

APPROVED
CANDIA ZONING BOARD OF ADJUSTMENT
MINUTES OF March 25, 2008

Present: Boyd Chivers, Chair; Arlene Richter, Judy Szot, Ingrid Byrd, Alternate; Amanda Soares, Alternate.

The Chair called the meeting to order at 7:00 p.m. Amanda Soares was seated for Ron Howe and Ingrid Byrd was seated for Frank Albert.

Chair Chivers noted that a hearing impaired interpreter was present for an abutter and also introduced the new secretary for the Zoning Board, Sharon Carrier.

Approval of Minutes

Ingrid Byrd **moved** to approve the minutes of December 18, 2007 as presented. Amanda Soares **seconded**. **4 were in favor with 1 abstention.**

Mail from the Southern New Hampshire Planning Commission regarding a workshop was passed out to the board.

Chair Chivers asked if there was a report from subcommittee on the by-laws. Ingrid Byrd stated she had made some changes in terminology and noted other regulations that were not necessary that applied to larger municipalities. Judy Szot said she would meet with Ingrid Byrd and have proposals ready to present to the board on April 22, 2008. Boyd Chivers asked that if any of the other board members had any ideas or revisions on the by-laws to email their comments to Judy Szot.

7:15 PM – Case #551 Applicant: Kenneth and Holly Choquette; Owner: Same; Location: 34 Lane Road, Map 414 Lot 146; For an appeal from an administrative decision, dated December 5, 2007, of the Planning Board to deny the applicant's request for a minor subdivision to allow one additional residential house lot.

Kenneth Choquette was present and accompanied by Sharon Somers from Donahue, Tucker & Ciandella, PLLC his attorney. This was originally scheduled to be heard on February 26, 2008 but was cancelled due to inclement weather and being unable to arrange for an interpreter. Chair Chivers asked if any abutters were present. Steve and Heidi Cote of 136 Green Road, Raymond, NH 03077 were present. Chair Chivers noted that the board had read the minutes from the Planning Board meeting on 12/5/07 and that the board understands what the legal and technical issues are. Chair Chivers explained that the board needs to clarify and discuss the issues, and then the board and abutters will have the opportunity to ask questions before the board closes and deliberates. Chair Chivers stated that Sharon Somers could make statements and he said she could start with her presentation of statements.

Sharon Somers asked if she could submit some other items for the board's consideration. She then raised the consideration that before proceeding, that Ingrid Byrd would recuse herself. She explained that she was not suggesting for a moment that Ingrid Byrd has pre judged this case but in light of her husband who is on the Planning Board which took part in the decision she is appealing that it would be appropriate to recuse herself from the

proceedings and further understands that if this takes place there will be less than a full board making the decision on this case. Chair Chivers clarified that the attorney was asking if Ingrid Byrd would recuse herself before the proceedings but asked that she make her presentation first and when she was done the Zoning Board would discuss Ingrid Byrd recusing herself.

Sharon Somers explained that the applicant is asking is to have the Planning Board's decision on 12/05/07 reversed based upon the plain language of the ordinance regarding 1 ½ contiguous non-wetland acres. She further explained that the plain language does not speak to, or prohibited the use of any utility easement or any land burdened by utility easement to be used as part of the calculation. The applicant made note that they have no intention of building within the utility easement area or in the setbacks areas. The house, septic system etc will be placed in areas not subject to utility easement and out side setbacks. Further she asked the Zoning Board in their considerations be sensitive to the concept of administrative gloss. She also asked to submit into record a copy of Attorney Bart Mayer's letter dated November 13, 2007.

The Zoning Board discussed confidential and privileged information. Chair Chivers stated that regardless if it is privileged and confidential that applicant has it and has read it and submitted it into record.

Sharon Somers explained the law in NH indicates the rule of administrative gloss requires various boards to adhere to past practices and further notes she had submitted a packet on March 6, 2008 indicating past practice of 6 different subdivisions approved in the past 3-4 years in which wetland setback areas have been used in calculating uplands and asked the board to honor that.

Chair Chivers thanked Sharon Somers for the brief summery. Judy Szot inquired about the packet that the applicant is referring to and since the board has not seen the packet, that they need to review it. Chair Chivers asked if the Planning board approved anything where utility easements were used in the calculations of buildable areas. The Attorney replied that she would look into that further and noted that it is not her understanding that has been an issue regarding the use of the area which is subject to utility easement in calculations.

Next Chair Chivers asked if Ingrid Byrd should excuse her self. Ingrid stated that she does not have a problem with this case and also explained that she and her husband do not always agree and have sat on boards and have voted opposite of each other. Further, she knows the ordinances and goes by the ordinances not by emotions. Council explained that the law says council can ask for a recusal but ultimately it is the individual board member's decision and if the Board member opts to continue the council would note their objection. This is similar to a juror's standard. Chair Chivers stated let the record show that Ingrid Byrd was asked to recuse herself by the council and she has declined and also let the record show that council objects.

Chair Chivers read into record the reasons for the Planning Board's Denial: "The Character of the land is unsuitable for the subdivision per Subdivision Regulation section 11.02. The lot is not compact or regular in shape per Zoning Ordinances 6.01F. The lot does not have 1 ½ contiguous acres per Zoning Ordinances section 10.05C. The PSNH easement is not considered buildable land."

Chair Chivers asked if both lots contained 1.5 acres contiguous buildable land and if the original set backs were used in the calculations and what percentage was used. The

applicant replied that the original lot 146 had 1.5 acres contiguous non-wetland acres and the proposed lot 146.1 had 1.59 contiguous non-wetland acres and that the original setbacks were used in the calculations but did not know the percentage used in the calculations along with what percentage of the utility easement was used.

Sharon Somers stated that PSNH easement tells you that you cannot put a dwelling on the easement but does not preclude that you cannot use the balance of the property for residential use. She showed on the plan where the easement ran through the back of the lots and showed areas of setbacks and noted all the living area is in the front area of the lot and that the PSNH easement would stay as raw land even after the subdivision.

The Co-op easement is shown on plans in the front of the lot. The easement restricts constructing a building but can be used for other purposes. Also shown on plans are the pockets of wetlands in the front portion and it was noted there is a portion immediately adjacent to Lane Road which does not have wetlands which is where the driveway will go.

Chair Chivers asked council to please explain how the Planning Board erred in its interpretation of section 11.02 in the subdivision regulations. Council stated that the error was in the interpretations that the applicant could not include setback or utility easement areas in terms to calculate the required area.

Chair Chivers said he was all set with his questions and asked the board for their questions.

Judy Szot pointed out that setbacks by definition are not buildable so why should they be an issue in this case. Further she said the lot is conforming now and this subdivision would create 2 non-conforming lots and did not believe that the board had the right to create non-conforming lots. She also brought up that the irregular shape proposed would create a 50' piece of land in a portion of both lots. With 25' setbacks this would make the 50' piece of land non-buildable.

Sharon Somers answered that the definition of buildable in the ordinances at the time the application was submitted does not reference setbacks or preclude calculating setbacks as 1 ½ contiguous non-wetlands.

Arlene Richter noted she still has a lot of questions and wanted to review the packet.

Amanda Soares asked what the original lot looked like before the subdivision and if the applicant would be living in this new home and questioned the irregularly shaped lot. Council replied that the applicant's intentions of use were not definite and the lots were subdivided per the Planning Board's suggestion to put the line along the stonewall so it would preserve the stonewall.

Ingrid Byrd asked what the original frontage was and what would the two new proposed lots be. Council stated the minimum requirement is 200' and the original lot has over 500'. The proposed frontage will be approximately 303' and 210'. She asked if the land was accessible only from Lane Road and council replied yes.

Chair Chivers asked the other board members and the audience if they had any other questions. Mary Girard asked how the council obtained correspondence from the Town Attorney. Council answered it came via correspondence from the engineer but the letter was addressed to the Planning Board.

Sharon Somers stated that she felt the applicant had a right to see this letter as the decision was made on 12/5/08 subsequent to that correspondence and went on to explain that the Planning Board explicitly stated in the minutes that they based their opinion on

the town attorney's opinion and she felt that there is some obligation on the part of the board to indicate what the opinion consists of so the council could have some effectiveness to try to counter that position.

Chair Chivers explained that there were two opinions from the Attorney. One supported the Planning Board in denying the applicant because the land under the PSNH easement is non-buildable in his estimation. Also in the letter Mr. Ladd from RSL brought up the point that past practices have allowed the use of setback in calculations and that is when Bart Mayer gave his opinion on how to defend ourselves in the event that issue is raised. Chair Chivers said the Planning Board did abide by an attorney's advice in its earlier decision. Then Mr. Ladd brought up the fact that other subdivisions have been approved and that is when the attorney brought up the administrative gloss issue with the board.

Chair Chivers felt it was fair that the letter is in the records and that the applicant should know how the Board arrived at their decision. Then he asked if there were any other questions anyone would like to ask.

Steve Cote agreed that Town's assessment was fair that the land is not buildable.

Chair Chivers suggested closing the hearing but discussing the issue of Administrative Gloss was agreed to be important by other board members and applicant. Chair Chivers stated that as far as he knew this issue has never come before the Zoning Board before, The Zoning Board in this town has never been asked to make the interpretation of calculating land under easements. If the Planning Board has approved subdivisions in the past that were in violation of the zoning ordinances, the Zoning Board has no authority over it since no one appealed it or brought to this board. Having brought this to the board Chair Chivers stated that they have no choice but to make an honest interpretation of the ordinances and definitions in the ordinances. Also, if there is administrative gloss he is not sure what the Board is required to do, to continue a mistake that was made a year ago and what is the burden upon this board under administrative gloss?

Sharon Somers explained that as part of the Zoning Board's job under 674.33, the Zoning Board shall have the power to hear and decide appeals if it is alleged there is error in any decision and she asked the Zoning Board to review the decision/interpretation of the Planning Board and part of that decision is taking a look how they have administered the ordinance in the past. Also she went on to say, how you fix the heart of the problem, if the problem does need to be fixed. She stated you fix it legislatively, prospectively and she wants to make sure this applicant is treated as other applicants have been treated in the past and if there is problem you fix it going forward. Council claims that it is administrative error on the part of the planning board to treat him otherwise.

Chair Chivers stated that the Planning Board has never embraced PSNH easements. He asked that the applicant provide all subdivisions in the town for the past 5 years that approved using Public Service or Co-op easements as part of the calculations for minimum lot sizes.

Chair Chivers clarified that in order for this subdivision to be approved the board would have to gloss over both the setbacks and the utility easements and furthered stated that the applicant does not have an administrative gloss defense on the easement.

Sharon Somers felt the applicant should be able to use the PSNH easement in the calculation because of the language in the ordinances. This is a separate issue from the issue of the administrative gloss.

Judy Szot asked if there were any case laws that allowed this use of PSNH or Co-op easements. Council answered it depends upon the definitions in ordinances. There have been some case laws but they talk about having specific language in the ordinance to support that contention but unfortunately the Town of Candia's Ordinances do not have this specific language.

Chair Chivers **closed case #551** and **moved** to continue the hearing until next month. He requested from the applicant information before the next hearing to show how much of the easement and setback land is needed in this case to reach the required minimum 1 ½ contiguous buildable land on the existing lot and the proposed lot. He also requested a copy from the applicant of the Public Service of NH easement allowing for residential use of the property and what voltage the lines are. The applicant was hesitant to commit to provide information on the voltage of lines in easement.

The Zoning Board will review information from the March 6, 2008 packet and the April Packet that the applicant will provide mid April.

For the record Ingrid is not the chairman as stated in the applicant's letter.

Applicant requested after the board's discussion of the information that they be allowed to make comments.

Case #552 Applicant: Kenneth and Holly Choquette; Owner: Same; Location: 34 Lane Road, Map 414 Lot 146; for a variance under 6.01F to allow one additional residential house lot on an irregularly shaped lot.

Kenneth Choquette was present and accompanied by Sharon Somers from Donahue, Tucker & Ciandella, PLLC his attorney. Chair Chivers asked council if there was anything else to add. Sharon Somers talked about the hardship criteria as shown in the March packet. This irregular lot has sufficient mass to be subdivided, unlike other surrounding lots that have a reasonable chance of being subdivided into regular shapes. This property starts out unique but does have enough land mass to be subdivided because of its current shape and therefore requires relief. The proposed configuration is to keep the integrity of the stone wall. The appearance will look like two regular lots from the road. In the March Packet there are 2 examples of subdivisions showing the Planning Board not requiring a variance for irregularly shaped lots. Sharon Somers further indicates this application appears to be under heightened scrutiny compared by other subdivisions that have come before this PB.

Chair Chivers asked if anyone had any other questions.

Arlene Richter **Motion** to continue the case #552 until April 22, 2008 meeting. **Second** by Amanda Soares. The board is not asking for any more information on this case.

Chair Chivers asked if there were any other matters before the board. Also, noted that since Ingrid Byrd and Amanda Soares started Case 551 and Case 552 that they will continue to sit on the board to finish these cases on April 22, 2008.

The meeting was adjourned at 8:35 p.m.

Respectfully submitted,
Sharon Carrier
Recording Secretary