

1 **Deering Zoning Board of Adjustment**
2 **762 Deering Center Road**
3 **Deering, New Hampshire 03244**
4

5 **Unapproved Minutes of February 7, 2019**
6

7 Members Present: David LeFevre, Chair; Larry Sunderland, Vice-Chair, Phil Bryce, Rob
8 Girard, Alternate Member Doug Lalmond.
9

10 Others Present: Applicant and parties in interest to Case No.: 2018-01. Present for the
11 Applicant: Michael R. Gallo, Property Owner, Attorney Brett W. Allard, and Dan
12 Higginson, Higginson Land Services. Others present: Tayce Morgan and Nathaniel
13 Doherty, Bradley Townes, Henry Lemieux and Katharine Jenkins, Tom Copadis, Kevin
14 Kahill.
15

16 Chair LeFevre called the meeting to order at 7:15 p.m.
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18 Chair LeFevre appointed Alternate Member Doug Lalmond as a voting Member in Case
19 No. 2018-01.
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21 Chair LeFevre explained to the Applicant and parties present the manner in which the
22 public hearing would be conducted in Case No. 2018-01. The Board would hear first
23 from the Applicant, then from anyone else in favor of the application. The Board would
24 then hear from anyone in opposition, following which the Applicant would be given an
25 opportunity to respond. Additional public comment would then be allowed as deemed
26 reasonable and necessary at the discretion of the Board to provide everyone present with
27 the opportunity to be heard.
28

29 Counsel for the Applicant, Attorney Brett W. Allard, started with his presentation in
30 support of the requested variance. He noted that the Property in question was a pre-
31 existing lot of record because it existed since 1954, prior to the Town's adoption of
32 zoning in 1986. Attorney Allard presented a septic design plan which illustrated the
33 variances requested: 1) house setback from the right-of-way 25 feet, whereas 50 feet is
34 required, 2) house setback from the wetlands 15 feet, whereas 50 feet are required, and 3)
35 septic system setback 60 feet from the wetlands, whereas 75 feet are required. Attorney
36 Allard noted that while the house was proposed to be setback 25 feet from the edge of the
37 right-of-way, the distance to the edge of the pavement (road as travelled) was
38 approximately 40-45 feet.
39

40 Attorney Allard began his presentation with the public interest prong of the variance
41 analysis, explaining that a variance satisfies this criteria if it does not violate basic zoning
42 objectives. With regard to the wetland setbacks, Attorney Allard explained that the
43 purpose of the wetland setback was to protect the wetlands.
44

45 Attorney Allard explained that the Property had a very limited building envelope. He
46 further explained that if a zoning ordinance regulates a parcel of land to such an extent
47 that no reasonable use can be made of the land, that results in inverse condemnation
48 and/or an unconstitutional taking. Attorney Allard explained that a taking occurs when a
49 property owner is denied substantial use of their land. Mr. Higgins clarified that the area
50 of the Property exclusive of wetlands was 1/3 of an acre.

51
52 Chair LeFevre asked Attorney Allard whether the unconstitutional taking analysis was
53 being presented under RSA § 674:33, I (b)(5)(B), in the alternative to the criteria
54 specified under RSA § 674:33, I (b)(5)(A). Attorney Allard clarified that he was not
55 addressing the hardship criteria, but rather, the public interest criteria.

56
57 Moving to the hardship criteria, Attorney Allard explained that the Board should consider
58 the hardship test under subparagraph A first, and if the Board determined that criteria was
59 not satisfied, the Board should then consider the hardship test under subparagraph B.

60
61 Attorney Allard discussed the cases of *Malachy Glenn Associates, Inc. v. Town of*
62 *Chichester*, 155 N.H. 102 (2007), and *Vigeant v. Town of Hudson*, 151 N.H. 747 (2005).
63 Attorney Allard states that the *Malachy Glenn* case also involved wetlands and was
64 analogous.

65
66 Regarding the setback from the road, Attorney Allard indicated a neighboring home was
67 setback approximately 45 feet from the edge of the pavement.

68
69 Turning to the spirit of the ordinance, Attorney Allard stated that this criteria was similar
70 to the public interest criteria. Attorney Allard further states that the buildable dry land
71 must be contiguous and capable of accommodating the septic field, which he believe it
72 was because the septic field satisfied the standards promulgated by NH DES.

73
74 With regard to the substantial justice criteria, Attorney Allard said this was a balancing
75 test, weighing the benefit to the public against the burden to the applicant, and in this case
76 there was no benefit to the public in denying the variance.

77
78 Attorney Allard stated that the proposal was to build a single family residence which
79 would be consistent with the development of the other properties in the neighborhood and
80 would not diminish surrounding property values.

81
82 Attorney Allard concluded with his statement that the case "really comes down to the
83 unconstitutional taking argument." Under the hardship test, the residential use was a
84 reasonable use.

85
86 Member Bryce inquired about the proposed single family residence. The structure that is
87 proposed is approximately 1,500 square feet, with a foot print of 30' x 40'. The Property
88 assessed value is \$27,000.

90 Chair LeFevre made several inquiries regarding the Property, to which Mr. Gallo
91 provided the answers. He purchased the Property in 2014. He paid roughly \$130,000,
92 which included the Property in question, as well as, two (2) other tracts, one of which had
93 an existing home. The total acreage of all three (3) lots was approximately 17 acres. A
94 copy of the deed to the Property was submitted to the Board, which indicated that the
95 conveyance consisted of three (3) separate tracts in a single transaction, the Property in
96 this case, and two (2) other properties. Mr. Gallo indicated that 15 acres were subdivided
97 into five (5) lots. The house lot was sold for \$175,000. The remaining four (4) lots were
98 sold for between \$240,000 and \$300,000 each.

99
100 Mr. Gallo indicated that he was in the business of buying and developing real estate. Mr.
101 Gallo indicated that he had been in the business for fifteen (15) years. He indicated that
102 he was knowledgeable about zoning, planning and land use regulations. He indicated he
103 made no inquiry of the Town prior to purchasing the Property. He confirmed that he did
104 not obtain any opinion from the Town regarding whether the Property was buildable
105 before he purchased it. He confirmed that no one from the Town ever represented to him
106 that the Property was buildable before he purchased it.

107
108 Chairman LeFevre specifically asked Mr. Gallo what his margin of profitability was with
109 regard to the portion of the Property he had sold. Mr. Gallo answered that it was "difficult
110 to tell."

111
112 Chairman LeFevre asked if there was anyone else that wished to speak in favor of the
113 application. There being none, Chairman LeFevre asked if there was anyone who wished
114 to speak in opposition.

115
116 Kevin Kahill explained that the Property is located uphill of a larger wetland network.
117 The upland area was artificially created when the former owner illegally filled the
118 wetlands in the 1990s. The former owner was denied a building permit for a barn on the
119 same location. The Property was never considered a separate buildable lot, but rather,
120 was originally subdivided and gifted to the former owner as a privacy lot.

121
122 Tayce Morgan stated that the fill used to fill in the wetlands included asbestos shingles
123 and said that the lot should be assessed for hazardous waste.

124
125 Tom Copadis stated that he knew the former owners and used to play in this area as a
126 child. He knew the lot was given to the former owner as a privacy lot and that the former
127 owner had filled in the lot.

128
129 The Board clarified that there were no deed restrictions which prohibited development of
130 the lot.

131
132 Katherine Jenkins spoke to the potential hazards of adding another driveway to East
133 Deering Road, which already had heavy traffic. The Property was shaped like a bowl.
134 Development of the lot could result in the diversion of water onto neighboring property.
135 A decision of the Board to grant the variance would run with the land. The Property has a

high water table. She wanted to know how the drainage was proposed to be engineered to prevent flooding on neighboring properties.

Heny Lemieux stated that he knew the former owner. He said the former owner filled in the wetlands to have a place to park vehicles. He thought the Property was attached to the lot across the street. Development of the lot would be inconsistent with the rural character of the land. Mr. Lemieux stated that he has water in his basement because of the high water table. The additional traffic would be dangerous to pedestrians and bicyclists. There was insufficient line of sight to put in another driveway.

Brad Townes said his well is located in the wetlands behind the Property and the septic leaching into the wetlands would contaminate his well water. In the event of a tank failure there would be extensive damage. He indicated that other homes built by the Applicant in the area had various problems including drainage problems. He questioned the edge of the wetlands as delineated on the septic plan. He indicated that his grandfather had hauled dirt that was used to fill in the property. He was concerned about the use of fertilizer on the Property and its impact on the wetlands.

Katharine Jenkins submitted a written statement in opposition to the variance. She stated the value of her house went down with the development of the other lots owned by the Applicant.

Attorney Allard in rebuttal indicated that the issues raised by the abutters are personal issues and not grounds to deny the variance. He said the Board's inquiry needed to be on the specific criteria. The Property was a separate lot, there were no covenants restricting its development, and the filling in of the wetlands has no bearing on the variance application. There was no evidence of flooding, fertilizers are not an issue, and the personal grievances of the abutters are not relevant. The denial of the variance would be an unconstitutional taking.

There was testimony that abutters were located downhill. The question of whether a view by the Board was necessary. A question was raised about impact on the wetlands as the wetlands on the Property were part of a much larger network of wetlands.

The Applicant indicated that the area of impervious service which would contribute to surface runoff into the wetlands was small. The Applicant confirmed that the Property had been filled in, which was readily apparent from a visual inspection of the Property.

Abutters questioned whether the septic field was located within the area of fill or within an area of naturally occurring upland.

Attorney Allard stated that from a public health, safety and welfare perspective, the septic system had received approval from NH DES.

Member Girard inquired about the plan and the foundation drain.

182 Katherine Jenkins stated that granting the variance would be a taking of her property. She
183 questioned the setback distance of the septic from her property. She questioned the lack
184 of woodland buffer. She indicated the Town should be protecting its residents.

185
186 Chairman LeFevre stated that he would give the Applicant the last word. Attorney Allard
187 reiterated that the variance analysis consisted of a five (5) part test, and the proposed use
188 was reasonable.

189
190 Chairman LeFevre closed the public hearing.

191
192 The Board began its deliberations with consideration of the requested variance from
193 Section 4.1.4 relative to the front yard setback. The consensus of the Board was that the
194 relative inquiry was the distance to the edge of the right-of-way, not the distance to the
195 edge of the road as travelled (pavement). The Board was also in general agreement that
196 the issue of driveway sight distance was not an issue for the Board.

197
198 Member Girard observed that the requested setback was similar to other houses in the
199 neighborhood.

200
201 Member Bryce indicated that he did not think the Board could parse the three (3)
202 variance requests out separately, as taken together the cumulative impact was materially
203 different than any one of the single variances being requested.

204
205 Chairman LeFevre indicated, with regard to the front yard setback, that he did not think
206 granting the variance would have a negative effect on surrounding property values, or be
207 contrary to the spirit of the ordinance or public interest, because the location of the house
208 was similar to other buildings in the neighborhood, and it would not alter the essential
209 character of the neighborhood.

210
211 Chairman LeFevre did have some reservations regarding the hardship criteria, and
212 specifically, whether the hardship was self-created. Here, the Applicant purchased the
213 Property for a relatively low sum, was able to subdivide five (5) lots, including the
214 existing house lot, and realize a substantial return on his investment. The Applicant is a
215 sophisticated real estate developer, knowledgeable about zoning, yet never contacted the
216 Town before buying the Property to inquire as to whether or not it was buildable. Nor
217 was there any representation made to the Applicant from any agency of the Town that the
218 Property was buildable. The Applicant made a business decision to develop the other two
219 (2) lots that he purchased and leave this lot out of that development, presumably on the
220 erroneous assumption that it was a buildable lot because it was grandfathered. Chairman
221 LeFevre expressed his view that he did not perceive the Board's responsibility as
222 guarantying the Applicant's ability to develop this Property under these circumstances. If
223 the criteria for granting a variance are not satisfied, Chairman LeFevre indicated he did
224 not believe there was an unconstitutional taking.

225
226 The Board discussed what rights the Property had if it was grandfathered. Chair LeFevre
227 explained that as a non-conforming lot of record was exempt from the minimum lot size

and frontage criteria of the Zoning Ordinance, but otherwise had to conform with the Zoning Ordinance in all respects, or receive a variance.

Alternate Member Lalmond indicated that he felt that a variance from the 75 foot setback requirement for the septic field was not appropriate.

Member Girard indicated he felt that the issues raised by the abutters relative to drainage, steep slopes, and the negative impact on wetlands raised concerns as to the negative effect this development would have on the abutters, and whether granting the variance would be consistent with the spirit and intent of the Zoning Ordinance.

Member Bryce expressed concern about the historical filling of the wetlands and the negative impact of the development on the abutters.

The Board did reach a consensus that some of the items raised by the abutters were not germane to the Board's deliberations. The allegations of the Applicant's shoddy construction practices, lack of site distance, and notion that the Property was meant to be a "privacy lot," at least in the absence of any deeded restrictions on use, were all irrelevant.

Vice-Chair Sunderland voiced concerns with the foundation drain directed at the wetlands, which concern was echoed by Member Bryce and Alternate Member Lalmond.

The Applicant suggested the possibility of the Board taking a view of the Property. The Board agreed to take a view. The Board discussed with the Applicant the fact that if the Board took a view, the Board would likely not have a full five (5) member Board at its next several meetings due to an anticipated absence. The Applicant agreed to taking a view with the understanding that it was not possible to tell when the Board would be able to convene its full membership.

Chair LeFevre continued the Board's consideration of Case No. 2018-10 to February 28, 2019 at 5:00 p.m. The meeting would convene at the Property. The Board will view the Property at 5:00 p.m. and then reconvene at Town Hall for the rest of its meeting.

The Board approved its 2019 meeting schedule.

The Board approved its January 24, 2019 meeting minutes.

Adjournment: There being no further business, Chair adjourned the meeting at 10:15 p.m.

Respectfully submitted,

