider said that he'd appreciate
186 the new Zoning Ordinance books as soon as possible. Ms. Gage gave the Board the newest Handbook
187 for Zoning Officials book.

188 Ms. Gage said that at the end of the month the LSPA is having a two-day work shop on landscaping for
189 water quality that she is attending. Ms. Gage gave further information regarding this workshop and that
190 she is going to sit on a panel to discuss Zoning. Mr. Simpson asked and Ms. Gage said that the fee is
191 \$79.00 for the two days and that there might be money in the budget to cover Board members who
192 want to attend.

193 Mr. Larrow made a motion to adjourn the meeting at 8:19 pm. Mr. Simpson seconded the motion. The
194 motion passed unanimously.

195 Respectfully submitted,

196 Melissa Pollari

197 Zoning Board of Adjustment

198 _____

199 Daniel Schneider

_____ Aaron Simpson

200 _____

201 Jim Lyons

_____ William Larrow

202 _____

203 George Neuwirt

TITLE LXIV PLANNING AND ZONING

CHAPTER 674 LOCAL LAND USE PLANNING AND REGULATORY POWERS

Zoning Board of Adjustment and Building Code Board of Appeals

Section 674:33-a

674:33-a Equitable Waiver of Dimensional Requirement. –

I. When a lot or other division of land, or structure thereupon, is discovered to be in violation of a physical layout or dimensional requirement imposed by a zoning ordinance enacted pursuant to RSA 674:16, the zoning board of adjustment shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings:

- (a) That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value;
- (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority;
- (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property; and
- (d) That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.

II. In lieu of the findings required by the board under subparagraphs I(a) and (b), the owner may demonstrate to the satisfaction of the board that the violation has existed for 10 years or more, and that no enforcement action, including written notice of violation, has been commenced against the violation during that time by the municipality or any person directly affected.

III. Application and hearing procedures for equitable waivers under this section shall be governed by RSA 676:5 through 7. Rehearings and appeals shall be governed by RSA 677:2 through 14.

IV. Waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a nonconforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge

of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them.

Source. 1996, 226:4, eff. Jan. 1, 1997.



4687 225th Ave SE
Sammamish, Washington 98075

50 Browns Hill Road
Sunapee, New Hampshire 03756

March 11, 2018

Zoning Board of Adjustment
23 Edgemont Road
Sunapee, New Hampshire 03756

Re: Case #ZBA18-02
Equitable Waiver of Dimensional Requirements
Parcel ID 0114-0006-0004
19 Brown Hill Road, Mark Brunelle

Dear Friends:

I have recently received notice of the hearing on this matter scheduled for Thursday, March 15, 2018.

I regret that I will be unable to attend the hearing on this short notice, and I have not yet been able to arrange for legal representation. I would ask that the Board postpone any action on this request until its next meeting.

I am not supportive of the waiver request at this time. The proposed waiver would impinge on plans we had been considering to create access from the road to the lower part of our property. Therefore, a decision by the Board to grant the waiver would limit the use of our property, a restriction that I would find unacceptable.

I am also concerned about the precedent granting such a waiver request would have on the enforceability of zoning requirements throughout the town in the future.

However, upon learning of this hearing late last week, I have opened discussions of the matter with the applicant. I hope to be able to reach a mutually acceptable resolution of the issue.

You may contact me at my Washington address, above, or on my cell phone: 603-892-1663.

Thank you for your consideration.

Sincerely,

James P. AuBuchon