December 7, 2009

Minutes of Zoning Board of Appeals Deliberative Sessions

Members Present: Bill Green (Chair), Peter Stanley (Zoning Board Administrator), W. Michael Todd, Cortland Cross, Jeff Horton, Doug Lyon.

Also Present: R. Peter Bianchi, Chet Ellison, Peter Blakeman

Chair Green called the meeting to order at 7:30pm and noted that they had called the meeting to continue with two hearings from the November 17, 2009 meeting.

The first discussion would involve a request for variance from R. Peter and Kathleen Bianchi. He said that it had been brought to the Zoning Board's attention that the granting of the variance would be in error due to the fact that the time limit they had with the property ran with the property and not the property owner. It has been reviewed with the Town's attorney and everyone at the meeting had been given a copy of the letter. The important point was that instead of granting the variance, the variance should be denied, with the condition that the applicant bring the property into compliance within the three year time period, which would be December 31, 2012. He felt that it was accomplishing the same thing but in a bit of a different way.

Mr. Lyon stated that basically, they way they had left it previously, they would have left a property in a legal limbo. This way of doing it would leave no doubt that a variance did not exist on the property. Mr. Cross felt it was a good deal and concurred with the consideration. Mr. Horton agreed as well. Mr. Lyon said that basically running through the criteria, he believed that granting the variance would diminish property values and would be contrary to public interest because their zoning laws do not allow for that type of business to take place in a residential district. He also felt it would be contrary to the spirit of the ordinance. He thought they should deny the variance. Chair Green said he wasn't sure the variance would fail on all five criteria, but didn't feel it would pass all five either. Therefore, he was in agreement that the variance be denied.

IT WAS MOVED (Doug Lyon**) AND SECONDED (**Bill Green**) to deny the variance with the condition that the applicant bring the property into compliance within the three-year time period, ending on December 31, 2012. <u>THE MOTION WAS APPROVED UNANIMOUSLY.</u>**

Chair Green said that they would move to deliberation on the Audrey Perry meeting, last heard on November 17th, 2009. Before starting, he wanted to note that a letter from Lake Sunapee Country Club had been received, stating that a foot path in question could not be used as an access-way for the driveway for the Audrey Perry property. This path was only intended as a walkway and the use of it as a driveway was never contemplated and the owner of Lake Sunapee Country Club did not feel it was appropriate.

Chair Green noted the supplemental information that had been provided by abutter, Chet Ellison, and he wanted to begin a discussion.

Jeff Horton said that he felt they should try to do the right thing on both levels. This person has paid their taxes and has done everything they have had to do to keep the lot buildable and sustainable. That carried a lot of weight with him. It sounded to him that there was a very real concern by Mr. Ellison, which would not be fully realized until a house was put onto the Perry property. Referencing the information provided by Mr. Ellison, Mr. Horton indicated that there seemed to be ways to mitigate the water from the property. He thought the lot should be allowed to be built on, but that there should be conditions put on it to make it unlikely that the water runoff would affect the surrounding neighborhood properties.

Cort Cross said that he wasn't sure whether the activities that had occurred since the zoning ordinance had been in effect would have allowed this type of building on this type of lot. He thought this lot would not be buildable under the current zoning ordinance. He said that the conservation committee meeting, there was considerable concern on their part on what the long term effects of this might be. He also remembered it was said that there would be enforcement problems in this situation. The lot was split from the Ellison lot and has been on the market for a long period of time. Mr. Cross said he was torn but felt he should go to the human side of the issue and felt perhaps a building on this lot was not a good idea.

Chair Green said that he had already expressed his position but wanted to say that on any board he has sat on, including this one, everyone has been very cognizant of how the neighbors and neighborhood would be impacted by the proposed changes. He was looking at the request before the board as a wetlands crossing, which was very specific and a special exception. It was permitted by the zoning, and in this case the property owner has met the State requirements involved. It meets the setbacks within the Town's zoning, allowing for room for a house to be built on the lot. As far as the runoff and water attributed to the proposed project, it did not seem to generate a substantial, significant or measurable amount. It was a lot that was given a subdivision approval back in 1970 or late 1960's. He felt the lot met the requirements.

Chair Green went on to say that there were two things within the property that made him favor the approval with conditions. He said the issues were the driveway crossing, and construction of the home on the lot. He read the conditions he came up with: ***There would be conditions of constructing the driveway, mitigating stormwater impacts by using a suitable infiltration practice such as a permeable pavement or a bio-retention design and constructed in accordance with Low Impact Development practices. Pervious driveway shall be approved by the New London Zoning Administrator at such time that the driveway application is submitted to the Town***. He said that the applicant has to make out a driveway application and it should comply with the design requirements. The other situation he saw with the property was the actual construction of a home.

Chair Green felt the other important thing, if he was a neighbor or an abutter, or the Ellisons, would be as a result of construction taking place on the lot, would it direct more water back on their property. The condition for this would be: ***for the construction of the home and the surrounding yard, landscaping shall be done to prevent additional runoff to the Ellison property***. (Chair Green gave the example of constructing a swale or a berm from that property to prevent additional runoff.) ***This should be done using low Impact Development Best Management practices in accordance with standards contained in Appendix A of the New London Land Subdivision Control Stormwater Low Impact Design criteria. The design for the home and surrounding yard shall be approved by the New London Zoning Administrator at such time as the building permit application is submitted to the Town.***

Mr. Lyon said he was in agreement with having this deliberative session in order to become more familiar with the low impact design standards as they would work with this lot. He said the problem with the lot is that it is currently very wet. No matter what development is done on it, it will remain wet. He felt they should approve the permit for the driveway with the understating that they have been paying taxes on the lot, but do it conditional on the use of the Low Impact Development design.

Mr. Todd said that the letter from Lake Sunapee Country Club does help the Perry's case. The bottom line was that they have all the criteria for a standard special exception they have to meet which consists of the testimony at prior hearings, exhibits that have been submitted as evidence, personal knowledge of ZBA members, and they have to go through the specific general criteria for a special exception to see if, based on the facts presented, they have to grant the exception. They are free to attach as many conditions as they feel warranted due to the special circumstances. Mr. Todd went on to say that he had a long list of special conditions he would like to attach to the approval, but that he did not have a chance to read through the Appendix A of the LID best practices information, which may change his list. He reminded them that if the Zoning Board does issue a condition they have the capacity to require different setbacks, to require screening off of the parking area, and to restrict the footprint of the proposed structure. They can

limit the size of it, the number of occupants, and can limit the access to it (traffic features). They could also require a performance bond, but he didn't feel this was necessary. On the basis of the facts before the board they have an obligation to minimize the abutters' concerns, as they have shown at every public hearing they have had regarding this lot. Mr. Todd specified that abutters are anybody who is going to potentially suffer from the downstream impacts of this proposed change to the lot.

Regarding the elements of the special exception, Mr. Todd said that they have to make sure they have facts in the record to support it. Whatever they decide has to be in harmony with the surrounding area, they have to consider the lot size, the design of the structure, to note the intensity of what is going on, the location of the proposed site, and they have to make certain that there is no adverse affect on the environment. He said they need to insure that it doesn't' impair the surrounding property values. Or otherwise detrimental for any adverse effects they have in this case. Offensive odor seemed to be the only adverse effect, as gasses do come from these wet areas. They have to make sure no discouragement of orderly development of scale or height with respect to the other surrounding buildings. They have had testimony that there is not a lot of open ground on this lot. This development is also not to be detrimental to the character or enjoyment of others in the neighborhood. Unless they can find all those things on the facts before them, they have no choice but to deny the special exception. He felt they needed to examine the minutes, and the exhibits that are in evidence. They need to make sure that they have everything matched for an approval.

Mr. Todd said that they need to choose the right conditions that will guaranteed the least amount of impact to the wetlands and to the water runoff situation. He explained that this would be a very challenging lot to build on. 40% of the lot is wetland. Given the size of the lot, that percentage is huge. He was not prepared to delineate exactly what those conditions should be at that night's meeting.

Chair Green asked if anyone recalled that in their second hearing on this issue, they went through step-by-step and reviewed the criteria for the special exception. Mr. Todd said that would be in the minutes. If the approval is appealed, that is when they would have trouble. Superior Court will take the minutes, their evidence, and they will not take any new evidence. They will take what they have and see if they acted rationally in their decision. If it isn't in the minutes, it is not in the evidence. They have to sift through the minutes, pick and highlight the pieces they need to find the facts they need to solve the questions and requirements.

Mr. Todd said that the next thing they have to do is decide what reasonable conditions they can attach. Chair Green said he wasn't sure if they had a copy of all the minutes at the meeting, but that he would like to go through this entire project at the meeting. He said that they should go through each of the criteria and deliberate.

Mr. Todd said that the lot was purchased in 1960. The wetlands have been delineated as a considerable percentage of the lot, even though it was done at the driest time of the year. About 35% of the lot was wetlands. This has been substantiated by photographs and testimony that the lot is very wet. They have to demonstrate that there isn't another access point that wasn't a wetland. The building lot could be accessed by another point, but that would mean using a portion of Mr. Ellison's property. He was not suggesting that this was a viable option, but was just noting that this was the only way the property could be accessed without crossing a wetland. It would appear that the area delineated by Peter Blakeman, engineer, the crossing chosen was the one that presented the most minimal impact. They have a wet lot and no other access to it. The first criteria had been met.

Secondly they have to show that the crossing is the minimum impact to the wetland. This point chosen was the narrowest and minimally impacted, so this criteria had also been met.

The general special exception requirement was next. Mr. Lyon said they should recognize that the use they are asking for (crossing a wetland) is generally prohibited in this area, but is allowed as a special exception under the terms of the ordinance.

Mr. Todd asked those attending the meeting to turn in the Zoning Ordinance to Section G-1 and to look at the list of 7 criteria (A-H).

Was this proposal in harmony with surrounding area given the location of the lot size and its use? Mr. Todd said that every other lot in this subdivision was of the same size, so there was nothing unusual there. He said that they cannot comment on the size or design of the structure because it isn't there yet, but that they could limit it by conditions. They may need some help here, but in the proposal they should come up with a number. It is going to be a single family, as all the other homes in that area are single family.

Location to public highways- Mr. Todd didn't feel that there was anything within the criteria that would cause alarm.

No adverse effect on the environment or no discouragement of appropriate and orderly development in the use of the land. They have to decide that proposed structure does not impair the value of the neighborhood or otherwise be detrimental or injurious to the public by production of noise, vibration, light, dust, fumes, etc. or other detrimental conditions. He said they have a wet spot here and they have to find in the facts sufficient evidence that whatever they do to put the crossing in, does not have any further adverse effect on the runoff. Do they have sufficient facts in the record to sustain a finding that that was the case here. He said that is where they have to do the digging. Mr. Todd said they evidence and testimony of a professional to that effect, but they do not have a witness of their own. In place, they have the information provided by Mr. Ellison, who received the information from an in-law. If the in-law had attended the meeting, she could have testified. The problem from a case-law point of view was that they were stuck with the testimony of an expert, versus a piece of paper that was inadmissible hear-say in a court of law. Mr. Blakeman's testimony, because he is an expert, in the eyes of the court carries more weight than a piece of paper. He said there was good material in the information supplied by Mr. Ellison, but they couldn't use it alone to refute the testimony brought forth by Mr. Blakeman.

Mr. Lyon said he read all of Mr. Ellison's information and found it to be of a general nature and did not address the specific problem. Mr. Todd said that they could use the information to impose reasonable condition. Do they have sufficient evidence in the record that this proposal and the resulting division, for a building, would have a detrimental condition that would be injurious to the neighborhood. Is there enough facts in the record to show that they could sustain a finding that if they go through with their proposal, that they won't sustain any injury to the neighborhood.

Mr. Lyon said that they have evidence that what was being proposed (a driveway) would not have adverse effects to the neighborhood. Mr. Todd felt the scales were hung. They only need a preponderance of the evidence. Mr. Blakeman's testimony said that there wasn't going to be any adverse effects. And if it did happen to cause adverse effects, they would require the driveway to be constructed of a permeable surface. He said that would appear to solve the problem.

Was there an adverse effect to the environment caused by location of the house? Mr. Todd said that the house to be built would have to be very close to Mr. Ellison's house. They can correct this with an adjustment of setbacks and a footprint, and screening walls. He didn't think they could correct all of those things with the setbacks.

Are there adequate and lawful arrangements for sewage disposal? Mr. Todd said that they plan to run a sewer line to the town sewer system, so there would be no public safety issues in this regard. He asked Mr. Stanley if there was Town water available in this area. Mr. Stanley said that there was not and that they would need to dig a well. Mr. Todd asked if there had been any testimony in this regard previously. He couldn't remember. It was decided that there was no testimony. Mr. Todd said that there would be no reason to conclude that there would be any adverse in any domestic water supply for them or anyone else. Utilities posed no issues.

Drainage. They have to find sufficient evidence in the record that says this proposal would have no adverse effect on the drainage off of that property. He asked the board if there was sufficient evidence in the record in this regard for a driveway. Chair Green went back to Mr. Lyon's comment, that Mr. Blakeman's finding was that there would be no impact to the drainage off of that property if an impervious driveway was constructed. Mr. Todd said that this fact would support the criteria. He said that they can reasonably assume that there will be a residential building constructed on the Perry property. If they believe that there could be adverse effects to the drainage due to there being a roof involved, that they can address the building permit with sufficient conditions to minimize the runoff from the roof by the construction of certain drains to address that issue. He felt that this should be a condition of the permit.

Necessary Public Catch-All? Mr. Todd did not feel that this was an issue.

No adverse effect on vehicular or pedestrian traffic in the neighborhood? Mr. Todd asked if there was anything in the record regarding this issue. There was not.

Does this proposal present any effect, detrimental or use of character or enjoyment of the neighborhood by undue variation in the neighborhood? He said that every lot in that area is wet. It is not a violation of the neighborhood, as the houses there are all residential. He said they don't know enough about the house to make certain that the approval would result in a wide variation for the type of housing but they can address it with a condition. He said that one of the conditions they could impose was the appearance of the building or the modification of exterior features. Mr. Lyon said that under condition "G" they concluded that it would not be detrimental to the character or enjoyment of the neighborhood. Mr. Todd said that they can't interpret the "variation" in the neighborhood. Mr. Lyon said that the driveway was the only thing being decided at this time.

Mr. Lyon said that items A through H had already been reviewed.

Mr. Todd remarked that he looked at the first two criteria for the wetlands crossing special exceptions. For both of these, there was sufficient proof that they had been met. They have shown that their proposed crossing imposed the least impact and that there was no other way. Now they have to meet all the standard criteria for a special exception. He said that items A, B and D were applicable, and he was intending to address possible runoff from the eventual roof. Item E posed no issue. The other requirements dealt with having two crossings. Item H pertained to the letter and the spirit of the ordinance.

Mr. Todd read that the spirit of the ordinance was "To protect and promote the general welfare of the Town's inhabitants by protecting the rural charm." In his belief, the general welfare was not going to become worse than it is currently.

He asked those in the meeting to contemplate if the proposed use was going to be dangerous to the comfort, peace, enjoyment, health or safety of those living in the community, or does it lend itself to the disturbance or annoyance of the abutters. Mr. Todd noted that there had been evidence in record to confirm that this proposal would be dangerous to the comfort, peace, enjoyment, health or safety, or would disturb people in the neighborhood. Mr. Lyon said that the driveway wouldn't create that situation but it was the eventual home that would be built there that would aggravate the situation. Mr. Todd replied that there was adequate testimony in the record that no one in the area was pleased with what was going on. He said that he would have to look at the minutes to determine if there was enough testimony to find that they decided that the proposal would be dangerous or disturb the abutters.

Mr. Lyon said that lot as it sits is a bit of an annoyance to the neighbors. To the extent that it decreases the joy and comfort of one neighbor in the room, he wants to be sure to help minimize the effect the addition of a driveway would make. He had no doubt that this was an annoying issue to those in the neighborhood.

Mr. Todd said that it states in the wetlands portion of the ordinance that they (wetlands) are extremely important to the Town. They intended that the overlay district shall prevent development of structures and land uses on naturally occurring wetlands which will contribute to the pollution of surface and groundwater by sewage and toxic substances. He said that this special exception has to comply with all the areas of the ordinance. He asked if

anything in wetland was part of the overlay district. Mr. Stanley said that a wetland is automatically in the overlay district because it is identified as such. He noted that the wetland overlay mapping was only for buffers.

Mr. Todd said that the purpose of identifying wetlands is to prevent the development of structures on lands that which would create pollution to surface and ground water by sewage and toxic substances. He said that he couldn't find any reason to suggest that the wetlands ordinance was being violated.

Chair Green asked how Mr. Todd felt at this point, in summary. Mr. Todd explained that in as much as this lot is what it is, there is sufficient information that shows the conditions were met and that they allow the crossing subject to whatever conditions they would impose on the driveway, the appearance thereof, and the proposed construction. Mr. Lyon summarized that they should allow the variance that have it contain certain conditions that they haven't yet discussed. Mr. Todd said that they need to mention every bit of evidence as they decided this, including testimony, exhibits, etc. They have to pull it together to summarize their decision in the nature of the opinion.

Mr. Lyon felt that if Low Impact Development (LID) standards were met, it would create some of the conditions that Mr. Todd had previously suggested. They would limit the footprint, among other items that had been suggested. Mr. Todd asked Mr. Stanley to explain what was meant by "LID" standards.

Mr. Stanley said that one of the things they need to reference is Section 4:L2, regarding stormwater recharge. They need some basis to determine how much water could be absorbed. In the stormwater recharge section, under item "b" it explains a formula that puts water from a ½ inch rain storm into the ground. It has to be able to absorb that amount of water into the ground. Mr. Stanley remarked that this was a reasonable standard that is used widely throughout such discussions. He added that there are a variety of methods to obtain this standard. One method is to incorporate a pervious driveway. The inclusion of this sort of driveway was not included in the original plans, as it would be considered overkill from the standpoint that the land more than compensates from driveway that would already be created. Mr. Stanley went on to suggest that they could direct some drainage from the eventual house to a pervious driveway to help move the water more quickly. They can also infiltrate stormwater runoff by using dry wells, rain gardens, etc. Mr. Stanley commented that they have a number of these sorts of things that are functioning very effectively today in the Town. He also remarked that they now require such things on all lake front properties due to the fact that they work. Mr. Stanley said that if the requirement was that they infiltrate the water from a ½ inch rain storm, they could work that into the conditions without a problem.

Mr. Todd said that they still have setbacks, and the screening of the parking area with walls or fences, and the appearance of eventual building to consider. Mr. Stanley said he did not think the screening was necessary and that it would create a difference between them and the other properties in the area.

At this time, Mr. Todd asked if the other participants would be in favor of suspending the meeting and setting a time to reconvene to discuss the other items. He thought it might be useful to be able to survey the existing structures in the neighborhood and also to examine other screening options. Chair Green said that he would like to keep going with the current meeting and not have to set up another meeting.

Mr. Lyon suggested making a motion:

IT WAS MOVED (Doug Lyon**) AND SECONDED (**Michael Todd**) that they approve the special exception subject to the driveway installed being pervious, and any house that is built on the property be built in conformance with Low Impact Development criteria, as specified in appendix A of subdivision regulations Article 4: L-2 and be mitigated consistent with appendix A.**

Mr. Todd asked to amend motion:

IT WAS MOVED (Michael Todd**) AND SECONDED (**Doug Lyon**) that in addition to the original motion in this discussion, the parking area and driveway be appropriately screened from Map 123, Lot 13 by use of fences or plantings. <u>THE AMENDMENT TO THE MOTION PASSED.</u> It was opposed by Jeff Horton.**

Mr. Horton said that there are no other screens on the properties they have talked about. Mr. Todd said there are no other properties that have this circumstance. Mr. Horton explained that at his own home, the neighbor's lights shine into his windows and it only lasts a few seconds. He wasn't sure it warranted a screen. Mr. Cross said he

sympathized with the concerns from the abutters and neighbors, and noted that this lot has been the way it is for so many years. He felt that the screening was not an unreasonable request. Doug Lyon agreed and noted that the addition of a screen would address one of the major complaints from Chet Ellison and felt some evergreens could be planted to help screen the neighbor's headlights from shining into his property.

Chair Green called for a vote for the original motion, made by Mr. Lyon.

THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Peter Stanley**) AND SECONDED (**Michael Todd**) to adjourn the deliberative session of the Zoning Board of Appeals. THE MOTION WAS APPROVED UNANIMOUSLY.**

The meeting adjourned at 8:50pm

Respectfully Submitted,

Kristy Heath, Recording Secretary
Town of New London