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Exeter Zoning Board of Adjustment meeting.

EXETER ZONING BOARD OF ADJUSTMENT JANUARY 19, 2010 MEETING MINUTES

Present:

Chairman: Hank Ouimet.
Vice Chairman: Marc Carbonneau.
Regular Members: Robert Prior, John Hauschildt.
Alternate Member: Martha Pennell
Code Enforcement Officer: Douglas Eastman.

The meeting convened at 7:15 PM.

Agenda:

1. Case #1391. Nathan Liebenow & Sarah Roe – 13 Douglass Way. Variance request.
2. Case #1325. Felder Kuehl properties – Epping Road. Variance extension request.
3. Case #1300. Felder Kuehl properties – Epping Road. Special Exception extension request.

New Business:

1. Case #1391:

The application of Nathan Liebenow and Sarah Roe for a variance from Article 4, Section 4.3 Schedule II: Density and Dimensional Regulations (Residential) to permit the subdivision of an existing parcel into two (2) residential lots with less than the required minimum lot width, depth and lot area. The subject property is located at 13 Douglass Way, in the R-3, Single Family Residential zoning district. Tax Map Parcel #65-19.

After opening the meeting and outlining the protocol for hearing the cases, Chairman Ouimet invited the applicant for the first case to approach the board.

Mr. Nate Liebenow and his wife Sarah Roe addressed the board at this time and gave a brief description of their property. Mr. Liebenow mentioned that the property is near the town golf course, is approximately 3.3 acres in size and within the R-3 zoning district. He also mentioned that the property extends from Douglass Way to Haven Lane.

Continuing, Mr. Liebenow stated that he and his wife wish to subdivide their over-sized lot into two lots with the new parcel measuring approximately 7000 square feet and being 80' x 87'. He then mentioned that a variance is required because 12,000 sq. feet is needed as well as 100 feet of frontage that they do not have for the new lot. It was also mentioned that the intention is to subdivide the lot; the applicant will sell the existing home and build a new home on the new lot. It was also mentioned that the physical changes associated with the project will remain consistent

whereas most of the houses in the area are Capes and the applicant will most likely build a Cape style home.

Mr. Liebenow also mentioned that the new lot and home would increase the town tax base and stated that their lot is the only one in the neighborhood that contains a large vacant space. The vacant space is being utilized by area youth and trash being left behind. It was then mentioned that the applicant has spoken to the neighbors about the project with no issues and one neighbor, Robert and Flora Richards sent a letter of support for the board's consideration. (At this time, Mr. Liebenow read the letter into the record.) The board was asked at this point if they had any questions.

Ms. Pennell asked the applicant if their property was one lot when they purchased it and the answer was yes. Mr. Liebenow stated that the original two lots were merged in the 1980's. Ms. Roe mentioned that the portion of their lot on Douglass Way is the same size as surrounding properties.

Chairman Ouimet mentioned that on Haven Lane, this newly created lot would be the smallest on the Lane.

Mr. Hauschildt asked the applicant if they had looked at the setbacks and if they could fit a house on the Haven Lane portion of the lot and the applicant responded yes. Ms. Roe stated that they intend to build in proportion to the existing neighborhood structures.

Ms. Pennell asked if there was a height restriction in the zone and the applicant answered yes.

Chairman Ouimet asked if the property was on town water and sewer and Mr. Liebenow answered yes.

At this time, Chairman Ouimet opened the hearing to public testimony. There was none. He then closed the hearing for public comment and opened deliberations.

DELIBERATIONS

Mr. Hauschildt mentioned that the neighborhood consists of all ranches and capes and the lots are the same size.

Chairman Ouimet commented that the applicant was asking for substantial relief.

Mr. Hauschildt stated that there is no other lot in the area with the same depth.

Mr. Prior commented that Haven Lane has larger lots.

Ms. Pennell stated that it looks like the neighborhood was planned out.

At this time, Chairman Ouimet mentioned that the state has adopted new variance criteria and it is outlined in the zoning reference booklet the board members received in their packets. It was

also mentioned that the board would like the office staff to create new “cheat sheets” for their deliberations.

Mr. Hauschildt began a walkthrough of the criteria for a variance with the board. Regarding not being contrary to the public interest, it was mentioned that the adjacent properties are similar. The board determined that the spirit of the ordinance is being observed whereas this is the only large lot available in the well-developed area. It was mentioned that it is more consistent to have a home there than not to have one and that the lot looks odd to not have a home on it. As with the first two criteria, the third criteria regarding substantial justice is also met in the opinion of the board. It was mentioned that there is no testimony or concern from abutters or neighbors and an injustice would be incurred if not granted.

Regarding criteria four and the values of surrounding properties not diminishing, it was mentioned that experts typically address the board regarding this issue, and with no testimony the proposal must be okay. In regard to the last of the variance criteria, it was determined that the applicant met this one also whereas a literal enforcement would be a hardship. It was mentioned that this was the only lot in the neighborhood that goes through to the other street and the Chairman mentioned that he agrees with Mr. Hauschildt and Mr. Prior that the general purpose is to keep conformity.

Mr. Carbonneau asked Mr. Eastman if granting this request makes the lots non-conforming. After a brief discussion the board just wanted the Code Enforcement Officer to make sure everything was okay before issuing building permits.

MOTION: MR. CARBONNEAU MADE A MOTION TO APPROVE THE APPLICATION AS PRESENTED, TO SUBDIVIDE THE PARCEL INTO TWO PARCELS. The motion was seconded.

In discussion, Mr. Carbonneau mentioned that construction will be dealt with when the building permit is issued.

THE MOTION PASSED UNANIMOUSLY.

Other Business:

2. Case #1325: Request for variance approvals extension.

Felder Kuehl Properties, LLC, Case #1325, Request for extension of two (2) variance approvals for proposed multi-family residential development on Epping Road, Tax Map Parcels #55-75 and #75-1.

Attorney Mike Donahue of Donahue, Tucker, Ciandella approached the board on behalf of the applicant at this time. He gave the board a brief description of the project know as “the Meeting Place” and mentioned that there were two elements to this case. The first element was the straightening of the zone lines and the add a story to the building and therefore provide more open space.

Continuing, he mentioned that there were two conditions associated with the project including using a porting of the lot for conservation and recording this with the registry. The second condition involved completing and recording the lot line adjustment for the rear, south corner of the residential portion of the property. Attorney Donahue then stated that the planning board approved the four-building site plan and the applicant Mr. Felder then ran into financing difficulties because of the economy. He then mentioned that the applicant has been successful with help from the town (a CBDG grant was obtained) and got financing for the first building which will be workforce housing. (This was accomplished with assistance from the NH Housing Finance Authority.)

With this background outlined, Attorney Donahue then mentioned that the first building will not be done before the variance expires. The applicant is here to ask for an extension to complete construction. He mentioned that “active and substantial development” needs to have occurred. Continuing, Attorney Donahue mentioned that additional sources of funding are being actively sought for financing for the other buildings but they are before the board to ask for an extension.

Mr. Hauschildt asked about the time table. It was clarified that the original variance was approved in May of 2006 and the applicant is asking for an extension to May of 2012 or a three year extension. Mr. Hauschildt then stated that the board has never had a case like this.

Mr. Ouimet then clarified that the variances were granted in 2007 and that one expires this year, 2010. Attorney Donahue then stated that work has started.

Mr. Hauschildt asked if active and substantial development has taken place and if so, the applicant doesn’t need to be here. It was then clarified that the applicant would be looking for something in writing from the ZBA to approve the extension of the project.

Chairman Ouimet stated that the town’s zoning code contains a provision. Attorney Donahue stated that this is the problem. He mentioned the term “naked variance” and stated that relief is needed where there are no further approvals needed by the Planning Board.

Attorney Donahue was then asked if he meant that the applicant did not have to be completed in three years but needs to have started within the three years.

Chairman Ouimet then asked Attorney Donahue if the applicant only needed a variance for relief from the three year ordinance restriction.

Attorney Donahue stated yes, perhaps. He mentioned that he has spoken with the town administrative staff and that they has suggested writing a letter and talking with the board. He then stated that if planning board action is required, it should supersede the three-year ordinance requirement.

Chairman Ouimet then asked Attorney Donahue if this was effectively the argument for the special exception extension request also.

Attorney Donahue responded that it was the same issue and the applicant is protected if active and substantial development has taken place.

Mr. Hauschildt asked if active and substantial development is already vested.

Attorney Donahue stated that you have a provision that says you have to complete the project.

Mr. Prior mentioned that the ordinance states improvements and physical things.

Mr. Hauschildt then asked Mr. Donahue what the applicant wanted from the ZBA.

Attorney Donahue stated that the applicant wants the ZBA to agree that they are governed by 673.49 and that should satisfy the applicant. He continued by stating that otherwise, the applicant would have to complete the four buildings in five years.

Chairman Ouimet then stated that he suggests the board leave the public hearing opened. Continuing, he mentioned that the applicant is rendering a legal argument, and that they are a volunteer board and this is the perfect setting for asking legal counsel about jurisdiction on this matter. It was then stated that without a legal opinion from town counsel, the board has no other choice than to require the applicant to apply for a variance.

Mr. Hauschildt stated that it is not black and white.

Chairman Ouimet mentioned that the applicant is not substantially complete and they can't meet the standard. He also stated that he does not think the board can make a decision without a legal opinion from town counsel.

The chairman then stated that he knows the applicant wants closure right now but that he does not think this board should try and play attorney.

Attorney Donahue responded that the applicant, Mr. Felder, is disappointed, but recognizes that the board has to operate in a comfortable manner. He stated that this is a legal issue and that he looks forward to working with the town counsel on this matter.

Continuing, Attorney Donahue then asked the board that any additional time that passes related to resolution of this issue is suspended. He then stated that the applicant will come back next month and if they need to file for relief they will.

Mr. Hauschildt asked Attorney Donahue if he asked for an extension in his written request.

Attorney Donahue stated that if the town counsel can find a way to extend this they will work with them.

Chairman Ouimet then asked Attorney Donahue if he would put all of this in writing and send to the board.

Attorney Donahue stated yes and reiterated that the same argument applies to the request for extension of the special exception granted for this project.

At this time, Chairman Ouimet closed the public hearing on Case #1325 and opened case #1300 for discussion.

3. Case #1300: Special Exception extension request.

Chairman Ouimet opened the case at this time.

The applicant, Mr. Felder approached the board and stated that he and his team originally did the commercial and residential portions of the project at the same time. Continuing, he stated that a lot of time and effort has gone into the project.

Chairman Ouimet opened the hearing to public testimony. There was none. He then closed case #1300 and opened deliberations.

DELIBERATIONS

Chairman Ouimet suggested that the board deliberate about the extension requests at the same time.

Mr. Hauschildt asked if there was a mechanism for extending variances.

Chairman Ouimet stated that it is bad precedent to only hear one side of a legal argument.

Ms. Pennell stated that the board has never done this before and they want to do it legally. She also mentioned that this may be a topic for the zoning ordinance review committee.

Mr. Prior mentioned that the board's lack of action has nothing to do with the project going forward.

**MOTION: MR. CARBONNEAU MADE A MOTION TO TABLE THE HEARINGS REGARDING APPROVAL EXTENSIONS UNTIL NEXT MONTH AND PENDING AN OPINION FROM LEGAL COUNSEL REGARDING EXTENDING THE THREE YEAR LIMIT.
Mr. Hauschildt seconded the motion.**

In discussion, Ms. Pennell mentioned that the motion should include "stopping the clock" while obtaining a legal counsel opinion.

Mr. Carbonneau suggested adding an acknowledgement that the applicant is continuing in good faith with previous approvals. He also stated that he didn't know how to stop the clock because of procedural issues.

Mr. Ouimet mentioned that one has expired already and one will be expiring.

The amended motion as presented by Mr. Carbonneau reads as follows:

MOTION: MR. CARBONNEAU MADE A MOTION TO TABLE THE HEARINGS REGARDING APPROVAL EXTENSIONS OF CASES #1300 AND #1325 UNTIL NEXT MONTH AND PENDING AN APPROVAL FROM LEGAL COUNSEL REGARDING EXTENSION OF THE THREE YEAR LIMITS AND WITH THE ACKNOWLEDGEMENT THAT THE APPLICANT IS CONTINUING IN GOOD FAITH WITH PREVIOUS APPROVALS.

**The amended motion was seconded.
THE MOTION PASSED UNANIMOUSLY.**

At this time, Chairman Ouimet asked Attorney Donahue to be included in a conference call with him and town counsel on this issue.

Other Business Continued:

4. Mr. Hauschildt briefed the board that changes have been made to the zoning ordinance and that the board needs to check amendments. He also mentioned taking the planning board to task regarding parking and daycare facilities.

5. Minutes: October 20, 2009

MOTION: MR. CARBONNEAU MADE A MOTION TO APPROVE THE OCTOBER 20, 2009 MINUTES AS SUBMITTED.

Mr. Hauschildt seconded.

THE MOTION PASSED UNANIMOUSLY.

(Mr. Hauschildt, Mr. Carbonneau and Mr. Ouimet voted.)

6. New Zoning Ordinances were passed out to the board members by Mr. Eastman.
7. Mr. Carbonneau gave the board an update on the Superior Court case that he and Mr. Eastman attended regarding an appeal of the boards' granting of a home occupation permit on Old Town Farm Road. He stated that the decision has not been rendered as of yet, and that he will update the board when they hear the decision.
8. Mr. Hauschildt mentioned the major changes to the zoning ordinance regarding wetlands and suggested that someone from planning meeting with the ZBA to discuss the changes.
9. Mr. Eastman thanked the board members for their volunteer efforts during 2009 at this time. He mentioned that the town staff and residents appreciate all of the hard work the board members complete. Mr. Eastman then shook each of the board members hands, thanked them and presented them with "Community Service Awards."

10. Ms. Pennell asked for a synopsis of the tele-conference Mr. Ouimet will be having with Attorney Donahue and town counsel.
11. Mr. Eastman mentioned that the new town counsel is Mitchell Municipal Law Group out of Laconia. He also mentioned that they only represent municipalities.

MOTION: MR. CARBONNEAU MADE A MOTION TO ADJOURN.
Mr. Hauschildt seconded.
THE MOTION PASSED UNANIMOUSLY.

The meeting adjourned at 8:30PM.

The next meeting of the Exeter Zoning Board of Adjustment will be held Tuesday, February 16, 2010 at 7:00PM in the Novak Room at the Town Offices.

Respectfully Submitted,

Christine Szostak, Secretary
Planning & Building Department