



Town of Hopkinton

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HOPKINTON ZONING BOARD OF ADJUSTMENT MINUTES FEBRUARY 7, 2012

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Tuesday, February 7, 2012, at 7:00 PM in the Hopkinton Town Hall. Members present: Toni Gray, Charles Koontz, Daniel Rinden and David Brock.

I. Application(s).

#2011-10 Jamie & Kathleen Schoch and Richard & Jayne Schoch Administration Appeal of the Selectmen's decision of September 12, 2011, granting Stuart Nelson a one-year extension of a previously granted building permit to construct a residence at 46 Bass Lane, Tax Map 208, Lot 14. The appeal is associated with Zoning Ordinance subsections 15.8.3 Variances and 15.10 Representations.

(Note: January 5, 2012, the Zoning Board of Adjustment granted the Applicants a rehearing limiting the issue of whether the discrepancy between the approximately 339' or 279' distance between the Schoch structure and Nelson structure was an implied condition of approval based on Section 15.10 of the Zoning Ordinance and whether it was relevant to the granting of the Variance requested by Nelson.)

Attorney Stephan Nix addressed the Board on behalf of the Schochs referring to various sections of the Hopkinton. In particular, Section 3.5.3 Medium Density Residential (R-2) which outlines the purpose of the district. He noted that the intent of the zoning district is to create open space between buildings, which is the issue before the Board. The distance of 339 feet was represented by Mr. Nelson's attorney and made relevant in response to objections and concerns raised by the Schochs.

While Mr. Nelson's attorney has argued that there had been a plan presented showing the proposed location of the house and driveway and a septic plan that also had shown the proposed location of the home, Attorney Nix stated that neither of the two plans had the relative location of the Schoch residence shown. Therefore, it was impossible for anyone to determine how the plans related to the 339 feet.

Attorney Nix corrected the fact that a document he had previously submitted had incorrectly indicated that the septic design had not been submitted as part of the record. While the septic design was not included on the list of exhibits it was discussed at the end of the presentation in June 2007. The transcript of the October 2007 never mentioned the septic plan.

Again, Attorney Nix stated that the only reliable information as to the location of the Nelson house is the 339 foot distance represented by Mr. Nelson's attorney. He suggested that if the distance was not relevant there would not have been four pages of transcript in which there was discussion concerning the distance.

Another issue to consider is whether there is an implied condition of approval under Section 15.10 Representations of the Zoning Ordinance. Attorney Nix made reference to a case, 1808 Corp v. Town of New Ipswich, in which there is a clause indicating that "representations made by the petitioner's agent at the ZBA meeting at which the petitioner's application was discussed show that the petitioner intended to use only a portion of the building for office space". While in that case the issue involved the use of office space, Attorney Nix suggested that from a "common sense" standpoint the same rule would apply to the Nelson case. This is especially given the fact that the distance was in writing and discussed with the Board at length on two occasions.

Zoning Ordinance Section 15.10 Representation states, "Representations made at the public hearing or material submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking, or use which are subject to regulation pursuant to subsection 15.8.2 or 15.8.3 shall be deemed conditions upon such special exception or variance." Attorney Nix stated that the Variance was to build a house on a non-conforming lot, referring to Zoning Ordinance Section 5.2.1 Use of a Non-conforming Lot. The ability to build the house and how it affects the neighborhood is directly related to the Variance. The representations made to the Board under the Ordinance became a condition of approval.

In closing, Attorney Nix asked the Board to "look at the big picture," noting that the representations made by Mr. Nelson's attorney were in direct response to the abutters' concerns. Furthermore, that the goal of the Zoning Ordinance is for large spaces to exist between buildings.

Attorney Simon Leeming representing Stuart Nelson addressed the Board to present a hand-out. Attorney Nix objected, noting that all parties had been instructed to submit documents to the Board by a time certain. Attorney Leeming responded that most of his documents are original to the record, with the exception of two documents which he agreed to go over orally.

Attorney Leeming provided the Board with a brief history involving the Nelson's purchase of the property. Prior to the Nelsons purchasing the property in 2005, Mr. Schoch apparently had discussions with Mr. French, the former owner of the property, about purchasing the property. Subsequently, the Nelson's purchased the property which Attorney Leeming believed was the cause of the dispute between the Nelsons and Schochs. Ever since then the dispute has continued through various forums over a number of years.

The Nelson property consists of 8.4 acres in an area where the lots are predominantly half acre lots. The Nelson lot is one of the largest lots in the area. The Variance that was

obtained was to be able to construct a house on a lot having 30-feet, rather than 50-feet of frontage. Therefore, any issues related to the 339 feet between buildings are immaterial.

Attorney Leeming referenced a photograph that was first presented to the Board in 2007 that showed the view from where the Nelson house was to be located through a wooded area, past a private right of way, toward the Schoch residence. In providing an approximate location of the Nelson residence, Mr. Nelson used a range finder. The range finder was inaccurate; however, that does not change the fact that the Variance was related to the frontage. At the same time, Tim Bernier attended the hearings with the septic plan that he had prepared that had showed the proposed location of the Nelson residence. Attorney Leeming noted that since then Mr. Bernier has provided an as-built plan indicating that the house was constructed in the location that was originally represented on the septic plan.

Attorney Leeming informed the Board that the disputes between the Schochs and Nelsons have gone through various forums, including the Supreme Court. As a result, an agreement was reached in which the Schochs had agreed that, “they shall not in any way oppose the issuance of a building permit for or the development of the Nelson’s 8-acre parcel.” He believed that the Schochs are now trying to make an argument concerning the 339 feet in an effort to get around that for which they have already agreed to.

Included in the record is a plan prepared in September 2010 by a surveyor that the Schochs had hired. The plan shows that the Nelson residence is not 339 feet, but rather 279 feet to the Schoch residence.

Attorney Leeming advised that on September 14, 2009 the original building permit was issued and shortly thereafter the Nelsons commenced construction. They have built what is now a house that is framed with a roof. Due to the economy they had scaled the house down and for a while the Nelsons didn’t have the funds to continue. In 2011, when the two year expiration date was coming up the Nelsons applied for and received an extension of their building permit. A year before that there was correspondence from Attorney Nix to the Nelsons indicating that if they do certain things with respect to their access way the Schochs would drop any issue with regards to the 339 feet. So, the Schochs have known about this issue but have only chose now to bring it forward.

Attorney Leeming noted that every time Attorney Puffer had made mention of 339 feet he used the word “approximately”. He also used the words “approximately 300 feet”. Again, Attorney Leeming stated that the 339 foot distance was not the reason that Mr. Nelson had requested the Variance; instead, it was because the lot had 30 feet rather than 50 feet of frontage. During the Board’s deliberation on the Variance there was no mention of the 339 feet, approximately 339 feet or any mention of the distance between the homes. In fact, the Board did not impose conditions addressing the distance between the homes.

Zoning Ordinance Section 15.10 refers to “features”. Attorney Leeming stated that a typical feature is if the house is a two-story, rather than having one-story. The distance from the Nelson home to the Schoch home is not a feature.

Attorney Leeming explained that there is a 20 foot difference in frontage that affected Mr. Nelson’s ability to construct a residence without the Variance. He stated that the house is almost complete.

Mr. Koontz questioned whether the septic plan had shown the actual location of the Nelson house. Attorney Leeming replied yes. Mrs. Gray then questioned whether the septic plan had shown the Schoch house. Attorney Leeming replied no.

In rebuttal, Attorney Nix asked that the Board not get caught up in the history between the two parties. He believed that Mr. Nelson is asking for a “free pass” in constructing his house in the wrong spot; noting that the issue of “approximate” does not matter. Attorney Nix then provided a scenario where you buy a piece of shore front property and you are told that it has 339 feet of shore front and then have it surveyed to learn that it is 60 feet short. He believed the discrepancy is significant. In the case of Mr. Nelson’s home the representation of 339 feet was made in writing.

Furthermore, Attorney Nix advised that the settlement agreement between the two parties is legally irrelevant to the Board’s proceedings; although, the settlement agreement was based on what had been represented in this case.

Lastly, Attorney Nix stated that the distance was important enough in September 2009 because the Town required an as-built plan certified by a surveyor to be submitted when the house is completed.

In rebuttal, Attorney Leeming stated that the idea that his clients went on without disregard to anything is incorrect. In reading the settlement it is very clear that the Schochs were not to contest the construction of the home or the issuance of the permit and that is what Mr. Nelson relied on when he moved forward in constructing his home.

Mr. Brock noted that the Board recently received a copy of a legal memorandum from the Board’s counsel and copy of a public notice concerning the possibility that the Board would want to enter into a non-public session under the terms and conditions of RSA 91-A:3, II (e). At this time, Mr. Brock moved to enter into a non-public session to review a legal memorandum from the Board’s counsel under the provisions of RSA 91-A:3, II (e). Motion seconded by Mr. Koontz. Vote: Rinden, Koontz, Gray, Brock and Krzyzaniak voted in favor. Motion carried unanimously (5-0). The Board entered into non-public session, as recorded separately, at 7:19 PM. The Board returned to public session at 7:27 PM. Vote: Rinden, Koontz, Gray, Brock and Krzyzaniak voted in favor.

(Note: Minutes of non-public session reflect that the Board of Adjustment entered into nonpublic session to review a legal memorandum that is classified as “confidential and

privileged legal communication”. Furthermore, the record reflects that there were no votes taken.)

Motion made by Mr. Brock, seconded by Mr. Koontz, to deny the appeal of the Schochs for the following reasons:

“After rehearing, the Board concludes that the distance between the Schoch structure on one side of the traveled way and the Nelson structure on the other side, whether ‘approximately 339’ or 279’, is neither relevant or material to whether the Nelson frontage variance continues to satisfy the five variance criteria.

Further, to any extent that Nelson’s representation, during the October 2, 2007 hearing, that the distance from the Nelson residence to the Schoch residence was approximately 339’ constituted a condition of approval under Section 15.10 of the Hopkinton Zoning Ordinance, the Board now clarifies and/or modifies that condition as one permitting the actual surveyed distance of around 279’. See RSA 674:33, II.”

With five members voting, all five members voted in favor of the motion (Rinden, Koontz, Gray, Brock and Krzyzaniak). The Administrative Appeal was denied.

(Note: Following the motion, Chairman Krzyzaniak requested each member sign the written motion indicating either in favor or in opposition.)

#2012-1 Patrick S. McNicholas Special Exception to operate a Bed and Breakfast Home at property owned by Nancy McNicholas, located at 204 Kast Hill Road in the R-3 district, Tax Map 210, Lot 9. The application was submitted in accordance with Zoning Ordinance Table of Uses 3.6.B.2 Bed and Breakfast Home.

Mr. McNicholas reviewed the criteria for a Special Exception as outlined in Section XV of the Zoning Ordinance.

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

The request is permitted by Special Exception in accordance with the provisions of Table of Uses 3.6.B.2. “All provisions will be complied with and site plan approval will be requested.”

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

“Use of the premises as a Bed and Breakfast Home creates no additional risk of fire, explosion or release of toxic materials.”

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 location and scale of the existing building will not be changed. The only items above that will be affected are parking areas and vehicles associated therewith which will be removed from the street and unobtrusive to abutters or the public."

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

"The periodic use of up to three lodging units will have minimal traffic impact."

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

"There will be no additional demand on municipal services with the exception of limited possible additional demand for police, fire, protection and waste disposal as may be associated by the temporary housing of guests."

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

"There will be no change to the property with the exception of additional unpaved parking spaces. It is unlikely that adjacent properties or the street will be impacted."

7. An appropriate location for the proposed use.

"The isolated and uncongested location of this property makes it a very appropriate location for this use."

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.

"This use should have no impact on the health and safety of others. The property is currently surrounded by large tracts of undeveloped land."

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

"With the safeguards of Zoning Ordinance Section 3.7.4 in place, the Ordinance recognizes the use of certain residences as Bed and Breakfast Homes as being a type of use that the Ordinance supports."

Mr. McNicholas reviewed a site plan of the property, along with the layout of the first floor and second floor bedrooms. He noted that the home has seven entrances on the first floor and three staircases to the second floor.

The property has been inspected by the Code Enforcement Officer with little changes requested. While the Fire Chief has not been at the property, Mr. McNicholas has had a telephone conversation with him and at some point will meet with the Chief to review life safety requirements.

There was no one wishing to offer public testimony.

Motion made by Mrs. Gray, seconded by Mr. Koontz, to approve the application contingent upon Planning Board site plan review approval. Motion carried unanimously (Rinden, Koontz, Gray, Brock and Krzyzaniak). The Applicant successfully addressed the criteria to be granted a Special Exception in accordance with the provisions of Section XV of the Zoning Ordinance.

#2012-2 Paul & Susan Bliss Equitable Waiver for a sunroom and deck in violation of the sideline setback for the R-4 district. The property is located at 294 Bassett Mill Road, Tax map 235, Lot 4. The request is associated with Table of Dimensional Requirements 4.3.

Mr. Bliss reviewed the standards for Equitable Waiver in accordance with Section 15.8.4 of the Hopkinton Zoning Ordinance.

- (a) That the violation was unknown to the owner, owner's predecessors, owner's agent or representative, or municipal official, until after the structure in violation had been substantially completed, or until after a lot or other division of land in violation had been conveyed to a bona fide purchaser for value (i.e. an innocent purchaser who had no knowledge or reason to know of any problems and who, in good faith, paid full value).

"During original construction of our home's foundation in the spring of 1983, Susan and her former husband had expressed an interest in passive solar design and construction. She had talked to her general contractor, the Building Trades Program of the Concord Regional Vocational Center, who had chosen Susan's home for their first endeavor, and her site subcontractor about the potential. They discussed the possibility of a sunroom addition to the new home that would help to heat the home economically. During the setup for the foundation of the home, Susan got a call at work from the site subcontractor confirming his calculations that the 9'-6" x 12' sunroom addition would fit on the south facing side of the home without impacting the side setback. However, she would have to make the decision immediately as the concrete subcontractor was setting his forms and would recommend doing it at the same time. Susan agreed to proceed with the work without realizing how it impacted the original building permit.

Many months later, in August or September, a town agent doing an inspection noticed the sunroom foundation and questioned it's permitting and proximity to the boundary. The agent was using a stone wall as the apparent boundary and found the sunroom addition to be a foot or two within the setback. After a short time, Susan was informed a 'Cease & Desist' order was sent to her in order to stop construction of the sunroom addition. Around that time, Susan applied for a Variance to allow for construction of the sunroom, but the Variance along with a subsequent request for appeal was denied. The sunroom was never built with the exception of a deck to cover the open hole.

Now, fast forward to the present where Susan and I are happily married and about to sell our home to build a retirement home here in Hopkinton. We had a new lot line survey done so we could see exactly what impact the sunroom foundation had on the side setback. A survey by Michael Dahlberg shows not only the sunroom foundation and accompanying deck to be in the setback, but even the home was built into the setback. We can all speculate as to how this happened back then and we now know there are many safeguards in place to prevent this from happening in the present.

Therefore, because the placement of the home and sunroom foundation was incorrect and unknown to the owner to be placed within the setback and the original violation was 29 years ago, we are respectfully requesting relief from the Town ZBA in the form of an Equitable Waiver from the standard dimensional requirements. This relief will enable us to either complete work on the sunroom as originally intended or to sell our home unencumbered."

- (b) That the violation was caused by a good faith error in measurement or calculation by an owner or agent or an error in interpretation of the Ordinance or its applicability by a municipal official in the process of issuing a permit, while that official was acting within the scope of his/her authority.

"As described in part a., the violation was caused by a good faith error in judgment by the original site subcontractor. The owner was unaware of the violation and proceeded under the advice of others."

- (c) That no public or private nuisance may be created by the violation;

"We can assure the Board, no public or private nuisance would be created by the approval of this request. The home is built on a narrow lot near the end of a gravel road in a heavily wooded area. No homes or structures of any kind can be seen in any direction. The abutters on the southerly side, Paul and Mary King, have a triple lot, their home being far to the front and further side of the lot along with their garage. I have spoken to Mr. King and he has no plans to build a structure in that area in the near future. Any future construction could easily be sited well away from our small are of impact."

- (d) That there will be no diminution in the value of other property in the area.

“There will be no diminution of the value to adjacent property as the area in question is only about 50-feet of a 1200-foot lot line. This lot is currently heavily wooded and our request for an Equitable Waiver will not adversely affect the value of adjacent property.”

- (e) That the violation will not interfere with or adversely impact any present or permissible future uses of any such property.

“The violation would not adversely impact or interfere with any present or future uses of the adjacent property. The adjacent lot is a heavily wooded three acre single lot which is part of a triple lot parcel owned by the Kings. The current placement of his home and garage leaves an abundance of space to site any future construction without any impact from our home.”

- (f) That due to the degree of past construction or investment, the cost to correct the violation so far outweighs the public benefit to be gained that it would be inequitable to require the violation to be corrected.

“Certainly the cost to correct the violation far outweighs the current benefit to be gained from enforcing the violation. As stated in earlier sections, the only impact is to the abutter on the south side, Paul and Mary King. Their property is so large in comparison; there is really no impact to it. The cost to correct the home would not be practical in any way. The cost to remove the deck and sunroom does not seem reasonable given the lack of impact to the adjacent property.”

Following Mr. Bliss’ presentation, Chairman Krzyzaniak opened public testimony.

Abutter Paul King addressed the Board advising that he owns three parcels along Bassett Mill Road. He indicated an area on the plan in which he may construct a house on one of his lots; noting that he has no objections to the Bliss’ application.

Abutters Audrey and Glenn Slatunas of 278 Bassett Mill Road were also in favor of the application.

Public testimony was closed.

Motion made by Mrs. Gray, seconded by Mr. Rinden, to approve the application as presented. Motion carried unanimously (Rinden, Koontz, Gray, Brock and Krzyzaniak). The Applicant successfully addressed the criteria to be granted an Equitable Waiver in accordance with the provisions of Section XV of the Zoning Ordinance.

II. Review of the Minutes and Notice of Decision of January 5, 2012.

Motion made by Mrs. Gray, seconded by Mr. Rinden, to approve the Minutes and Notice of Decision as presented. Motion carried unanimously (Rinden, Koontz, Gray, Brock and Krzyzaniak).

III. Adjournment.

Motion made by Mr. Koontz, seconded by Mrs. Gray, to adjourn at 8:18 PM. The next scheduled meeting of the Board is at 6:00 PM on Tuesday, March 6, 2012.

Karen Robertson
Planning Director

History:

1. *April 4, 2006, ZBA denied Variance (Nelson).*
2. *June 1, 2006, ZBA denied Motion for Rehearing (Nelson).*
3. *March 15, 2007, Merrimack County Superior Court remands to ZBA Substantial Justice Criterion.*
4. *June 5, 2007, ZBA approved Variance (Nelson).*
5. *August 15, 2007, ZBA approved Motion for Rehearing (Schoch).*
6. *October 2, 2007, ZBA approved Variance (Nelson).*
7. *September 14, 2009, BOS approved Building Permit (Nelson).*
8. *September 12, 2011, BOS approved one-year extension of Building Permit (Nelson).*
9. *November 17, 2011, ZBA denied Administrative Appeal (Schoch).*
10. *January 5, 2012, ZBA approved Motion for Rehearing (Schoch).*
11. *February 7, 2012, ZBA denied Administrative Appeal (Schoch).*