



Zoning Board of Adjustment Meeting
Monday, February 1, 2016, 7:00 PM
City Hall Council Chambers

MINUTES
Approved 3/7/2016

Call to Order by the Chair

I. Attendance/Roll Call

Present & Participating: Richard Collins, Michael Hurd, Todd Russel, Carolyn Towle, Amy Richardson, James Petrin

Absent:

City Staff: Nate Miller, Executive Director of the Upper Valley Lake Sunapee Regional Planning Commission was filling in for Mike McCrory.

II. Minutes of Previous Meeting January 4, 2016

Motion: To accept the minutes of the January 4, 2016 meeting as written.

Made by: Mr. Collins **Second:** Mr. Petrin

Vote: Unanimous in favor

III. Old Business

- A. (ZO 2015-00017) Ian & Tonia Gates, 8 Bessie Avenue** – seek a variance from Section 22-209, R1 District Yards, of the City Zoning Ordinance to permit a deck within the side yard at **8 Bessie Avenue**. Tax map 129, Lot 66. Zoning District R-1. (Cont. from 1/4/2016)

Mr. Miller said that no new materials had been received by the staff.

Mr. Gates stated that he had hired a surveyor who was unable to find any property markers on the Gates' property. Mr. Gates said the surveyor recommended using the fencelines as the property lines. Mr. Hurd said that fencelines were not acceptable, that the property boundaries are described in the deed to the property and that a full survey would be required.

Mr. Gates asked if a boundary line agreement between neighbors (section 471-2 from the state) would be acceptable, because a full survey would cost him thousands of dollars due to the lack of markers. He said a full survey could conceivably impact all of the properties between him and Maple Avenue.

Mr. Hurd again said he was not comfortable with a boundary line agreement. Mrs. Towle and Mr. Russel agreed.

Mr. Gates said he had had the Building Inspectors inspect the deck and they have found it to be mostly in compliance with the Building Codes (need handrails on the deck stairs and the balusters on the deck are too far apart). Mr. Hurd said he had discussed this with the Building Inspector and confirmed what Mr. Gates was saying. Mrs. Towle asked for the findings from the Building Inspector to be in writing.

Motion: To continue (the hearing) to the April 4th (meeting).

Made by: Mr. Russel **Second:** Mrs. Towle

Vote: Unanimous in favor

- B. (ZO 2015-00018) Ian & Tonia Gates, 8 Bessie Avenue** – seek a variance from Section 22- 114, Nonconforming Structures, and Section 22-209, R1 District Yards, of the City Zoning Ordinance for an expansion of a nonconforming structure making it more nonconforming at 8 Bessie Avenue. Tax map 129, Lot 66. Zoning district R-1. (Cont. from 1/4/2016)
- C. (ZO 2015-00019) Michael & Elizabeth Lemieux, 519 Jarvis Hill Road** – seek a variance from Section 22-451(2) Floodway District: Prohibited Uses - Fill & Obstructions, of the City Zoning Ordinance to permit placement of fill in the F1-F2-SB districts and erection of a fence in said districts for agricultural and pit access at **149 Alden Road**. Tax Map: 182, Lot: 3. Zoning District: RR (Cont. from 1/4/2016)

Mr. Petrin recused himself from the hearing. Mr. Hurd asked Ms. Richardson to sit in for Mr. Petrin.

Ms. Taylor distributed an updated staff report from Mr. McCrory (dated January 28, 2016) and new information from Mr. Rhoads (dated February 1, 2016). Ms. Taylor suggested the Board take a 5-minute recess to read the new materials. **[Someone says something off-camera that appears to relate to additional materials.]**

Motion: To accept everything and review it all at once.

Made by: Mr. Russel **Second:** Ms. Richardson

Vote: Unanimous in favor

Motion: To take a five-minute recess

Made by: Mr. Russel **Second:**

Vote: Unanimous in favor

After the Board came back into session, Mr. Miller gave a brief summary of the application. He stated that the hearing is a continuation from last month on an application for an “after-the-fact variance under section 22-451, which relates to development in the floodway, for an agricultural access road that was improved. Based on correspondence from the applicant’s agent on January 29th and February 1st in conjunction with the staff memo dated January 28th, there appears to be agreement between the applicant and City staff on some key aspects of this case. In the January 29th letter, some of the discrepancies between the datum used to determine the base flood elevation have been rectified; staff and the applicant agree that there was improvement on this road; gravel and grading did occur on this road without a floodway development permit or a review process by the

zoning board. The question for the Board to adjudicate this evening is whether to grant an after-the-fact variance for the improvements that occurred on the road pursuant to section 22-451. The review criteria are contained in Mr. McCrory's report.

Mr. Miller said that when the Board contemplates a variance under section 22-451 (floodway development) – that also ties in with section 22-453 which requires ensuring that when development happens it does not raise the base flood elevation or change the capacity of the floodway. Mr. Miller said that the February 1st letter to the Board from the applicant's agent states that in his professional engineering opinion the work that happened on the access road "will not result in an increase in flood levels or change the carrying capacity of the floodway." This letter relates to a concern raised in Mr. McCrory's staff memo of January 28th.

Mr. Rhoads said the intention of his letters was to condense and simplify the matters before the Board. The elevation data has been corrected which led to the revised plans that were distributed to the Board this evening. He said there was no good digital way to overlay the FIRM maps on the survey so he had to put in some "wobble room". (He scaled off distances from Chestnut Street.) He said it does not change the facts in the case. He said they are not arguing that the road is in the floodplain and floodway and below the flood elevation. The road was built in 1961, before the surrounding properties, and that it has been used for the same basic purposes since that time. Mr. Rhoads said that a representative of NRCS (Steve Pytlik) had met with Mr. Lemieux and examined the road and concurred that the road had been box cut and material removed then replaced with 12-13 inches of new material, blended into the cornfield on the side. Mr. Pytlik did not say specifically that the elevation of the road is exactly where it was, but Mr. Rhoads believes that field evidence indicates that it is. He stated that a permit should have been filed, but that Mr. Lemieux was not aware of it at the time. Mr. Rhoads said he has done a lot of work in Claremont and he was not aware of it either. He said Mr. Lemieux is asking for the variance and to be able to leave the materials in place. Mr. Lemieux is now aware of the elevation of the road and what needs to happen if it is to be changed in the future.

The Board had no questions for Mr. Rhoads. Mr. Lemieux declined to speak. Mr. Hurd then asked the abutters to speak. He asked that comments pertain to the road only.

Mr. Allard said it appeared as though everyone's mind was already made up. He said his biggest concern now is that this was a farm road and now it's going to become a commercial road. "It's just a matter of time. Everything has been done without permits before to get us where we are now." Soon it will have gravel trucks driving down it and "if you want to live next to that, buy a house up there. Mine's going to be for sale soon."

Arthur Bastion, 91 Spring Farm Road said "no permits, no permits, no permits." He said in his opinion a businessman like Mr. Lemieux should know about getting permits and there is no excuse for not getting the necessary permits. He said he agreed with Mr. Allard - that the road has been used for many years with only tractors and hay wagons – not gravel trucks. No gravel ever came out by that road prior to Mr. Lemieux owning it.

Mr. Ruetz disagreed with Mr. Rhoads' assertion in his February 1st letter that the flood water did not crest at the access road. Mr. Ruetz said he has seen the water crest over the

road with his own eyes. And, he said, he had stated as such at previous meetings. There was discussion between Mr. Ruetz and the Board about the interpretation of Mr. Rhoads' statement, with Mr. Ruetz and the Board disagreeing.

Mr. Rhoads said that what he was trying to say was that the south side of the road may be prone to flooding even when the water doesn't get over the road. He said if the water went over the berm and under the road on one occasion, it doesn't change his opinion.

Mr. Miller stated that the average width of a typical two-lane road would be twelve-foot lanes and four-foot shoulders for an average width of thirty-two to thirty-three feet. He said he offered this information to the Board to provide some context. Mr. Russel stated that the majority of this road fits that, with one section that reaches forty-eight feet (Mrs. Towle said forty-three feet.). It is where trucks pull in and they can pull off to the side so another truck can pass.

Ms. Taylor reminded the Board that when they close the public hearing and go into "discussion mode", that they must consider the five points of the variance in addition to the three additional (criteria) that are specific to the district.

Mr. Hurd asked for the average width of the road. He said three quarters of the road is narrower than the bottom. Mr. Rhoads said he believed he had stated for the record last time that it was between fourteen and fifteen feet. He said the email he received from the NRCS said that the wide part is forty-three feet.

Mr. Rhoads asked to make one more point on behalf of Mr. Lemieux. He said when the Board is discussing the conditions of the variance Mr. Lemieux wants to remind the Board that the access road was created in 1961 to allow access to the property. It has been used and maintained since its installation for agriculture, logging and access to the pit on the property. The road was left with the property upon subdivision of the property in 1995 at the request of the Planning Board, according to the minutes of those meetings, for public safety reasons. Maintenance of this road is in the public interest. The excavation of roadway materials and replacement has not altered or obstructed drainage patterns. The Lemieuxs believe the road keeps silt, fertilizers and airborne dust out of the stream and the air. The roads have existed prior to the adjacent structures and residences being built (words obscured – cannot make out) since 1961. The current users have utilized it since 1995 without any complaints filed including when the work was being done in 2011. Continued use and maintenance of the road ...(?)... as it existed for 65 years. The road is an important feature of the property as it provides access to the major roads and public safety and for preventing runoff into and pollution of the adjacent stream.

Mr. Ruetz stated that Mr. Lemieux's application does not meet the five variance criteria. Mr. Hurd stated that this variance is only about the road – nothing to do with the quarrying. Ms. Taylor clarified that the question before the Board is not the existence of the road, but rather the fill that was placed on the road and whether or not you need to grant a variance for the placement of that fill. Mr. Ruetz had nothing further to say.

Mr. Hurd confirmed that there were no further questions from the Board to the applicant. He declared the public hearing closed.

Mrs. Towle said not only was material removed from and replaced onto the road, but the road was made wider and that was not part of the discussion between Mr. Hurd and Mr. Lemieux. She wanted it clarified that there was no permit to do that. She said she wanted this to be part of this thought process.

Mr. Hurd said that the engineer stated that the grades weren't changed, so theoretically the road could be converted back to cornfield. The issue in filling in the road in the flood zone is an elevation change. Based on information and evidence presented to the Board, elevations have not been changed. He acknowledged that the road is wider at the bottom, but felt the width of the road was not relevant – only that material was taken out and material was put back in.

Mr. Russel said that in his opinion after looking at the aerial photos of the road, that the road was simply cleaned up and not made wider. He said the USDA grant only paid for a twelve foot wide road. A key point is that the work was done without a permit. He said historically the Board has looked at what was done and was it done correctly. "If it was done by the books, we grant it", he said. He said if Mr. Lemieux came in with a plan to do what they have already done, would the Board grant it. That's how he is looking at it.

Ms. Richardson said yes, the work had been done without a permit, but it actually helped, it didn't damage anything, it didn't lower the property value, it actually helped the flood area by preventing some of the flood waters from getting into the streams and properties.

Motion: That the Board grant a variance from section 22- 451 Floodway District Prohibited Uses of the City Zoning Ordinance to permit placement of fill in the F1-F2-SB district for pit access at the 149 Alden Road pit (but the road is on the Spring Farm Brook side) with the conditions that:

1. The access road serving 149 Alden Road, aligned parallel with Spring Farm Brook and running between the property and Spring Farm Road, may be maintained as needed for agricultural and other permitted uses. Maintenance work shall not alter the road in any way without prior review and written approval from the Planning and Development Department.
2. The applicant shall provide documentation, prepared by a registered professional engineer, stating the access road improvements as presented in this application and in testimony will not alter the flood carrying capacity of the floodway.
3. The issuance of this variance to construct below the base flood level will result in increased premium rates for flood insurance up to amounts as high as twenty-five dollars (\$25.00) for one hundred dollars (\$100.00) of insurance coverage and such construction below the base flood level increases risks to life and property.
4. This variance shall be recorded in the chain of title.

Motion made by: Mr. Russel

Ms. Taylor stated that condition #3 comes directly from the ordinance and thus had to be included, but that she was unsure as to the figures' accuracy.

Mr. Russel said he wanted to amend his motion to include “erection of a fence” based on language contained in the January 4th agenda. Ms. Taylor said no testimony had been given on a fence. Mr. Russel agreed to leave it out of the motion.

Second on the motion: Ms. Richardson

Discussion on the motion:

Mr. Russel said (something about the spirit of the ordinance which I could not understand) the ordinance is supposed to regulate what’s done in the district – it isn’t that a building was built or that the whole field was raised a foot – there was twelve inches out, twelve inches in (regardless of the width); we’ve had two people (an engineer and a someone from SDA) both say that.

Mr. Hurd said, as stated in testimony, there will be no increase in flood heights. Public safety will not be affected because the base flood level didn’t change. Because of the conditions in the motion, any future changes in the road would have to go before (the Board) so the base flood level will not increase after the fact either.

Mr. Russel said the change from a small road to a bigger road, just changing what the road is, doesn’t change property values. The way the road is used in the future may affect property values, but at this point they are not affected. He said he had not seen any evidence where it has changed property values.

Mr. Hurd said, “Is it a reasonable use? It was there.” It is an agricultural road. Per testimony, it has not changed – the grades are still the same.

Mr. Russel said the proposed use is a reasonable one. It was a 10-12 foot road in the past used to get farm equipment down – farm equipment has changed since 1960. The new road looks nicer – that’s the only change he sees.

Mr. Hurd said someone testified that the erosion factor is better with the new material than the loam that was there.

Mr. Russel said that Mr. Rhoads said in his opinion as an engineer the flood heights will not change. Mr. Russel said a licensed engineer knows more about this than he (Mr. Russel) does.

Mr. Hurd said there is no threat to public health with the filling in of the road. As per an engineered plan, we’re no increasing real estate; we’re not decreasing a flood reservoir.

Mr. Russel said the special condition of this property is where the road is in reference to the brook. Mrs. Towle did not think this was a hardship. Ms. Richardson felt that if the road is not maintained it can cause other environmental issues. Mr. Hurd said this is an existing road. It needs to be maintained for water flow. Over the course of time the grade of the road can change sending water in the wrong direction. By maintaining the grade you’re not going to have a burden. (I probably have captured this incorrectly as I was unable to follow Mr. Hurd’s reasoning.)

Mr. Russel said that if this plan had come before him before the work was done, he would have granted it.

Vote on the motion: Mr. Russel, Mr. Hurd, Mr. Collins and Ms. Richardson voted in favor of the motion. Mrs. Towle voted against the motion.

Mr. Petrin rejoined the Board.

IV. New Business

- A. **(ZO 2016-00001) Ed & Gloria Leskiewicz, 73 Thrasher Road** – seek a variance from Section 22-166, Permitted Uses in the RR District of the City Zoning Ordinance, to place solar panels on an adjacent parcel (Map 72, Lot 37, 63 Thrasher Road) for use at **73 Thrasher Road**. Tax map 60, lot 13. Zoning District RR.

Mr. Hurd read the public notice. Mr. Miller read the abutters roll.

Mr. Miller referred to a map contained in the Board's packet that depicts the location of this project. The applicants are seeking a variance to construct a solar array as an accessory use. Their house is at 73 Thrasher Road (map 60, lot 13). They would like to erect a solar array on the adjacent lot, owned by the same owner (map 72, lot 37). The solar array would serve directly the house at 73 Thrasher Road. Staff considers this an accessory use. However, an accessory use is defined in the zoning ordinance as, "a land use located on the same lot that is incidental, subordinate and bears a reasonable relationship to the primary use." Another remedy for this project would be to do a lot line adjustment to include the project site in the 73 Thrasher Road parcel, but the applicants have chosen the variance. There is a staff report from Mr. McCrory in the Board's packet. Mr. Miller said the applicants were present to answer the Board's questions.

Mr. Russel said he has done business periodically with Mr. Leskiewicz and asked the Board if they saw a conflict. None of the Board members did nor did Mr. Leskiewicz.

Mr. Leskiewicz said there will be two arrays of solar panels with approximately 12-14 individual solar panels per array. Each array is mounted on four sonatubes each 16 inches in diameter. Each array is 25 feet long, 8 feet wide. He has chosen this location because it is not practical to the sides of his house (well on one side, septic system on the other), trees are in the way in the front yard. The project site is 150 feet from the house and 125 feet from the boundary line. (The location is shown on a 2014 aerial photograph.) The applicants said that if they were to sell the two parcels separately that they would probably do a lot line adjustment to keep the solar array with the 73 Thrasher Road parcel.

Mr. Hurd asked if the panels would have any effect on the current use status of the back lot. Ms. Taylor said she didn't know.

Mr. Miller asked how high the panels are once mounted. Mr. Leskiewicz said approximately 15- 16 feet at their highest point.

The Board had no more questions. Mr. Hurd closed the public hearing.

Ms. Taylor said at a minimum a building permit and an electrical permit will be required for this project.

Motion: To grant the variance under section 22-166 Permitted Use in an RR District of the City Zoning Ordinance to place solar panels on an adjacent parcel (tax map 72, lot 37, 63 Thrasher Road) for the accessory use of 73 Thrasher Road, tax map 60, lot 13 with the conditions that:

1. This variance shall be for the proposed solar array located at 63 Thrasher Road (Map 72, Lot 37), which will be an accessory use to the primary residence at 73 Thrasher Road (Map 60, Lot 13). This variance is void if this accessory use is removed, property lines amended or other changes causing the use to be in conformance with the Zoning Ordinance.
2. Upon transfer of ownership of either parcel for any reason, the owner shall execute an easement or similar agreement, recorded in the chain of title, to maintain the accessory use serving the residence at 73 Thrasher Road.
3. This variance shall be recorded in the chain of title.

Motion made by: Mr. Hurd **Second:** Mr. Collins

Discussion on the motion: Mr. Hurd said he did not think this would cause a depreciation of surrounding values. Mr. Russel said it would block the neighbor's view as the array will be tucked in behind a stand of trees and behind the house. He said the hardship is the obstacles in the applicant's yard. Mrs. Towle said it was in the public interest because it's solar. Mr. Hurd said it's a reasonable use. The hardship is the layout of the land. Denying the variance would make it difficult to place the array on the applicant's land.

Vote on the motion: Unanimous in favor

V. Communications

The Board received the latest issue of *Town and City* magazine and the 2015-2016 New Hampshire Planning and Land Use Regulations.

Mrs. Towle talked about House Bill 1203, which is a revision of variance procedures that the legislature is discussing this week. She asked to have copies of it emailed to all of the Board members. Ms. Taylor said briefly that the revision would require boards to vote on each criterion separately. It appears to intend to make a clearer record.

Ms. Taylor handed out copies of case law that would help the Board better understand "uniqueness" of a property as it relates to variances.

VI. Other Business

VII. Adjournment

Motion: To adjourn the meeting

Made by: Mr. Russel **Second:** Mr. Collins
Vote: Unanimous in favor

The meeting adjourned at (?)

Respectfully submitted,
deForest Bearse