



TOWN OF WEARE
PLANNING BOARD
ZONING BOARD OF ADJUSTMENT
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Monday
thru
Friday
8 AM – 4:30 PM

**ZONING BOARD OF ADJUSTMENT
MINUTES
JULY 3, 2007
(Approved as amended 8/7/07)**

PRESENT: David Ruoff, Chairman; Ian McSweeney, Vice Chairman; Forrest Esenwine; Jack Dearborn; June Purington; Elwood Stagakis, Alternate; Naomi L. Bolton, Land Use Coordinator.

GUESTS: Dennis McComish; Ed Naile; Fred Johnson; Lynnellen Johnson; Ginger Esenwine; George Burpee, Sr.; Michael Ryan, Attorney; Malcolm Wright; Heidi Wright; Neal Kurk; Eric Morse; David Erikson; Karen Broemme; Marc Phillips;

I. INTRODUCTION:

Chairman David Ruoff called this meeting to order at 7:30 PM and asked the board members present to introduce themselves. Chairman Ruoff explained to those present the way by which the board conducts business.

II. ADMINISTRATIVE ITEMS:

There were no administrative items for this evening and the board went right to the hearings.

III. PUBLIC HEARINGS:

Case #1207 Dennis McComish – Rehearing
Administrative Appeal, Article 3, Section 3.4.2
Applicant disagrees with the decision made by the Code Enforcement Officer.
Tax Map 411-279 54 Oak Hill Road

Attorney Ryan handed the board three documents with regard to this case on behalf of the abutters Malcolm and Heidi Wright. Dennis McComish and Ed Naile were present as well. Mr. Naile also handed each board member a package of information as well. The board decided to take a brief recess to have a chance to read all the information that was just handed to them.

Mr. Naile stated he was the president of the NH Coalition of Taxpayers. They have an interest in the case because they feel it flies in the face of the ordinance. The McComish property was and still is a residential use pre-existing the adoption of the Weare Ordinance. This residence is and always has been in a residential

district. The McComish property is exempt from the Weare Ordinance regarding pre-existing nonconforming uses, as it is NOT non-conforming to the district it is in. The cease and desist was based on the false assumption that the McComish home was a “discontinued non-conforming use” which means the Town of Weare issued it improperly. The Town of Weare has the burden of proof to show that this property has been discontinued, or in other words, abandoned. The Town of Weare Zoning Ordinance is silent regarding any standard for abandonment or discontinuance of a residence in a residential district. The cease and desist order from the Town amounts to a taking of the McComish property. Mr. Naile read back to the board that the cease and desist was based on which was 3.4.1. He also gave the board a copy of the NH practice and procedures, book 15 of that series which 15 & 16 deal with land use and planning. This is what lawyers usually refer to when they are looking at an issue.

Dennis McComish handed the board a plot plan; septic design; septic approval from the State; a well release form; receipts for septic items; receipts for lawn mowing; a photo of the area that where the septic is proposed to be installed, etc. They are submitting these as evidence of actions taken to improve the property and natural progression of activities that a normal owner of property would take. Their argument is that they are a pre-existing use, conforming use when the zoning ordinance was adopted. The building has been there since 1874. The use has not changed. They feel they shouldn't be subject to a cease and desist and they shouldn't be asking for a variance. Mr. Naile then went through the rest of the information that he presented to the board.

Approving Abutters: None

Disapproving Abutters: Attorney Mike Ryan was present and stated that the first thing he handed the board was an objection to the granting of the rehearing. Obviously they didn't have a chance to do that because the way rehearings are granted, which is kind of unfortunate because the board granted the rehearing contrary to the law. In that the representation they made of what the law is in their request, is not the law. Attorney Ryan stated that he doesn't know what Mr. McComish's issue is, and Mr. Ryan can't figure out why Mr. McComish can't understand what the Supreme Court says. In the request for a rehearing they make an argument for a grandfathered conforming use, there is no such thing in the State of NH. If it is conforming it doesn't need to be grandfathered. To the extent they are saying they are not a non-conforming use. That is just wrong. It is against the law in the State of NH. The Supreme Court is clear. Even if their use in terms of the residence is allowed in a residential zone, if at the time that zoning went into affect you did not meet the area requirement you become a non-conforming use, which is exactly what the zoning ordinance says in article 3.4. The second item was a copy of a recent Supreme Court decision of Melvin Severance, II vs. Town of Epsom. The third item were three copies from the assessing department regarding the property. Attorney Ryan stated that clearly under the New Hampshire law, they are a non-conforming use. The structure

exists on 0.16 acres of land. That is a non-conforming lot. Is it an allowed use? Yes in the sense that it is a residential area and it is zoned residential but it is a non-conforming lot, which makes it a non-conforming use. As to the abandonment, they presented last time the fact that in 2004 he was given a cease and desist and was requested to come before this board and he didn't do anything. He sat on that for a couple of years before deciding to do something. That in itself is abandonment. He was told that he had to do something. He didn't take any action to come before this board, as he now has to overturn the decision of the code enforcement officer. That is abandonment. Attorney Ryan stated that he didn't care if he went in and used it. That doesn't matter. He was told you can't do it, and once you are told you can't do it, if you go do it illegally that doesn't make it right. You can't show that he hasn't abandoned it by illegal action that is allowing his behavior to overcome. It just isn't allowed under the law. They submitted today something that the Board of Selectmen signed in 1992, even at that time the house, other than the fact that Mr. Rice had lived there for so many years, the main part of the house was destroyed in 1970. It didn't have septic. It didn't meet any of the codes in 1970 and it certainly didn't meet the codes in 1990. He understands the Town of Weare allowed Mr. Rice and other residents to live in residences that today wouldn't be approved. But to say that somehow that is a residence when in fact it doesn't meet the codes and didn't meet the codes back then is a stretch. Their issues are that, first; they are a non-conforming use it is clear under the New Hampshire law. Second; is the extent they were told to do something in 2004 and to say it is a hardship and a taking of his land is not true. He bought the property in 2004. It was clear in 2004 it was a non-conforming lot. It was clear in 2004 what he had to do and what he was told to do by the Code Enforcement Officer; he didn't do that: to Attorney Ryan that is abandonment. The Town has a public interest in enforcing the zoning law but also to make sure that lots of a proper size is what we have in this Town. A house with 0.16 acres wouldn't be allowed under any circumstances, and, how the zoning reads, he is not sure he could get a variance to allow it. A special exception is another route.

Chairman Ruoff stated he has a question for Attorney Ryan, take the condition of the property and the house out of the equation, bring it up to code, it was never destroyed by fire, it had plumbing and everything but it is still a non-conforming lot, how does that affect, suppose someone wants to just pack up and travel to Europe for 6 years. Attorney Ryan interrupted and responded they haven't abandoned it if they've gone to Europe for 6 years that is not what the law means for abandonment. Chairman Ruoff asked, so it has something to do with the intent of the owner? Attorney Ryan responded, yes. Chairman Ruoff continued, what if the intent is to eventually fix it up, when they return is it non-conforming. Chairman Ruoff stated that he disagreed with the interpretation of the court case that Attorney Ryan attached.

Forrest Esenwine stated the way he reads the court case is that the Town of Epsom indicated that the change to a year round residence was a substantial change.

changing the location of the entrance so that it can be a shared entrance. Mrs. Johnson then addressed the seven conditions needed for a special exception as follows:

1. The specific site is an appropriate location for such a use or uses in terms of overall community development: The appearance of the house won't change. As a family we will be better situated to support each other in the short and long term future.
2. The proposed use will not adversely affect the neighborhood and shall produce no significant reduction of real estate values in the neighboring area: The existing appearance will not change.
3. The proposed use will not be nuisance or serious hazard to vehicular traffic or pedestrians: only one additional car will be added to ample parking area.
4. The proposed use will not cause an undue burden on the Town through the provision of basic Town services: There will not be a school system involved.
5. Adequate off-street parking be provided if determined necessary by the Zoning Board of Adjustment: There is adequate off-street parking. There is presently 200 feet plus parking.
6. A buffer may be required to screen neighboring uses from the proposed use. Buffers may be fence screens, dense planting of suitable trees and shrubbery, or naturally occurring shrubs and trees: The existing buffers will remain.
7. The Zoning Board of Adjustment, in granting any special exception, may include such restrictions or conditions to insure compliance with this section: This is a long term plan for which my family to live in. The purpose of our proposal is not to rent this space to non-family members. We would be happy to make any special exemption which clarifies the purpose.

Approving abutters: None

Disapproving abutters: None

Public at Large: None

Other Boards: None

Chairman Ruoff closed the public hearing at 8:56 PM.

BOARD DISCUSSION: No board discussion was held as the request appeared to be very straight forward.

CASE DECISION: Jack Dearborn moved to that conditions 1-7 be accepted as presented; June Purington seconded the motion. Vote: unanimous in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine). Chairman Ruoff moved to grant the special exception for Case #1407 as requested; Ian McSweeney seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed.

Case #1507 Marc Phillips Automotive Service (Owner: George Burpee)
Special Exception, Article 24, Section 24.8
Applicant is requesting permission to continue allowing the parking on this lot within the setback.
Tax Map 411-107 7 Renshaw Road

Marc Philips was present. Mr. Philips explained to the board that the purpose for being here tonight is for a special exception to continue to allow parking on this lot in the setback. Mr. Phillips explained that he went to the planning board for a site plan for a change of use on this property. It used to be a garage and then was changed to a landscape supply place and he would like to change it back to a garage. It was during the site plan review process that the planning board discovered that a special exception is needed to allow parking in the setback, which is why he is here. Without any further explanation Mr. Philips went through the seven conditions as follows:

1. The specific site is an appropriate location for such a use or uses in terms of overall community development: Site was approved by the planning board on April 26, 2007 for use as an Auto Repair and Sales shop. The business was originally opened in 1987, prior to zoning.
2. The proposed use will not adversely affect the neighborhood and shall produce no significant reduction of real estate values in the neighboring area: The business is in a commercial zone and meets the requirements of the zone. The State right of way in that area is 50 feet from the center line, extremely much wider than Route 114 north.
3. The proposed use will not be a nuisance or serious hazard to vehicular traffic or pedestrians: The site has controlled access on the secondary (Renshaw) road; no State access is used for this site.
4. The proposed use will not cause an undue burden on the Town through the provision of basic Town services: The shop has its own water and sewer and requires no other Town services. Access is off a Town road, plowing is done by the current tenant.
5. Adequate off-street parking be provided if determined necessary by the Zoning Board of Adjustment: Planning board approved 28 vehicles on existing lot, but must come back to the ZBA because the existing parking lot sits in the setback and has since 1987. Nothing is changing except for the tenant.
6. A buffer may be required to screen neighboring uses from the proposed use. Buffers may be fence screens, dense planting of suitable trees and shrubbery, or naturally occurring shrubs and trees: The buffer exists and is not being asked to change.
7. The Zoning Board of Adjustment, in granting any special exception, may include such restrictions or conditions to insure compliance with this section: The tenant would be willing to comply with any reasonable condition.

Approving Abutters: None

Disapproving Abutters: None
Public At Large: None
Other Boards: None
Chairman Ruoff closed this hearing at 9:05 PM.

BOARD DISCUSSION: No board discussion was held as the request appeared to be very straight forward.

CASE DECISION: Forrest Esenwine moved that conditions 1-7 be accepted as presented; Chairman Ruoff seconded the motion. Vote: unanimous vote in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine). Forrest Esenwine moved to grant the special exception for Case #1507 as requested; Ian McSweeney seconded the motion. Vote: unanimous vote in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine).

Case #1607 David Erikson & Karen Broemme
Variance, Article 18, Section 18.2.2
Applicant is requesting permission to build a screen porch and an addition onto the existing home that already exists in the front setback.
Tax Map 410-076 246 Poor Farm Road

David Erikson and Karen Broemme were both present. Mr. Erikson explained that they would like to build a screen porch to the east and an addition to the north, some of which will be within the 50 foot front setback. Mr. Erikson then addressed the five points of hardship as follows:

1. That there will not be a diminution of value surrounding properties as a result of the granting of this variance because: The proposed addition will enhance the appearance of our house as viewed from the road, because it includes a better designed entry and higher quality materials than the old board and batten and aging door. The new utility room makes the house more efficient in energy use and more acceptable to the average owner. Since the workshop/garage building is already closer to the road than the house and because of the way the land drops off from Poor Farm Road, moving a part of our north wall six feet closer to the street will not appear as encroaching on the street. The addition will allow the changing of the grade and landscaping to settle into the hillside better than previously.
2. That the granting of the variance will not be contrary to the public interest because: This addition is no way hinders the public use of Poor Farm Road. Across the road is currently an orchard and field with a summer home up a long driveway. If a home were built directly across from ours, this addition would not block any additional view and will make more attractive than at present. The fossil energy use of our house will be less resulting in a general environmental gain.
3. That enforcement of the zoning ordinance will create an unnecessary hardship in that the zoning restriction:

- aa. An area variance is needed to enable the applicants proposed use of the property given the special conditions of the property because: Our house was built before there was a Zoning ordinance in Weare. I chose to build close to the road to leave more agricultural land intact, to take advantage of the existing shade trees, to lessen snow removal and to settle the buildings into a good location from both a visual and passive solar standpoint. We have tried many different designs to improve the look and function of our home and adding to the north is the design which we, two builders and an architect have advised.
 - bb. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance because: Because the existing entry, kitchen and utilities (well, pump, plumbing, electric meter and panel) are all on the north side of the existing home, we need to expand to the north to make them more usable and functional. The drainage and lack of damp proofing on the north foundation wall can best be remedied by building a new professionally built foundation just six feet wide to the north of the existing foundation.
- 4. That through the granting of relief by variance substantial justice will be done because: Neither the Town nor the public have any loss and there are considerable gains for the neighborhood and the public.
 - 5. The use, for which the variance is requested, will not be contrary to the spirit of the ordinance because: This house was built before zoning was in effect, and has the look of a still older home. In fact, the assessor's card for years read that I built it in 1890. Like many old farm houses it was built close to the road for practical and aesthetic reasons, nestled into a south facing slope at the edge of open fields and orchard. With the barn like garage/workshop even closer to the road, this addition moving slightly closer to the road will not be at all out of keeping with the overall look or function of the area.

Approving Abutters: None

Disapproving Abutters: None

Public At Large: None

Other Boards: None

Chairman Ruoff closed this hearing at 9:19 PM.

BOARD DISCUSSION: No board discussion was held as the request appeared to be very straight forward.

CASE DECISIONS: Point #1: June Purington moved to accept point #1; Forrest Esenwine seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed. Point #2: Forrest Esenwine moved to accept point #2; June Purington seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed. Point

#3aa: June Purington moved to accept point #3aa; Forrest Esenwine seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed. Point #3bb: June Purington moved to accept point #3bb; Ian McSweeney seconded the motion. Discussion: Chairman Ruoff added that it would require relocation of utilities to put the addition anywhere else. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed. Point #4: June Purington moved to accept point #4; Ian McSweeney seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed. Point #5: June Purington moved to accept point #5; Forrest Esenwine seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine) and 0 opposed.

Chairman Ruoff moved to grant the variance for Case #1607 with the condition that no part of the structure be closer than 29 feet to the front property line; Ian McSweeney seconded the motion. Vote: 5 in favor (Purington, Dearborn, McSweeney, Ruoff and Esenwine).

IV: OTHER BUSINESS:

JUNE 5, 2007 MINUTES: Forrest Esenwine moved to accept the June 5, 2007 minutes as amended; June Purington seconded the motion, all in favor.

VOLUNTEER INTERVIEW: Neal Kurk was present. Mr. Kurk indicated that he would like to serve on the ZBA. He is currently an alternate of a planning board and he would like to also serve on the zoning board because he felt the two boards need some cross organization. Forrest Esenwine moved that the board recommend Neal Kurk as an alternate to the Zoning Board; Chairman Ruoff seconded the motion, all in favor.

V. ADJOURNMENT:

As there was no further business to come before the board, Forrest Esenwine moved to adjourn the meeting at 9:30 PM, June Purington seconded the motion, all in favor.

Respectfully submitted,

Naomi L. Bolton
Land Use Coordinator