

EXETER PLANNING BOARD

MINUTES

OCTOBER 14, 2010

Chairman Lang Plumer called the meeting to order at 7:00 PM in the Nowak Room on the above date.

PRESENT: Chairwoman Kathy Corson, Vice Chairman Ken Knowles, Clerk Lang Plumer, Selectmen's Representative Bill Campbell, Members: Carol Sideris, Gwen English and Katherine Woolhouse, Alternate Member: Dennis Derby, Town Planner Sylvia von Aulock and Deputy Code Enforcement Officer Barbara McEvoy.

NEW BUSINESS: PUBLIC HEARINGS

JEFFREY and DEBORAH GALLANT – PB CASE #21009

Continued public hearing on the application for a Conditional Use Permit to permit the proposed construction of a 26'x 32' private garage/shop with an in-law unit, a septic system and associated site improvements encroaching upon the required buffer area of the Wetlands Conservation Overlay District (WCOD). The subject property is located at 46 Brentwood Road, in the R-1, Low Density Residential zoning district. Tax Map Parcel #62-58.

Ms. von Aulock distributed a copy of the 1999 lot line adjustment plan (Prescott – PB Case #9928) to the Board noting that it depicted the entire subject property. Ms. Sideris stated that she had not attended the last meeting or the site walk last week and would be stepping down from discussion of the application. Ms. English also indicated that she would be recusing herself from the public hearing discussion as she was an abutter to the subject property. It was noted that Dr. Derby would now be a voting member. Chairwoman Corson stated that she had not attended the last meeting but she had watched the video and did attend the site walk last week, and would be chairing the discussion.

Mr. Ed Woicak, of Marshall Law Office, addressed the Board on behalf of the Applicant. He indicated that he had reviewed the comments from the abutters' counsel and Town counsel relative to the "in-law/extended family" unit issue. He submitted a response prepared by Attorney Marshall which indicated their disagreement with the conclusion and arguments presented on behalf of the abutters (letter from Marshall Law Office, dated 10/14/10). He indicated that in reading the ordinance it is unclear and is ambiguous since it does not define or use the term "in-law" apartments, although what was clear was that the Town has consistently allowed property owners in residential districts to construct and occupy such apartments without special exception (ZBA) approval. Mr. Woicak noted that supporting documentation of NH Supreme Court case law was attached to Attorney Marshall's letter in which it has been demonstrated that the courts uphold "town policy" if consistently enforced. He stated that only the Town can change its own "town policy".

Chairwoman Corson polled the Board on their position of the "in-law" apartment issue. General consensus of the Board was that they were in agreement with Town Counsel's interpretation. Ms. von Aulock reminded the Board that the application before them for consideration was for a Conditional Use Permit (CUP) and the issue of whether an "in-law" apartment was proposed within the structure was irrelevant to the merits being discussed. She noted that the issue could be addressed as a condition of approval by requiring that the Applicant to obtain a special exception approval from the ZBA for such a use.

At the direction of the Applicant, Mr. Woicak requested to amend the application by removing the "in-law" unit from the proposed construction; he indicated that the application would be for the construction of the garage/shop building (with storage above) and septic. Ms. von Aulock requested that the construction of the driveway also be included in the application. She indicated that the NH DOT permit was for construction of the curb cut only and the construction of the driveway was subject to the town's wetland conservation overlay district regulations regarding buffers. She also noted that the construction of the driveway began prior to the NH DES Wetlands permit being granted.

Mr. Knowles asked if the Applicant was prepared to demonstrate to the Board that the proposed construction could not fit behind the existing residential dwelling. Mr. Woicak responded that Mr. Peter Landry was prepared to address the Board's request.

Mr. Peter Landry, LLS/CWS of Landry Surveying, LLC then addressed the Board. He distributed some additional written comments and a supplement plan depicting existing conditions on the subject property. Chairwoman Corson stated that the Applicant was requested to provide any new materials in a timely manner so they could be provided to the Board prior to this meeting. She indicated that given the materials were just received; the Board would not be making any decisions on the application this evening but would entertain the Applicant's presentation.

Mr. Landry continued and addressed Conditions #2 and #3 of Section 9.1.6. B. of the Wetlands Conservation District regulations. He indicated that a third party Certified Wetlands Scientist (CWS) had been hired to confirm the wetlands delineation on the site. He provided the Board with several photographs for the benefit of those Board members who were not able to attend the site walk. Mr. Landry reviewed the existing conditions of the Gallant property and commented that the proposed use could not feasibly be carried out outside the Wetlands Conservation Overlay District (WCOD). He pointed out that a 45' setback around the existing fire pit was being maintained in conjunction with the recommendations of the Fire Department. He indicated that no construction was permitted within the 3:1 slope area around the leach field. The area of the shooting range (and its adjacent safety area) as well as the future pool location were also identified. Mr. Landry noted that the forty-foot (40') wetlands buffer and setbacks were also delineated on the plan. He also pointed out the 'finger' of wetlands adjacent to the garden area that was created during the original driveway construction and has surfaced 15 years later.

Mr. Landry presented a brief history of the project noting that it began well before the new wetland buffer regulations were proposed. He indicated that the Applicant had obtained all necessary approvals prior to the new regulation being adopted by the town. Ms. von Aulock recalled that the Applicant's septic design was originally denied given the restriction noted on the 1995 NH DES permit and it was not until after the new NH DES approval had been issued that the Town's Building Inspector Doug Eastman had approved only the septic design. She stated that no other approvals and/or permits (i.e. building permits) had been issued.

Mr. Landry proceeded to address Condition #3 dealing with the design, construction and maintenance of the proposed use and its impact on the wetland buffer. He indicated that as a result of the newly adopted regulations which require a conditional use permit to be obtained, the Applicant has had to modify the septic system design previously approved by the town and state. He indicated that several modifications were made in an effort to minimize any detrimental impact on the wetland and/or wetland buffer. Those modifications included reduction in the overall garage size (from a 1,200 square foot footprint to an 832 square foot footprint), relocation of the driveway (area beyond the wetland crossing) further away from the wetland boundary, and the addition of a treatment swale. Mr. Landry noted that the useable upland area in this location prior to the new regulation being adopted was approx. 21,000 square feet, and since its adoption in March 2010 was reduced to approx. 4,800 square feet in area (i.e. not requiring a CUP). He indicated that 360 square feet (or 43%) of the proposed building would be encroaching the 40' buffer, as well as the remaining portion of the driveway (approx. 1,260 s.f.) and the entire treatment swale (approx. 1,560 s.f.)

Mr. Plumer requested that a better plan be provided to show the entire subject property as well as the proximity to structures on the abutting properties. He expressed his desire to see the 'big picture'.

Mr. Knowles inquired about the square footage of the proposed pool area. Mr. Landry responded that the additional area beyond the 20'x 40' footprint was to accommodate for the pool coping and the pump area appurtenances. He noted that there zero percent (0%) impact currently to the area of proposed development in the proximity of the existing residence. Mr. Knowles raised the issue of flooding. Mr. Landry responded that all flooding (as depicted in the pictures previously presented by the abutters) has occurred on the Gallant property and not encroached onto the abutting property. He noted that the NH DES Wetlands Board had acknowledged that the 36" culvert in Brentwood Road was undersized and had been the major cause of flooding in a heavy rain event.

Ms. von Aulock inquired about the square footage of the septic area and the reserve area. Mr. Landry indicated that it was an Enviro-septic system with a reduced footprint of approximately 300 s.f. and that

no reserve area was required to be provided as it was not a subdivision of the property. He also indicated that there was a note on the plan indicating "Suitable replacement area, in place or redesign."

Dr. Derby commented that he felt the project was approached all wrong. He indicated that it was unfortunate that there was no other input to the State other than the Conservation Commission (CC). He commented on feeling 'somewhat manipulated' at this point and indicated that the town should have heard this application well before now. He expressed his displeasure with the process and stated that had the Applicant researched the history of the property prior to commencing with the proposed development, the contentious issues associated with this application may have been lessened.

Mr. Plumer inquired about the additional plantings. Mr. Landry responded that the Applicant purchased a variety of trees and shrubs from the Rockingham County Conservation District (RCCD) and planted them along the edge of the wetland boundary in mid-April. He noted that a list of such plantings was depicted on the site plan.

Mr. Woicak briefly reviewed the chronology of the project once again. He indicated that the Board had heard a large amount of testimony on behalf of the abutters, and it was not all about the town's regulations; he commented that they are simply opposed to the project visually and just do not want it to happen. He stated that his client had the constitutional right to use and enjoy his property. Mr. Woicak indicated that the Applicant satisfied the NH DOT site distance and other requirements necessary for the driveway permit. Subsequently, the abutting property owners planted two trees and constructed a fence which extended beyond their front property line and into the state ROW (NH Route 111A). Ironically, he noted that one of the arguments used in the abutters' appeal of the NH DOT permit was that there was inadequate site distance provided. Therefore, one would question the credibility of such persons.

Chairwoman Corson interjected and stated that the Board understands the abutters are upset, but asked that Mr. Woicak focus on the application before the Board.

Continuing, Mr. Woicak stated that his client met the six (6) requirements of the Wetlands Conservation Overlay District (WCOD) regulations as outlined in Section 9.1.6.B of the ordinance and that minimal impact would result from the project. He requested that the Board grant his request for a Conditional Use Permit (CUP).

Mr. Knowles pointed out that Section 9.1.8. of the Wetlands Conservation District ordinance prohibits wastewater disposal systems (including a 4,000 s.f. reserve area) even though they may be permitted in the underlying zoning district requirement. He indicated that the ordinance did not differentiate between new construction and replacement.

Mr. Landry responded that there was only a total 4,800 s.f. of useable area outside of the WCOD buffer area. He indicated that the plan did not have a 4,000 s.f. reserve area and it never did.

Mr. Woicak indicated that the condition of the 1995 NHDES permit regarding future development was boilerplate. He noted that the original permit had never been recorded at the Rockingham County Registry of Deeds (RCRD) nor was there any reference (by note) on the plans or in the respective deeds for the property. Subsequently, the NHDES had waived condition #3 (of the 1995 NHDES approval) when the March 2010 wetlands permit was granted.

Ms. von Aulock commented that the garden and shooting range areas were not actual structures and could possibly be relocated. She inquired about any regulations which may address discharge of firearms on private property. Mr. Woicak responded that Mr. Gallant had met with the Police Department to determine the best area (for safety purposes) in which to locate the range. Ms. von Aulock mentioned that the Board needed to consider the conditions of the remaining 13+/- acre lot.

Chairwoman Corson inquired as to how the Planning Board decides about private property layout and/or design. She asked where does the Planning Board draw the line. Mr. Woicak responded that the ordinance gives no guidance on how to proceed. Mr. Landry stated that the remaining land was twelve (12) acres in size and was extremely wet for the most part. He referred the Board to the sketch plan block on the 11"x 17" plan previously distributed. Ms. von Aulock confirmed there were only two (2) areas of uplands in accordance with the 1995 plan.

Mr. Knowles commented that the proposed garage could be located in the existing garden area and would not require an additional septic system. Mr. Landry indicated that access to that area would still require crossing (encroachment) of the wetlands buffer. He also noted that there was no prohibition of having a bathroom in the garage/shop structure. Mr. Knowles indicated that an expansion of the existing septic system could support the garage.

There being no further questions of the Board at this time (8:15 PM), Chairwoman Corson opened the public testimony portion of the hearing.

Attorney Jed Callen addressed the Board on behalf of the abutting property owners at 50 Brentwood Road, Anne Duncan and Guy Kayton. Ms. Duncan distributed written comments from Attorney Callen, dated 10/14/10. Attorney Callen spoke on the following points:

- Based on the Applicant's presentation, the application should be denied.
- The CUP application should include the entire driveway construction and not just the portion beyond what has already been constructed. He indicated there was apparent confusion between Messrs. Landry and Woiccak.
- Alternative location – desire and 'future' plans are not considered structures and cannot be used to negate the CUP application process. Such proposed uses can be relocated to provide for a garage location.
- Erroneous chronology presented by Applicant. Attorney Callen requested the right to return to this point and address it later, if necessary.
- Request to orally amend the application is invalid and violates NH RSA's which address application submission and abutter notification deadlines. He stated that the statute was clear that abutters have the right to submit information in a timely manner for the Planning Board to review --- for that reason we have the public hearing process. He indicated that if the Applicant wishes to amend the application, the current application must be withdrawn and the Applicant must re-apply.
- Proposed use ("In-law/extended family" unit) not a permitted use in the R-1 zoning district. A second house cannot be constructed on the property. He stated that an accessory dwelling unit would require a special exception approval from the ZBA. Attorney Callen argued that Applicant's counsel has attempted to apply the 'administrative gloss' argument by claiming the ordinance was ambiguous and that others have received the benefit of said misinterpretation of the ordinance. He stated that the history of the town permitting 'in-law/extended family' units without requiring a special exception approval was irrelevant. He noted that Town Counsel concurred with this interpretation.
- Disputed Applicant's argument of being 'grandfathered'. He indicated that the issuance of a State driveway permit had no bearing on the applicability of the town's ordinance. He indicated that to the contrary, the law indicates that a person has no vested right to build anything until and unless one holds all State and local permits required. He proceeded to review the construction activity timeline and asserted that the driveway construction was done illegally.

Chairwoman Corson acknowledged that the abutters' issues had been covered thoroughly, and the Board was well aware of those concerns. She asked that Attorney Callen refrain from any further finger-pointing and to focus on the criteria appropriate to the application.

Attorney Callen referred to Mr. Knowles' earlier comment with respect to Section 9.1.8.B which states that Wastewater Disposal Systems, including a 4,000 square foot reserve area, are prohibited in the Wetlands Conservation Overlay District (WCOD). He confessed to have missed this reference, but indicated that he concurred that it was applicable. In conclusion, Attorney Callen stated that the application, as submitted, should be denied.

Mr. Brian Griset, also speaking on behalf of the abutters, addressed the Board. He spoke of the inconsistencies throughout the application process. He indicated that he supported the intent of the new ordinance, although he had issues with some of the language. He stated that an Applicant should not be able to reserve "future" areas to negate the Conditional Use Permit process.

Ms. Gwen English, 44 Brentwood Road, addressed the Board. She commented that the abutters and their legal team had been thorough in their presentation and she did not feel the need to reiterate any of the points made by them this evening or at the previous meeting. She provided the Board with some history of the mid-1990's subdivision and the enormous challenges faced by the owners at that time with respect to the wetlands and access to the uplands in an attempt to choose a building site. Ms. English indicated that it was her understanding that given the physical characteristics of the property and restrictions placed on NH DOT and NHDES permits, that no further development requiring access roads or further alteration to wetlands would occur. She stated that it was her opinion that the State agencies failed to review thoroughly the documents from the 1990's and did not uphold their original decisions. Ms. English stated that the issues being considered would clearly have an adverse effect on our water quality and wetlands. She commented that this was all about protection of abutters and the people leaving downstream from flooding; it is about principles and taking seriously our regulations that the Board has worked so hard to develop.

There being no further public testimony, Chairwoman Corson closed the public hearing. Board discussion ensued.

Ms. von Aulock reviewed her discussion with Town Counsel on several issues relevant to the application. She requested clarification regarding the inclusion of the driveway construction in the application. Mr. Woicak represented that the Applicant has agreed to include the driveway construction in the application.

Chairwoman Corson indicated that further guidance on the intent of Section 9.1.8. (prohibition of wastewater disposal system and reserve field) was necessary. Ms. von Aulock also noted that the issue of the proposed 300 s.f. septic area with no reserve area needs to be looked into. Mr. Campbell commented that he was not prepared to take action on the application this evening.

Mr. Plumer moved to table further discussion on the application until the Board's October 28th, 2010 meeting; second by Mr. Campbell. Discussion: Dr. Derby commented that the application either met the CUP criteria or it did not; he stated that it failed to comply with 9.1.6.B., Conditions #1, 2, and 3, and saw no purpose to table the application for further discussion. ***VOTE: 3-2 (Dr. Derby and Ms. Woolhouse voting in the negative). APPLICATION TABLED.***

Ms. von Aulock requested that both parties provide additional copies of the materials submitted this evening for the case file and to be forwarded to Town Counsel. She requested that any further materials being submitted for review must be received in the Planning Office by the close of the day on October 21st, 2010.

OTHER BUSINESS

PLAN NH – RPC “EXETER TRAIN STATION NEIGHBORHOOD” CHARRETTE

Mr. Bob Hall, Chairman of the Exeter Train Station Committee, was present to provide a brief public presentation for the two-day charrette planned for next Friday and Saturday, October 22nd and 23rd at the Lincoln Street School Library. He explained that the Town was working with Plan NH and the Rockingham Planning Commission (RPC) to host a public workshop where participants will share ideas and concerns that will help to create a master plan for future planning of the train station neighborhood. He indicated that approximately 180 postcard invitations were mailed to property owners in the immediate area. He encouraged all residents and property owners in town to come out and share their thoughts. For more information, please contact the Town Planning Department.

PROPOSED ZONING AMENDMENTS FOR 2011 TOWN MEETING

Ms. von Aulock briefly reviewed the list of proposed amendments, to date, noting that more detailed language would be provided at a later meeting. The following are being proposed for discussion:

1. Cemeteries: Add State Regulations (to Article 6, Supplementary Use Regulations)
2. Section 12.4 ZBA limits of approval: consider extending from 3 years to 5 years

3. Mixed use definition: clarify existing definition
4. Proposed rezoning of Tax Map/Lot # 88-5 (100 Domain Dr) from R1 to Industrial (requested by Jonathan Ring on behalf of Altid Enterprises)
5. Notice of Public Meeting: Reconsideration of notifying public meetings via signage.
6. Article 5.31B Lot Merger Clause to be removed according to legislation that has recently passed.
7. Exeter Shoreland Protection District Ordinance (ESPDO) – Section 9.3.4 Use Regulations – subsection C. Reference to “permitted as a conditional use, under Article 9.3.4.G.2 should read Article 9.3.4.G.1 and to add **“or a permitted use under Section 9.3.4.I.”** for clarification. (requested by ZBA)
8. Definition for **“in-law/extended family”** unit and where permitted, determine if any ZBA action will be required
9. Amend Section 9.4 – Floodplain Development Ordinance in accordance with recommendations by Jennifer Gilbert of NFIP (National Flood Insurance Program)
10. Review of “2010 Final Legislative Bulletin” for any new RSA changes which may result in proposed zoning changes.

Chairwoman Corson commented that she was opposed to the “public notice” sign proposal for several reasons, noting that it was an undue burden on the town budget, the town staff and the applicant whose application was under review. Mr. Campbell stated there was merit in trying to inform the public and indicated they would be helpful. Ms. Sideris agreed that it would be an additional burden and that the current notification process for land use applications/reviews was sufficient (i.e. abutter notification, legal notice in paper, Town website and EXTV-public television).

APPROVAL OF MINUTES: None

TOWN PLANNER ITEMS - None

REPORTS ON “OTHER COMMITTEE” ACTIVITY

Mr. Plumer reported on the Rockingham Planning Commission (RPC) Metropolitan Planning Committee meeting last evening in Hampton Falls, NH that he and Ms. Woolhouse had attended. He indicated there was a public hearing on the FY 2011-2014 Transportation Improvement Plan (TIP) and Long Range Transportation Plan Amendments, and Air Quality Conformity Determination. Ms. Woolhouse also noted that a NH Community Broadband Mapping Program was being presented at the Exeter Public Library on Tuesday, October 19th from 6 – 8 PM. The program is being co-hosted by UNH/GRANIT, RPC and NH DRED and all local/regional residents, businesses, and municipalities who are interested in learning more about high speed internet access in NH and the NHBMP are encouraged to attend.

Ms. English provided the Planning Office with a copy of the New Hampshire Housing Finance Authority's newest guidance publication, ***“Meeting the Workforce Housing Challenge, A Guidebook for New Hampshire Municipalities”***. This document was prepared to assist local land use boards as they meet the challenge of complying with the state's workforce housing statute, effective January 1, 2010.

CHAIRMAN'S ITEMS – None

There being no further business before the Board, ***Mr. Campbell moved to adjourn; second by Mr. Plumer. VOTE: Unanimous. The meeting was adjourned at 9:30 P.M.***

The next meeting of the Exeter Planning Board will be held Thursday, October 28th, 2010 at 7:00PM in the Novak Room at the Exeter Town Offices.

Respectfully submitted,

Barbara S. McEvoy
Deputy Code Enforcement Officer
Planning & Building Department