

**TOWN OF CHESTERFIELD, NH
ZONING BOARD OF ADJUSTMENT**

**MINUTES
September 10, 2013**

Present: Chairman Burt Riendeau, Vice Chairman Andy Cay, Harriet Davenport, Renee Fales, John Perkowski, Alternates Lucky Evans and Kristin McKeon

Others Present: Chet Greenwood, Code Enforcement Officer and Rick Carrier, Town Administrator

The Zoning Board of Adjustment met at the Chesterfield Town Office on September 10, 2013. Riendeau explained the process of the meeting.

1. Eric and Diane Powers request an Equitable Waiver of dimensional Requirement from the 4 acre requirement for 2 family dwellings based on Code Enforcement Officer providing a building permit in 2006. The property is located at 47 Norcross Landing, W. Chesterfield, NH (Map 13D, A3) Residential district. This is a continuation from last month.

The voting members for the first application will be Cay, Fales, Davenport, McKeon and Riendeau.

Present: Eric and Diane Powers

Eric stated that he has submitted a packet to the secretary of the Zoning Board on September 3. The packet contained photos of their home, a signed statement of the contractor, receipts from Home Depot, building and contractor bid, inspection report of June 2, 2010 and other letters from January 17 through August 21. Also included was a legal opinion from Attorney Jeremy Hockensmith. Eric had provided a construction timeline for the planned addition to their house, which has been worked on for the past six years. The Powers had planned to rent the original unit, after the addition was complete and after the children had left, to help the loans incurred in building it and the cost of college. Eric was told by Carol Ross and Chet Greenwood, that no additional zoning requirements were needed and the property was zoned for both one and two family homes, as noted in the meeting minutes of June 17. Chet had provided details about requiring two separate addresses, firewall between the two separate units, a fire door, two separate kitchen facilities, inspected periodically, and he gave approval to occupy in June 2010. The kitchen did not need any additional permits. At that time the kitchen had been completed for nearly two years. Letters and memos are included from Mr. Greenwood and Carol Ross, acknowledging their honest mistake of not knowing about the additional frontage or acreage requirements for two family homes. Planning board minutes and memos confirm this error.

The Powers are requesting an equitable waiver of dimensional requirement. Last month the Zoning Board of Adjustment had two questions related to equitable waiver, as a remedy to the error.

Question 1 - Is the waiver a waiver of use? The attorney's opinion is no because the district has already permitted for single and two family homes.

Question 2 – Can an equitable waiver of dimensional requirement be used when the citizens are not knowledgeable of the law? In the attorney’s opinion, it was not a failure to inquire. They asked two experts about zoning requirements. They relied heavily upon their assurance that they were permitted to fill and use the proper as two family. Financial planning was to rent to a third party, after children had moved out.

Eric stated that they never tried to misrepresent their intentions and have cooperated with Greenwood during the entire construction process, with any and all modifications required by Greenwood. Town officials made a mistake and feels that the Powers should not be paying for it. The unit is a duplex and was designed that way for six years.

Eric is requesting to be allowed to use it in the manner that they intended. In 2007 the Powers requested permission to build a two family dwelling in their district.

Riendeau stated that the questions that the board and why Greenwood was asked to come to the meeting was to get Greenwood’s prospective of the process. There were some points, at the last meeting, on whether or not the building permit that was issued in 2006 was for construction. Greenwood responded that there was three parts to the building construction. The first request was for a bedroom in the basement. Then the Powers wanted to put an addition on the end of the building for a garage. Greenwood instructed the Powers that, to separate two building structures, a firewall between them with fire doors would be required. A permit was given for the addition. In the application for the addition, the Powers did not include the kitchen. Subsequently the kitchen was added and a deck was added. Fales asked Greenwood if he knew about the kitchen and the deck. Eric stated that he had a building permit for the deck. Eric stated that the addition was for a 26 x 40 foot, 2-1/2 story house. Greenwood was under the impression that it was going to eventually be a two family dwelling, at the point that the firewall was added, during the first and second permit. At this point, Greenwood assumed that the Powers were in compliance to have a two family dwelling on the property, regardless of the acreage or the frontage.

Annie DiSilva (abutter) of 41 Norcross Landing stated that she felt the town officials could have made mistakes and decisions were not put in writing. She reported that she has had water issues at her residence when the Powers have had renters in the building. She has had her well dug again. DiSilva has requested that the Zoning Board consider the water issues with her property in making the decision on this matter.

Cay stated that he felt that it was up to the neighbors to sort out the water issues and for the Powers to find the solution.

Cay stated that the Powers application did not document that they were putting in the second kitchen. If a town official makes a bad call, it doesn’t grant permission for their incorrect call, and it does not grant relief for violation of the board.

Riendeau stated that there was no actual proof that the wells were going to be diminished. Cay stated that there was not enough evidence on the issue from both sides. The expectation from the board is that the Powers will figure how best to do that.

Cay made a motion that the board will continue the Powers matter to next month meeting and that the Powers investigate and address the issue of the impact of the well water at the DiSilva's and provide the board with evidence that would demonstrate that there is no diminish of value and use on DiSilva's use of their well on their property, as a result of the granting of this equitable waiver. Davenport seconded the motion. Motion passed unanimously.

Criteria for granting equitable waiver:

The Powers will need to satisfy the board on their findings. The key is, is the use of their property, as a two family, interfering with the DiSilva's use of their property. A protocol needs to be developed for the test, with what the results are. If results can't be met within a month, an extension will be made.

2. **Nine A LLC** requested a variance from Article II, Section 203.6a, to allow a five (5) unit cluster subdivision in the Spofford Lake District. The property is located at Route 9A, Spofford (Map 5K Lot B3, Map 5N Lots B1, B2, and B9) Residential/Spofford Lake District

The voting members for the first application will be Cay, Fales, Davenport, Perkowski and Riendeau

Present: James Phippard and William Saturley

Saturley presented a potential of subdivision and stated that most of the information about the Nine A LLC property remains the same from 2006. Riendeau stated that this is a new application, based on the proposal for the project now. The board felt that they did not need background history. Evans stated that the board had voted, at a past meeting, that all proposals and deliberations were null and void for future references. Cay confirmed that the files are all a matter of public record.

Phippard described the property location, owned by Nine A LLC including: Lot 5KB3 – 6.1 acres, Lot 5NB1 – 3.05 acres with a parking lot, 5NB2 – 19.52 acres and contains a metal building housing the waste water treatment plant, previously serving Spofford Hall and contains a gravel roadway, passing through the property leading to a leach field. 5NB9 – 66.5 acres, fronting on Rt. 9A. The frontage consists of just over 200 feet. The property lies in the residential district. A portion of the property (500 feet) parallels the shore in the Spofford Lake district.

Phippard is proposing the creation of a five lot cluster subdivision, five single family house lots, with a small private roadway and five residential lots around it. The five lots being proposed would be located on the lake side of Route 9A on the 6.1 acre parcel. A lot merger will be proposed to the Planning Board to merge three of the lots and to do a boundary line adjustment to add a two acre piece, in order to create 30 acres necessary for cluster to be considered. The roadway would be approximately 400 feet long and end as a cul-de-sac. The lots created would vary in size from 0.88 acres to 1.37 acres.

Phippard handed copies to the board of other properties around Spofford Lake identifying lots from 0.10 to 1.99 acres, prepared by Southwest Regional Planning Commission in 2006. There are 346 existing non-conforming properties, out of 422 properties in the Spofford Lake district. Also included was a map showing properties of less than 200 feet of road frontage required for a 2 acre lot.

Phippard stated that the existing gazebo is intended to stay with Lot No. 2 and the property owner would be responsible for the maintenance and care of the gazebo.

Phippard further proposed that the roadway would be private and would be a homeowners association, with five property owners sharing responsibility of the dead end road. He also proposed to install an on-site gravity sewer system, to deliver sewerage away from the lake to a small sewer pump station to be constructed, owned by the association. It would be pumped across the street, past the area where the existing treatment plant exists, approximately 1,000 feet from the lake, more than 500 feet outside the lake district, where there is two existing leach fields.

Phippard stated that there was a discussion in 2006 as to whether the proposal would qualify for a cluster development. He stated that one of the criteria of the 30 acre area is preservation of land is required. Phippard stated that approximately 24 acres of land would be preserved.

Phippard reported on the existing deteriorating condition of Lot 5KB3, property known as the footprint of Spofford Hall, with 99,000 square feet of floor area. The cost estimate for demolition was asbestos abatement and demolition, without removal of foundation was just under \$300,000. The cost to remove the foundation at \$50,000, cost of removing water treatment plant at \$75,000.

Perkowski stated that cluster housing can't be done in the Spofford Lake District. Phippard responded that that is the variance that is being asked is to allow the cluster. The details of the cluster still need to be approved by the Planning Board. The Planning Board still needs to approve the less than 200 feet frontage for each of the lots on the cul-de-sac.

Perkowski about the common septic and leach field, would there be a separate well for each of the lots. Phippard answered yes, with a 75 foot protective radius entirely contained within the lot around the lake for each of the lots.

Perkowski asked how many lots have been created substandard less than 2 acres since zoning was created. No information was available.

Cay asked how many acres lie within the Spofford Lake District. Phippard responded that there are 11 acres.

Variance criteria:

1. Public interest to remove the existing building and to allow residential use
2. Prevents overdevelopment, committing 24 acres of open space across the street, other than leach field purposes to support new lots.
3. Substantial justice is done, paying taxes to allow a cluster for some type of reimbursement, preserving quality of Spofford Lake.
4. Variance will not diminish the values of surrounding properties.
5. Unnecessary hardship on the property owner.

Anthony Martini (Lake Spofford Cabins) He had erosion on his property, directly across from the leach fields.

Bob Brockmann asked what was being done to the parking lot across the street.

Phippards answer: It would be turned into green space and it would be used as a staging area.

Jeff Forrester stated that the current leach field is thickly overgrown.

Joan Cook had concerns on 9A access to the other 60 acres and future development.

Ken Walter felt that any kind of change would be an improvement. He stated that most of the lots around the lake were created before zoning existed.

Phippard felt that pollution of the lake with contaminants going into Spofford Lake was a factor to creating zoning regulations.

Bill Mantor asked if the Zoning Board was just voting on the right to have a cluster development.

Riendeau responded that the board would just be voting on what was being proposed.

Pam Walton had concerns with the wells and the amount of ledge in the area. Phippard responded that it is a "hit or miss". He added that the existing well at Spofford Hall was getting 14 gallons per minute. McKeon had concerns on the impact of neighboring wells from drilling new wells.

Fales moved to close the public session. Perkowski seconded the motion. Motion passed unanimously.

Board Discussion

Powers:

Cay noted that there is a list of items for the equitable waiver of dimensional requirements to address a problem of an honest mistake.

There are four criteria to look at:

- *Findings on lack of discovery that the violation was not noticed or discovered until after the structure was substantially completed or until the lot was subdivided and conveyed to a bonified person.*
- *That it was a honest mistake, that violation was not the result of ignorance of the law, failure to acquire of misrepresentation of bad faith; that it was an honest mistake of measurement of calculation or error and interpretation by a local official and the process of permit that he/she had an authority to issue.*

Cay stated that he felt that this was clearly an honest mistake and there was proper discovery. They made adequate inquiry on several occasions.

- *There is no value of physical or dimensional violation is not constitutional in any sense, diminish property values or interfere with the purpose of use of surrounding properties*

Cay noted that one abutter has stated that her water has been affected by this home, in particular because of use. It sounds like water supply in that area is troublesome, but that can be mitigated by drilling a well deeper. Resources and expenses could be incurred. There is some question of value.

- *The balancing test due to the degree of the past construction or investment, cost of correcting stakeout ways and benefit that would be gained and that would be inequitable to require the violation be corrected.*

Cay stated that they are pretty far into the game and that they were lead down this path by an honest mistake by public officials through their own inquiry and there would be a big cost to them to change it, at this point. You have to make findings on those four points. It does not say that all four have to apply. You have to weigh those items and see how that comes out on balance. If they can't use their dwelling as a two family dwelling, they can't derive their rental income, which was their intent, then that's their cost and their property is overdeveloped, for what they need for their own use, such as prior taxes, debt services is something that they can't realize a benefit.

Riendeau stated that he doesn't feel that a waiver to grant can be given, on the condition of only renting to a certain number of people, because it can't be policed.

Riendeau stated that the motion is going to have to have the findings to those four criteria in the motion.

Andy Cay motions to continue Eric and Diane Powers request for an Equitable Waiver of Dimensional Requirement to the next Zoning Board of Adjustment meeting to be held in the Town Office Building at 7:00 PM on October 8, 2013. The Powers are asked to investigate and address the issue of the impact of the well to the abutting property owned by Annie DiSilva. The Powers are asked to come back with evidence that there is no interference with the permissible use of the DiSilva's property in the granting of this equitable waiver. The motion is seconded by Renee Fales and passes unanimously.

Nine A LLC:

Perkowski noted that after the addition of Namashaug Landing, it was decided that cluster developments would not be allowed anymore in the Lake District. Perkowski also noted that when reviewing the criteria for a cluster development, he noted it says contiguous acreage and this lot is separated by a road.

Fales noted that she does like the fact that the septic is outside of the Lake District. Renee noted that tree cutting would be controlled by the State.

Perkowski noted that it would be in the public interest as the property is not producing the amount of taxes it could produce if it was developed. McKeon noted that it is assessed and taxed at 1.6 million currently. Perkowski noted that they allowed the building to go into disrepair therefore causing the current situation on their own. Perkowski noted that he does not believe that adding 5 houses would hurt the surrounding property values; however 3 houses would meet all criteria except frontage requirements. Perkowski noted that this is a much better proposal than this applicant has brought before the board previously. McKeon noted that the board received a letter and one of concerns in the letter is the fact that there are Bald Eagles living in the trees on that property. Fales noted that they are no longer on the endangered species list. McKeon noted that she believes that one of the top sources of pollution to lakes is the fertilizer used on the properties surrounding the lakes. Davenport noted that the applicant has been before the board previously, and has come back with a much

improved plan from where they beginning. Cay noted that the current situation that exists on this property is bad for everyone. Cay noted that the 5 lots is higher than the board would like to see, but is not sure it is unreasonable. The septic system should never fail and is across the street outside the lake district, taking away the possible contamination problem from the septic. Cay noted that they are proposing to preserve a good chunk of land, which will never be developed. Cay noted that the alternative is the current building sits there until something happens. Evans noted that preservation of the land is important, as well as the impact 5 houses would have on the lake compared to 3 houses.

Perkowski asked if granting this application would set a precedent. Cay noted that the board works on applications case by case and granting this would not set a precedence.

Riendeau noted that he is concerned that this application essentially asks the Zoning Board to change zoning.

Cay noted that the applicant has spent a lot of time developing a plan, has brought legal representation with him and therefore the board should continue this meeting to the next scheduled meeting date to allow them to come back and discuss why they do not believe it would constitute a change in zoning.

Cay moves to continue the hearing on the application submitted by Nine A LLC requesting a variance from Article II, Section 203.6a. The applicant is tasked with coming back before the board and giving testimony as to why this application does not ask the Zoning Board of adjustment to re-zone this property.

The question of the need for re-noticing the abutters will be checked with the Town Attorney and if needed, the re-noticing will be at the expense of the Town and not the applicant. Fales seconded the motion which passed unanimously.

Review of August 13, 2013 Meeting Minutes

Cay moves to approve the August 13, 2013 Meeting Minutes. Fales seconded the motion; which carried unanimously.

Adjourn: The meeting adjourned at 11:11 p.m.

Respectfully submitted,
Patricia Grace
Secretary

Approved

Burton Riendeau
Chairman, Zoning Board of Adjustment

Date_____