

Hopkinton Zoning Board of Adjustment
Minutes
October 2, 2007

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Tuesday, October, 2007, at 7:00 PM in the Town Hall. Members present: Toni Gray, Charles Koontz, John Boatwright, Harold Perkins and Carolyn Hackwell.

Board members unanimously agreed to review the applications out of order due to the fact that Mr. Harold Perkins was present and would be recusing himself from review of the application of Stuart Nelson. At this point in time, Chairman Krzyzaniak, Toni Gray, Charles Koontz, John Boatwright and Harold Perkins began review of Mr. Porter's application.

I. Applications.

TH07-7S-10-1 Jack Porter—Mr. Porter addressed the Board of Adjustment requesting a Special Exception to convert office space formerly utilized by SphereOptics into an apartment/office. The property is owned by Louisa Porter, located at 881 Main Street in the VB-1 (village commercial) district, shown on Tax Map 101 as Lot 5. The application was submitted in accordance with Table of Uses 3.6.A.3 and Section 4.4.3 of the Hopkinton Zoning Ordinance.

Mr. Porter reviewed the layout of the proposed apartment, explaining the need to add a kitchen and shower in the space. Following the conversion, the main building will contain seven apartments with the eighth apartment located in a detached building that was once a garage. Mr. Porter discussed what he believed to be as a demand for apartments, suggesting that he may rent to a person that is interested in living in the apartment and having a business office.

1. Standards provided by this Ordinance for the particular use permitted by special exception.

"The property is located in a mixed use zone with neighbors that are apartment buildings, commercial buildings, single family residences, and mixed business and residential buildings."

2. No hazard to the public or adjacent property on account of potential fire, explosion or release of toxic materials.

"No external changes to the building are proposed. The addition of a new kitchen and shower will be necessary. The property is served by Town water and sewer."

3. No detriment to property values in the vicinity or change in the essential characteristics of a residential neighborhood on account of the location or scale of buildings and other structures, parking areas, access ways, odor(s),

smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials.

"The building has been used for the past twenty-eight years as offices and apartments. The requested change will have no impact on the neighbors or the Contoocook Village."

4. No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity.

"There will be no change in traffic as a result of the use. Currently, there are twenty-four existing parking spaces. The Ordinance requires 1.5 spaces per unit which calculates out to a total of twelve spaces required."

5. No excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police and fire protection, and schools.

"Minimal changes if any in the demand for services is anticipated. The residential use will provide less of a use of water and sewer based on the prior office use having twelve to fifteen employees. "

6. No significant increase of storm water runoff onto adjacent property or streets.

"There will be no changes in parking lot or the building size."

7. An appropriate location for the proposed use.

"The proposed use fits perfectly into a mixed business, apartment building and single-family residence in Contoocook Village."

8. Not affect adversely the health and safety of the residents and others in the area and not be detrimental to the use or development of adjacent or neighboring properties.

"There will be no change to the current use of the property."

9. In the public interest and in the spirit of the ordinance.

"The proposal will improve the current use of the space and provide additional rental housing for the community."

The apartment space had been inspected by the Code Enforcement Officer with no concerns raised.

There was no one present wishing to provide public testimony.

Mrs. Gray, seconded by Mr. Perkins, moved to vote on the application as presented. Motion carried unanimously. With five members voting, all five voted in favor (Gray, Koontz, Perkins, Boatwright and Krzyzaniak). The Board unanimously agreed that the Applicant successfully addressed the criteria to be granted a Special Exception in accordance with Section 15.8.2 of the Zoning Ordinance.

Richard Perkins recused himself for the remainder of the meeting; while, Carolyn Hackwell joined the Board.

TH06-2V-4-1 Stuart F. Nelson— Attorney Mark Puffer representing Stuart Nelson addressed the Board for a Variance from Section 5.2.1 of the Hopkinton Zoning Ordinance requiring a non-conforming lot to have 50-feet of road frontage. The property is located off Clement Hill Road in the R-2 (medium density residential) district, shown on Tax Map 208 as Lot 14.

Review of the application was limited to reconsideration of the substantial justice criterion.

The application was originally denied by the Zoning Board of Adjustment on April 4, 2006, and then on September 5, 2006 (TH06-4V-8-2). On June 5, 2007, after reconsideration of the substantial justice criterion in accordance with the Superior Court's Order, dated March 15, 2007, the application was approved. Later, on August 15, 2007, the Board of Adjustment granted a Motion for Rehearing submitted by Jayne and Richard Schoch and Jamie and Kathleen Schoch.

Attorney Puffer began by stating that he did not believe that the Applicant should be back before the Board for a rehearing as he believed the Board did not have any legal defensive reason to grant the rehearing.

Attorney Puffer referred the Board to exhibits that he had reviewed with the Board at the June 5, 2007 hearing. Exhibits were as follows:

- Exhibit A) Superior Court's Decision of 3/16/07
- Exhibit B) 1992 Subdivision Plan
- Exhibit C) Merger Documents
- Exhibit D) Loughlin, Land Use, Planning and Zoning, § 24.11
- Exhibit E) Average Size of Other Lots Using the 30-Foot R-O-W
- Exhibit F) Jamie and Kathleen Schoch's House
- Exhibit G) Chester Rod and Gun Club, Inc. v. Town of Chester, 152 N.H. 577 (2005)
- Exhibit H) Malachy Glen Associates, Inc. v. Town of Chichester (decided March 20, 2007)
- Exhibit I) ZBA Minutes of June 4, 1996 (Spilewski), August 6, 1996 (Roberts), October 7, 1997 (Kirsch) and May 2, 2006 (Doherty)
- Exhibit J) Variances to Section 5.2.1

Attorney Puffer referred to the Superior Court's finding that purchase with knowledge should be considered in evaluating the unnecessary hardship criterion, rather than in evaluating the substantial justice criterion. Additionally, the Court noted that the ZBA, in its decision, had stated that no new residences had been constructed on the right-of-way since the adoption of the Zoning Ordinance. The Court then recognized the fact that the ZBA did not elaborate as to how this was related to the variance criteria.

In reviewing Exhibit B, Attorney Puffer orientated the Board with respect to the location of Mr. Nelson's 8.6 acres parcel having 30-feet of frontage onto Clement Hill Road.

Mr. Koontz questioned whether Mr. Nelson owned the 30-feet of frontage at the time of his initial application, April 2006. Attorney Puffer indicated no, stating that Mr. Nelson had believed that he owned the frontage; however, after the hearing, during a title search, Mr. Nelson was made aware that he did not own the frontage. Mr. Nelson then obtained a quitclaim deed from the prior owner so that he now owns the frontage.

Attorney Puffer informed the Board that the 30-feet of frontage is currently being used as an access right-of-way for eight other parcels. Three of the eight properties have year-round residences.

Exhibit C was documentation that Mr. Nelson had merged the 30-foot strip of frontage to his larger parcel, so that the property is now considered one parcel.

In reviewing Exhibit D, Attorney Loughlin's treatise, Attorney Puffer read the following: "It is not possible to set up rules that can measure or determine justice. Each case must be individually determined by board members. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by the granting of a variance that meets the other qualifications. A board of adjustment cannot alleviate an injustice by granting an illegal variance." Attorney Puffer believed that when considering the "substantial justice" criterion the Board has to balance the harm to the individual applicant should the Variance not be granted and the harm to the general public should the Variance be granted.

Mr. Koontz questioned the difference in considering the "loss" to the individual that is not outweighed by a "gain" to the public. Attorney Puffer believed that balancing the "harm" or "loss" would be essentially the same meaning.

Attorney Puffer stated that the Superior Court had three main issues of concern. The Court's finding that it was improper to consider the purchase with knowledge in evaluating the substantial justice criterion. While Mr. Nelson was aware of the Ordinance requiring a minimum of 50-feet of road frontage, he believed that he owned 30-feet of frontage as was shown on the Town's tax map. Additionally, Mr. Nelson had been informed by a public official that he would likely get a

Variance. At this time, Chairman Krzyzaniak and Mrs. Gray questioned the name of the public official. In response, Attorney Puffer stated that it was Karen Robertson. Mrs. Robertson disagreed, stating that it was untrue. Attorney Puffer then inquired with Mr. Nelson who had indicated that he had only inquired with Mrs. Robertson as to whether other applicants that had received Variances for lack of road frontage. At the time, Mrs. Robertson had replied yes, and provided Mr. Nelson with minutes of those meetings. Mr. Nelson said that he had then just assumed that he would also be granted a Variance. Again, Attorney Puffer referenced the Court's decision, advising that prior knowledge should be considered in evaluating the unnecessary hardship criterion, rather than the substantial justice criterion.

Attorney Puffer believed that since the enactment of the 50-foot restriction, which he believed to be in 1988, there have been three conversions of properties in the area to year-round residences (Dockham, Schoch, and Martin). He was unaware of any applications being denied by the Zoning Board of Adjustment. Furthermore, when considering a Variance, Attorney Puffer stated that the Board needs to look at the surrounding properties. Attorney Puffer then corrected reference to the total acres of the Nelson lot indicating that it is 8.4 acres, rather than 8.6 acres as he had previously stated.

Attorney Puffer stated that not granting the Variance will mean that Mr. Nelson has no economic use for his property. Mr. Nelson intends to build a residence with an in-law apartment which is allowed in the R-2 district. While Mr. Nelson has no intentions of subdividing his property, Attorney Puffer stated that Mr. Nelson would agree to a condition limiting further subdivision.

The eight other parcels that utilize Mr. Nelson's road frontage to access their properties are a greater distance from Clement Hill Road than where Mr. Nelson proposes to construct his residence. Chairman Krzyzaniak then questioned relevancy of the distance that the residences are from Clement Hill Road. Attorney Puffer believed that the purpose of the frontage requirement on a public way is for safety purposes. In other words, the distance that an emergency vehicle would have to travel to reach the eight other properties is greater than that to Mr. Nelson's proposed residence.

Attorney Puffer then referenced Exhibit E which summarizes the lot sizes of the eight other lots and Exhibit F which was a photograph of Jamie Schoch's house through the trees. The purpose of the photograph was to show that the distance from Mr. Nelson's proposed residence to the Schoch property line, which is approximately 339-feet. Chairman Krzyzaniak suggested that Mr. Nelson may decide to construct an outbuilding closer to the property line. In response, Attorney Puffer indicated that he did not believe that Mr. Nelson had plans to do so. Chairman Krzyzaniak then read a letter, dated June 10, 2007, from Mr. Nelson to Jamie and Kathleen Schoch in which Mr. Nelson indicated his willingness to not build accessory buildings in proximity to Mr. and Mrs. Schoch's property line in exchange for permission to walk, drive his ATV, golf cart and snowmobile from Trout Way (private road) to Mr. Nelson's property along Rolfe

Pond Drive. Chairman Krzyzaniak believed that the letter was a threat to the Schoch's that if they didn't grant permission to cross their property that he would build an accessory structure near their residence. In response, Attorney Puffer explained that the letter was not intended as a threat, but rather a compromise. He believed that the letter is irrelevant to the proceedings.

Mr. Koontz suggested that, should the Variance be denied, Mr. Nelson would have the ability to construct a shed on his property. Attorney Puffer was uncertain of the interpretation of the Town's Ordinance with respect to principal and accessory structures.

Attorney Puffer raised the point that the Board should focus on the 30-feet of frontage available, rather than the construction of the residential structure. He then reminded the Board that the residential use is a permitted use in the district.

Exhibits G and H are Court cases in which Attorney Puffer believed to be helpful to the Board. In one instance, the Court discusses the analysis in determining whether a Variance would be contrary to the public interest or injurious to the rights of others. He believed that any Variance would be in violation of the public interest; therefore, the Court indicated that, "the Variance must 'unduly, and in a marked degree' conflict with the ordinance such that it violates the ordinance's 'basic zoning objective'."

Lastly, Attorney Puffer pointed out other Variances in which similar requests had been made in which the Board had approved. In each case a Variance was sought under the same Section 5.2.1 of the Zoning Ordinance. Each of the properties had no frontage on a public way, but rather access to their properties by way of a right-of-way. Again, Mr. Nelson's property consists of 30-feet of frontage along Clement Hill Road.

Attorney Scott Hogan representing Richard and Jayne Schoch and Jamie and Kathleen Schoch addressed the Board explaining that his first steps in reviewing the application before the Board was trying to determine the Town's policy concerning issuance of building permits on back lots and then trying to determine the history and ownership of the lot in question. Attorney Hogan had reviewed the minutes of the Board's April 2006 meeting in which the Board had first heard Mr. Nelson's application. He had reviewed with the Board excerpts from the minutes with respect to the Applicant's response to the substantial justice criterion. Furthermore, excerpts concerning the Applicant's knowledge of the non-conformity of the lot at the time of purchase were reviewed. Attorney Hogan believed the minutes clearly reflect the Applicant's knowledge that the lot did not comply with the Ordinance at the time he had purchased the property.

Attorney Hogan then reiterated the fact that the Board must measure the loss to the individual (Applicant) that was not outweighed by a gain to the public. The question is whether the Applicant would be deprived a benefit should the Variance be granted. While the Applicant would be deprived a benefit, the

determining factor is whether there would be a loss to the Applicant. Attorney Hogan believed that there would not be a loss since the Applicant had purchased the property at a reduced price, knowing that the lot was non-buildable. Furthermore, the lot has been taxed as a wood lot with the abutters understanding that the lot was non-developable.

When Mr. and Mrs. Richard Schoch had established the lot, now owned by Jamie and Kathleen Schoch, they had gone through the necessary subdivision process to create a lot having minimum road frontage. In fact, the driveway of Richard and Jayne Schoch is actually on property owned by Jamie and Kathleen Schoch.

Attorney Hogan believed that the ability to develop back lots is a fundamental decision of the Voters of the Town. He then referenced minutes of a Planning Board meeting in which the Board of Selectmen had referred Mr. Nelson's application to the Planning Board for review and comment. In reviewing the application, the Planning Board made it clear that it has been a long standing policy to not develop back lots. They further referenced provisions of the Master Plan.

Attorney Hogan stated that the Applicant continues to make a point of the difference between 30-feet and 50-feet. The difference in frontage is not the issue before the Board. The issue before the Board is the lack of frontage and the broad policy decision of the Town not to issue building permits on back lots. The other residences along the right-of-way have already been established. The Board needs to consider the Ordinance and policy based on today's standards, noting that applications rise and fall on their own merits rather than that of other uses that have existing for a number of years.

Public testimony was opened.

Abutter Roger French addressed the Board explaining that his family had originally purchased the property, now owned by Mr. Nelson, as a house lot for his uncle. Mr. French did not believe that there should be a problem with Mr. Nelson constructing a residence on the eight acre lot.

Abutter Richard Schoch addressed the Board in opposition to the application. Mr. Schoch stated that the Applicant should have to comply with the Ordinance requiring proper road frontage. He stated that the Applicant should not be able to purchase 30-feet of frontage and then have the sufficient frontage to be able to build on the lot. Mr. Schoch then advised that the letter from Stuart Nelson to Jamie Schoch is requesting permission to cross over Richard and Jayne Schoch's property, not Jamie Schoch's property. At this time, Board members reviewed a site plan showing Mr. Schoch's property. Mr. Schoch stated that he would have to make a deal with Mr. Nelson to allow him to cross over his property, so that he would not build next to Jamie's house.

Attorney Puffer readdressed the Board stating that Trout Way, which is a right-of-way, is currently a matter of litigation between the Schoch's and the Bensons.

He stated that Trout Way is not relevant to the proceedings before the Board. Chairman Krzyzaniak then asked Attorney Puffer to explain why he had brought up the issue of Trout Way and the pending litigation between the Schochs and Bensons. In response, Attorney Puffer indicated that his comments were in response to Mr. Schoch referencing Mr. Nelson's request to access Trout Way.

With respect to comments made by Attorney Hogan concerning the harm or loss to the Applicant, Attorney Puffer stated that the harm to the Applicant is that he would not be able to build on the lot should the Variance be denied.

Attorney Puffer advised that Mr. Nelson understood that the lot did not meet the requirements in the Zoning Ordinance, but believed that he would be granted a Variance. Mrs. Gray reiterated the fact that the Ordinance requires a minimum of 50-feet of frontage. In response, Attorney Puffer stated that the Ordinance serves no valid purpose in this case.

Attorney Hogan readdressed the Board referencing a 2007 Supreme Court decision which references the substantial justice criterion as any loss to the individual that is not outweighed by a benefit to the public. Attorney Hogan stated that the Board needs to determine the facts to be relevant.

Public testimony was closed.

Mrs. Gray referred to page four of the April 2006 minutes of the Board's meeting in which she had believed that Mr. Nelson had not successfully addressed the substantial justice criterion due to the fact that he had purchased the lot knowing that it was non-buildable. Mrs. Gray reaffirmed her opinion of April 2006, and believed that the Board has the right to review all facts in determining whether the substantial justice criterion has been met.

Mr. Boatwright then referred to statements he had made in April 2006, in which he believed that the application met the requirements to be granted a Variance. Mr. Boatwright reaffirmed his prior opinion.

Mr. Koontz believed that the Applicant's knowledge at the time of purchase is not the only factor to be considered by the Board when considering whether there is substantial justice.

Mrs. Hackwell believed that the Applicant, in good faith, thought that he would be able to build on the property.

Motion made by Mr. Boatwright, seconded by Mr. Koontz, to vote on the application as presented. Motion carried unanimously. With five members voting, three voted in favor (Koontz, Hackwell and Boatwright) and two voted in opposition (Gray and Krzyzaniak). The majority of the Board agreed that the harm to the Applicant in denying the use of his property would outweigh any harm to the public. Therefore, substantial justice would be done by granting the Variance.

II. Review of the Minutes and Notices of Decision for August 1, August 7, August 15, 2007.

Motion made by Mrs. Gray, seconded by Mr. Koontz, to accept the Minutes and Notices of Decision of August 1, August 7, and August 15, 2007. Motion carried unanimously.

III. Any other Business to legally come before the meeting.

Sign Ordinance—Board briefly discussed the number of advertising signs that are in the Contoocook Village and that in violation of the Zoning Ordinance. Mrs. Robertson will send letters to all businesses advising the limitations outlined in the Town's Sign Ordinance.

IV. Adjournment.

Motion made by Mr. Boatwright, seconded by Mr. Koontz, to adjourn at 9:40 PM. Motion carried unanimously. The next regular scheduled meeting of the Board is Tuesday, November 6, 2007, at 7:00 PM in the Town Hall.

Karen L. Robertson
Planning/Zoning Director

Pursuant to New Hampshire RSA 677:2, any party to the action or proceedings, or any person directly affected thereby, may apply for a rehearing. Application, in writing, must be submitted to the Zoning Board of Adjustment within thirty (30) calendar days beginning the date upon which the Board voted to approve or disapprove the application. Such a request must set forth the grounds on which it is claimed the decision is unlawful or unreasonable. The Board must decide to grant or deny the rehearing within thirty (30) days.