

APPROVED
CANDIA ZONING BOARD OF ADJUSTMENT
MINUTES OF April 22, 2008

Present: Boyd Chivers, Chair; Frank Albert, Vice-Chair; Arlene Richter; Judy Szot; Ron Howe; Ingrid Byrd, Alternate; Amanda Soares, Alternate.

Chair Chivers called the meeting to order at 7:00 p.m. He stated that Amanda Soares was seated for Ron Howe and Ingrid Byrd was seated for Frank Albert at the March 25, 2008 hearing and would continue on this case tonight.

Approval of Minutes

Soares **moved** to approve the minutes of March 25, 2008 as amended. I. Byrd **seconded**. **All were in favor.**

- Page 3, 3rd paragraph remove the word back.
- Page 3, 1st paragraph, page 4, paragraph 3, page 5, line #1 change coop to “Co-op”.
- Page 3, 7th paragraph, page 5, 4th paragraph change irregular to “irregularly”.
- Page 4, paragraph 2 change for to “in”.
- Page 5 paragraph 2 change allowances to “allowing”.
- Page 5, 5th paragraph one line add to the end of the sentence “as stated in the applicant’s letter.”

7:15 PM – Continuance 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 and Richard Ladd, R.S.L. Layout & Design, Inc. This was a continuance from March 25, 2008 Chair Chivers asked if any abutters were present and none were present.

Chair Chivers noted the applicant came back with information requested from the 3/19/08 meeting.

The board asked the applicant to provide drawings to show what percentage of setbacks and or easements are necessary to reach the 1.5 contiguous buildable acres or approximately 65,340 sq feet for each lot.

R. Ladd showed on the first plan that the entire area of the PSNH easement was used on both lots. Lot 146 used 20.74% and lot 146-1 used 23.3%. Also, additional land beyond the PSNH easement was used to reach the 1.5 contiguous buildable acres for each lots.

S. Somers wanted to clarify that there are two plans one using easement areas or the setbacks but not both.

R. Ladd showed on the plan using setbacks that lot 146 used 49.4% and lot 146-1 used 43.5% of setbacks in the calculations. He informed the board that lot 146 has a small portion of the coop easement in the set back area but the two lot lines can be adjusted not to use the coop easement. The coop easement was approximately 3000 sq ft.

Chair Chivers asked the applicant to clarify which plan the Planning Board used to make their decision. S. Somers clarified that the configuration is the same as the one presented to the Planning Board that was denied.

S. Somers and R. Ladd stated that the utility issue or setback issues were not raised until well into the proceedings after all the engineering had been done.

Chair Chivers asked if the applicant had been able to find the voltage of the PSNH lines and S. Somers answered that she was unable to come up with any further information but did make efforts to get in formation and was unsuccessful.

Chair Chivers noted that the applicant had answered all the questions asked. He then asked the applicant when they first applied for the subdivision.

K. Choquette replied that he first came in for an informational in 2005. In September of 2007 he came in for a subdivision, followed by meetings in October, November and December of 2007. The final decision was made on December 5, 2007.

Chair Chivers asked if the plan they submitted to the Planning Board relied on the information of the language of the utility easements to reach their calculations.

R. Ladd responded that the Planning Board did not show concerns with the utility easement until late in the proceedings then suddenly the use of setbacks for the calculations were a concern. He felt had there not been issues with the PSNH easement the Planning Board would have been less troubled with the setbacks. R. Ladd further added he used setbacks in his calculations in the past.

S. Somers stated that part of the administrative appeal to the ZBA involved past practice using setbacks in their calculations and that the Board should adhere to past practice. S. Somers suggested that the Town clarify setbacks legislatively and noted that a legislative change was made.

Chair Chivers responded that the plan proposes to absorb all the set backs along the perimeter utilizing land from setbacks from wetlands and this violates the whole purpose of the wetland setbacks by encroaching up to the edge of the wetlands leaving no buffer.

R. Ladd responded that it was used for calculations only and that the actual building and septic will be 100' from the wetlands. Plans submitted as evidence last month showed the

use of setbacks. R. Ladd noted two of the plans were his. One of the plans approved used a higher percentage of setbacks to meet the 1.5 contiguous upland buildable acres. He calculated this lot has approximately 15,000 sq feet to build on and is located on route 27 that abuts the Lamprey River.

Chair Chivers pointed out the issue of utility easement or the use of setbacks to reach the 1.5 contiguous buildable acres has never come before the Zoning Board of Adjustment and that is the issue that the board has to resolve.

Chair Chivers asked if the irregular shaped lot, that violates 6.01F had anything to do with the denial by the Planning Board.

R. Ladd responded that was one of the reasons for the denial.

S. Somers answered that this is a separate issue that is to be discussed in Case 552.

Chair Chivers noted that there is already a house on lot 146 and if you subdivided there will be no room to do anything per town ordinances no structures, shed, pool.

S. Somers asked that the board to allow this application to be granted and treated by the Planning Board in a manor consistent with past practice.

Chair Chivers stated that S. Somers is asking the board to approve the subdivision based on their interpretation of the zoning ordinances. S. Somers responded that she asking to approve this based upon past practice of this Town and reminded the Board that under case law that you have a duty to adhere to.

Chair Chivers responded that zoning board has examined and obtained council opinion. Since, the board has never considered this particular issue then the board is not bound by it. The zoning board interprets the zoning ordinances separately and is not bound by the Planning Board's past practices and if the Planning Board has made mistakes in the past in interpretation in application the zoning board is not bound by it.

S. Somers stated she had not seen the town council's letter and has no idea what he basing his authority on and cannot render an opinion tonight whether he is accurate or not on that issue

S. Somers then asked what the Town's position is when an applicant finds themselves in this position.

Chair Chivers stated it would be found under NH law.

S. Somers stated she is stunned to hear this rational from the zoning board and then stated she understands it is coming from Town Council not necessarily coming from the board.

J. Szot wanted to know why she would assume that.

S. Somers answered she thought she heard her say the board conferred with Town Counsel.

J. Szot asked why she would assume the board came to this conclusion as the board can come to their own conclusions.

S. Somers stated if she misspoke it was because she thought that she said the board conferred with town counsel.

J. Szot asked S. Somers if she was referring to a letter from Town Counsel and said the board does not have a letter from Town Counsel. S. Somers answered no and she said that Chair Chivers has just said he had conferred about this proceeding with Town Council if she understood correctly.

Chair Chivers responded that the board did get something on this issue of administrative blush.

J. Szot stated it was about a confidential letter sent to the Planning Board that the applicant had. J. Szot said Town Counsel correspondence is privileged information. Chair Chivers asked if there any other issues to discuss.

S. Somers stated that this is an administrative appeal of the Planning Board decision pursuant to RSA 676:5 III. states *“If, in the exercise of subdivision or site plan review (which is what happened with the Planning Board on December 5, 2007), makes any decision or determination which is based upon the terms of the zoning ordinances or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative office, then such decision may be appealed to the board of adjustment under this section...”*

S. Somers states she appreciates that this board had not the occasion to have deal with this situation before but this is no different if someone is denied a building permit application and files an administration appeal of the Building Inspector’s decision. We are appealing the decision of how the Planning Board interpreted the zoning ordinances.

It was the consensus of the board that is why the applicant is before the zoning board.

S. Somers answered she was bringing this up because she thought or may have misunderstood the board say that if a decision had been made from the planning board that this was an inappropriate forum. S. Somers and the zoning board stated that they are in agreement that this is where the issue of administrative gloss should be decided.

Chair Chivers asked if there were any other issues. He stated this issue comes down to utilization of the land to reach the calculations.

Chair Chivers asked the other board members if they had any questions for the application or R. Ladd.

A. Richter noted that the applicant bought the land knowing that there was an easement and that there were wetlands.

J. Szot asked the applicant when he bought the land, if he was led to believe that he could subdivide. He replied no and stated he came to the Planning Board in 2005 for an informational on how to go about subdividing and they gave him information excluding anything pertaining easements.

Chair Chivers asked if the setback was met from the leach field to the wetlands or if the wetlands went further into other properties.

R. Ladd explained the drawing showing the 100' setback. He noted that if wetlands were on other properties within 50' of the lot line they would be shown and there are none. He pointed out where the test pit is shown on the drawing.

I. Byrd asked how much land and if there was frontage to the back piece of land.

R. Ladd replied that there is approximately 4 acres with no frontage on the back part of the lot which continues into Raymond.

There was a discussion of lot lines on the proposed lots and the question of what could be the margin of error. R. Ladd replied the margin of error is 1/8" every 100' and measurements today are even better than that with electronic equipment and the use of satellites.

Chair Chivers if there are no more questions we will close the hearing case #551 and will hear case #552.

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 and R. Ladd from RSL Layout & Design, Inc.

S. Somers asked to go over point briefly noting that they have met the hardship criteria and that an irregularly shaped lot variance is necessary to allow the subdivision. The proposed use is residential and presumed to be reasonable and as stated before the backlands will not be built on. The lot shapes created was recommended by the Planning Board suggesting in maintaining the integrity of the stone walls. Regarding the spirit and intent S. Somers understood the intent in irregularly shaped lot ordinances is really to try

to prevent situations where you have adequate frontage for the lot but because of the peculiar shape of the lot, for example in new subdivisions being created, you end up with pie shaped lots where the building lot becomes non existent because it is squeezed into the point. S. Somers noted there is adequate frontage and all of the living/building activities are going take place in the front of the lot portion and not in the irregular shape and feels the intent of the ordinance is met. S. Somers also went over examples of other approved lots where there are irregularly shaped lots and a variance was not even requested by the planning board.

Chair Chivers asked how the applicant proposed to get over hardship requirement.

S. Somers said this was done with the Boccia test. One of the criteria is size, this lot has enough acreage like many other lots in the neighborhood but because of its irregular shape has the inability to be subdivided. That is what makes it special in relation to other properties in the neighborhood. The other aspect of the Boshia test asks if there are any other reasonable alternatives to subdivide and there aren't any. These two criteria meet and comprise the Boccia Standard.

Chair Chivers asked the board if they had any other questions. Hearing none he closed the hearing for case #552.

Deliberation Administrative Appeal

J. Szot had two issues:

The first is the applicant states to their attorney that the Board is bound by the plain language Candia Zoning ordinances and she agrees. J Szot then states the zoning ordinances definition is specific that a setback is, "*A line beyond which the foundation wall and or any covered porch or portion of a building should not project*". That means no building or foundation can be within a setback, which leads the board to conclude that setbacks are not buildable.

The second is the issue of administrative gloss and J Szot feels the zoning board is the final arbiter of whether or not the planning board has interpreted the zoning ordinances properly. This is the first time the zoning board has been asked to interpret this issue. The zoning board has the responsibility to determine what the zoning ordinances says and what it was intended to do.

Chair Chivers questioned the board if they were bound by the past practices of Planning Board.

J. Szot answered the board has have never looked at this issue and states it is very clear that the definitions of setbacks prohibits building and cannot be used to calculate buildable area.

A.Richter stated that she feels this is very irregularly shaped property. I know and appreciate what the applicant wants to do but feel the piece is too irregular.

Ingrid Byrd noted that this lot is irregular now and legal and what the applicant proposes is two irregular lots that require variances. She states the board must be bound by definition of setbacks which are not buildable and notes the Zoning Board of Adjustment's decision is independent of the Planning Board.

A.Soares stated she is agreement with J. Szot and I. Byrd that it is clear that setbacks are not buildable.

Chair Chivers asked the board if the fact that the town has recently clarified the definition of buildable lot assisted the board in anyway in coming to their tentative conclusion.

It was the consensus of the board that it did not.

Chair Chivers ask if the board would make motion.

J. Szot Motion to Find: The definition of setback clearly states "*A line beyond which the foundation wall and or any covered porch or portion of building shall not project.*" This clearly states that no building or foundation of a building can be within the setback. Logic would have one conclude that setbacks are non-buildable land. If the land cannot be built upon, how then can it be used to calculate buildable acreage? The Board concludes that the use of setbacks to satisfy the required buildable acreage is not allowed and that the Planning Board acted according to the ordinance when they denied the subdivision.

A. Richter seconded. All were in favor.

There was discussion of the motion and the following was stricken and underline wording was added for the amended motion.

Chair Chivers **moved** to amend the Motion to Find: ~~The definition of setback clearly states~~ That the language of Section 10:05c providing for 1 and ½ acres of contiguous land for the purpose of accommodating primary structures and utilities precludes any use of that land in the calculation thereof which is within a required setback area as defined in the Candia's zoning ordinances (in article 3 of the Candia's zoning ordinance) as "A line beyond which the foundation wall and or any covered porch or portion of building shall not project." The Board concludes that the use of setbacks to satisfy the required buildable acreage is not allowed and that the Planning Board acted according to the ordinance when they denied the subdivision. A. Richter **seconded** amended motion. **All were in favor.**

Chair Chivers **motion to find:** That the definition of Buildable Lot as described in the Candia Zoning Ordinance shall be interpreted as land not encumbered by restrictions such as found in utility easements and, as pertains to Section 10.05C does not include such area as is required to satisfy set back requirements of the Candia Zoning Ordinance.

The motion made by B. Chivers was withdrawn, when discussion made it clear that the issue of utility easements were not being raised in this case.

J. Szot **motion** the Zoning Board contends that this is a case of first impression for the board as it has never been asked to render a decision on whether setbacks could be used to calculate buildable land. The Zoning Board of Adjustment is the final arbitrator to accept the decisions of the Planning Board without considering the language of the ordinance would be to abdicate our responsibility. The board finds that the definition of setback specifically prohibits building in setback areas. I. Byrd **seconded. All were in favor.**

Chair Chivers clarified that there are two motions one on the interpretation of the use of buildable and one in respect to administrative gloss of past practice and asked if anyone would like to make a motion to dispose of this case.

J. Szot **moved** to deny Kenneth and Holly Choquette, the applicant's request for a minor subdivision to allow one additional residential house lot case #552.

J. Szot withdrew her motion to add additional wording to clarify her motion.

J. Szot **moved** to deny their request for a minor subdivision to allow one additional residential house lot case #551. The subdivision does not comply with section 1.02 of the ordinance as it does not provide for "...orderly and planned growth..." It is the applicant's burden to prove that their subdivision is consistent with the spirit of the ordinance. This subdivision creates two oddly shaped, gerrymandered lots with a long 50' portion that is not buildable. The proposed subdivision attempts to meet the letter of the ordinance but does not meet the spirit of the ordinance. Section 2.01 requires conformation with the regulations of the ordinance. By allowing the subdivision, a lot that is now conforming, would become nonconforming because the use of setbacks would be required to create the 1.5 buildable acres needed to meet the requirements of the ordinance. Further the new lot created would also be non-conforming as it too would use setbacks to create 1.5 buildable acres needed to meet the requirements of the ordinance. Allowing this subdivision would be in violation of Section 2.01 of the ordinance. Section 6.01 F of the ordinance requires lots to be regular and compact in shape. The current owners of this land knew when they purchased this property that it was oddly shaped and that it had several easements. By seeking to subdivide their lot into two buildable lots, when the current lot meets single lot zoning requirements, is arguably a self-created hardship. There is no hardship except the one created when a line was put on paper. The owners purchased the land with the full knowledge of the limitations on its use. Attorney Somers argues that the Planning Board has in the past approved subdivisions with oddly shaped lots. The examples provided to the board show lots with one or two slightly irregular boundaries. None is as extreme as the lots proposed by the applicants. The lots created by the applicants, while attempting to meet the language of the ordinance, in no way meet the spirit of this section of the ordinance. A. Soares, **seconded. All were in favor.**

Chair Chivers noted that the Planning Board’s decision has been upheld.

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.

Chair Chivers noted that the case #553 must be disposed of.

I. Byrd read into record: *“The Board of Adjustment shall hear and decide requests from the terms of this Ordinance. No variance may be granted unless ALL of the following criteria are met:”*

1. *No diminution in the value of surrounding property would be suffered.*

Consensus of the board is no diminution.

2. *“Granting of variance would be of benefit to public interest”.*

Consensus of the board is no.

3. *“Denial of the variance would result in unnecessary hardship to the owner arising out of special conditions affecting the land and/or buildings that distinguish the property from other similarity restricted property in the area.”*

Consensus of the board is no.

4. *“Granting the variance would result in substantial justice”*

Consensus of the board is no.

5. *“The use will not be contrary to the spirit of ordinance.”*

Consensus of the board is no.

Chair Chivers noted that the applicant must meet all five criteria and the applicant only met one of the criteria.

J. Szot **moved deny** request for a variance, the hardship was self created, the applicant bought the land with knowledge of limitation in use, not consistent with spirit of the ordinance, and creates non conforming lots when they already have use of the land. The lot does not meet 6.01f of the ordinance.

A. Soares **seconded. All in favor.**

Chair Chivers thanked A. Soares and I. Byrd. R. Howe and F. Albert joined the board.

By-Law Subcommittee Review

There was a discussion of the By-Laws. J. Szot went through all the proposed changes she had written out. The board requested S. Carrier to type the By-Laws to have on disc and to insert fee schedule that the Planning Board uses.

The meeting was adjourned at 9:35 p.m.

Respectfully submitted,
Sharon Carrier
Recording Secretary