

ZONING BOARD OF ADJUSTMENT MEETING  
DECEMBER 4, 2014

PRESENT: Wendy Freeman, Chairman, Marianne Graham, Stanford Long, Edwin Somero, David Lage (7:20 p.m.), Joanne Meshna

The meeting was called to order at 6:45 p.m. at the Town Office.

6:45 p.m. Ginger Hill - Continuation of public hearing for an equitable waiver of dimensional requirements application:

Steve Pro, President of SepticPro, recapped the application. Ginger Hill owns lot 3/86 at 70 Middle Pratt Pond Road. Her septic system failed and Mr. Pro prepared and installed a new system. He came to the Town but was told to file with the State. A neighbor reported the system was too close to their boundary line and Mr. Pro was told by the Building Inspector that a septic system is a structure and must be 20 feet from the side boundary. When the Inspector came to look at the system it was substantially completed. Ms. Hill has since spoken to the abutter and she does not have a problem with the location of the system.

Wendy noted at the last meeting it was left that it might be possible to move the tank and Mr. Pro was going to determine the cost to do so. Mr. Pro responded the only way would be to do blasting. He spoke with a blasting company and they would not give them a number because of the proximity of the house and it being on piers. Mr. Pro added the other thing they could do is bring it down closer to the water but that would require waivers because of the pond and the well. Another thing they looked at was moving it to the other side of the cottage at a cost of \$6-7,000 but there is ledge there also and the garage would be encroaching on the other property line.

Wendy stated she had to review the variance criteria in her own mind even though that was not the application. Equitable waivers are typically for those things that have occurred sometime in the past. She added with the variance the diminution of property values, the spirit of the ordinance, whether or not there is a public nuisance and hardship are determined.

At 7:10p.m. Marianne made a motion to close the public hearing and enter into deliberations. Edwin seconded the motion and it passed unanimously.

The Board reviewed RSA 674:33-a, Equitable Waiver of Dimensional Requirements. There was agreement they could find for all criteria except II. which states the violation has existed for 10 years or more. However, the Board did not ask the applicant to apply for a variance. There is no other place to move the tank without requiring other waivers.

Marianne made a motion to grant the equitable waiver of dimensional requirements application. David seconded the motion and it passed unanimously.

7:20 p.m. Richard Nantel - Continuation of public hearing for a variance application:

Attorney Dwight Sowerby submitted a document to the Board supporting the variance application. He stated that the Nantels wanted to build a garage on their property and the only place to put it creates a setback problem. At the closest point it would be 12 feet to the property line. He displayed an aerial photo of the property showing the odd shape of the lot and indicating the only buildable area. There are slopes, wetlands, and a retaining wall on the property that limit the location. The only reasonable location is next to the house with the plan in the future to connect it to the house.

Wendy noted at the last hearing that turning the garage at a 45 degree angle might make the setback requirements. Attorney Sowerby stated that would not work and the applicant would not be able to attach it to the house. The Board at the last meeting with a drawing had cut out the garage and repositioned it on the plan and it seemed to fit. Mr. Nantel responded the drawing had not been to scale but showed distances. He re-measured and tried to move the garage back and forward and kiddy corner. The only way it would fit would be to move the garage four and a half feet in front of the house which puts him thirty-three feet to the stream. Attorney Sowerby stated even though there are alternatives that does not affect the proposal before the Board. The question is are the alternatives reasonable. Their position is they are not and the proposal means the criteria for a variance.

Edwin asked if there was a possibility of making the garage smaller and Attorney Sowerby responded there was but this size is reasonable and meets the criteria. The fact that there are alternatives does not mean the applicant has to do those alternatives. Wendy responded if there is a reasonable alternative such as turning the garage on an angle to the home how could the applicant meet the criteria for contrary to the ordinance. Attorney Sowerby responded that if you turn the house it locates it in front of the house. The fact that there is an alternative does not mean that the proposal in front of the Board is not reasonable. It is the most reasonable. David asked what the purpose was of having the ordinance if it is arbitrary to say this is where it is and just grant it. Wendy added that if the applicant got rid of the breezeway they could line it up against the house. Attorney Sowerby stated that is not the law. The law is whether or not it is reasonable and does it meet the criteria.

Attorney Sowerby reviewed the five criteria for granting the variance:

- 1) The variance will not be contrary to the public interest - The Supreme Court has ruled that to be contrary to the public interest, the proposed variance must be "unduly and in a marked degree" conflict with the ordinance such that it would violate the basic zoning objectives by "...altering the essential character of the neighborhood or threaten the public health and safety of the public." Case is Chester Rod and Gun Club, Inv. v. Town of Chester, 2005. This is a small garage that does not affect the neighborhood and will not be visible from any location except the one above the property.
- 2) The spirit of the ordinance is observed - The ordinance has a purpose section which among other things is "...to protect the use and enjoyment of property, to promote the orderly and

harmonious development of the town, to promote and conserve the health, safety, convenience and general welfare of the inhabitants...to lessen the congestion of the streets, to lessen the danger from fire and natural disasters, to provide adequate light and air, to prevent overcrowding of land, to avoid undue concentration of the population, ...to preserve the value of land..." The establishment of having setbacks fit among many of the purposes but in this case the spirit of the ordinance is observed for the following reasons:

- a. This particular setback is to town-owned vacant land that is not likely to ever be developed.
- b. The garage will not impinge on any other abutter's property and may not even be visible.
- c. It will not impair any property values.
- d. It will protect the use and enjoyment of the applicant's property.

It does not affect the orderly and harmonious development of the town or the health, safety, convenience and general welfare of the inhabitants. Wendy noted the parking area had already been extended. If the variance is granted, she asked that the area between the garage and rock wall not be used for parking of a vehicle but become a green space again.

- 3) Substantial justice is done - Attorney Sowerby referred to a quote from the *Malachy Glen Assocs. v. Town of Chichester* case as follows: "Perhaps the only guiding rule on this factor is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." What the court is saying is if there is a gain to the individual but that is outweighed by damage to the general public that is not substantial justice. If there is a gain to the applicant and no hurt to the general public, that is substantial justice. Granting the variance will does not harm the general community at all while denial will harm the applicant and not benefit anyone else. Granting the variance from the substantial justice point of view is the right thing to do.

Wendy stated at the last meeting the Board had noted that if the variance is denied the garage will still be built as there is room for the garage, and she was trying to figure out why it was the right thing to do. Attorney Sowerby responded that the legislature has laid out the statutory criteria as to granting a variance. They have delegated to this Board the power to apply the statute. The Board cannot add anything to the criteria. All the alternatives are not part of the statute. The statute states you must consider the five criteria. The rules for substantial justice are fairly well established. Wendy stated that not every home in New Ipswich has a garage but every home may want to have one; however, the garage may not fit on the property and questioned if because the applicant wants a garage, it should be granted. Attorney Sowerby responded there is no-one else in this case that is affected or harmed. There is harm to the applicant in denying the application.

- 4) The values of surrounding properties are not diminished - No other property will be impacted in any way. There is conservation land which will not be developed and the garage is not visible from any other abutting property.

- 5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship to the applicant- 1) special conditions of the property that distinguish it from other properties in the area - This is the only place on the property to locate the garage. It is a small lot that has some serious issues. 2) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property - Granting the variance will have no deleterious effect on any other property nor would it any way violate any of the purposes listed in Article II of the ordinance. Granting the variance provides great relief to the applicant and has no effect on the community as a whole. 3) The proposed use is a reasonable use - Constructing a garage that will eventually be connected to their house is a reasonable request. There is no deleterious effect on any other person, place or thing. Any other location is unreasonable.

Mr. Nantel stated that his well line and underground cables come into the house at that side and moving the garage would impede the utility lines. Stan asked why the garage cannot be built against the house and Mr. Nantel responded the way all the underground utility lines and well line come into the house at that side make it difficult and they would have to be relocated.

At 7:50 p.m. David made a motion to close the public hearing and enter into deliberations. Stan seconded the motion and it passed unanimously.

The Board reviewed the criteria for granting the variance:

- 1) The variance will not be contrary to the public interest - David disagreed to a small point. The abutting land is conservation land and there are trails for public use. Stan and David agreed they had met this criteria.
- 2) The spirit of the ordinance is observed - Wendy asked why the Board did not rewrite the Zoning Ordinance and make a 12 foot setback for garages because they do not hurt anyone. There is a rationale for a 20 foot setback. The Board has asked many times if the garage would fit if it was turned on an angle. It would not be connected to the house but you still get the 24x30 foot garage. Wendy continued that the applicant is basically saying this is what I want and I want that 12 foot setback for me. Marianne stated she would have felt better if the applicant had made some effort to come up with a design as they had talked about. If there are utility lines coming in at that corner, there may be good reason to put in the breezeway. She felt they were taking advantage of the fact the abutting property is town land. She did not feel it was diminishing property values but was bothered about how it effects the Board's decisions about the Zoning Ordinance. David stated he would have liked to have seen a plan also to show why moving the garage on an angle did not work. Wendy stated when a Board makes a decision what the court looks at is whether or not the Board concluded was reasonable. The court determines if the Board understood the criteria and made a reasonable judgment against the criteria based on the facts or lack of the facts presented. Stan added that the simple fact that no one will see it is not relevant; it is still 12 feet to the boundary line and not 20.

- 3) Substantial justice is done - Marianne agreed that substantial justice is done. It allows the owner to use the property the way he wants to use it and there is no harm to the general public. David and Stan agreed. Wendy stated that denying the variance does not harm the applicant either.
- 4) The values of surrounding properties are not diminished - David noted there were no abutters present opposing the application or concerned about their property values. Wendy added she could not see any diminishing of property values by putting the garage 12 feet from the property line.
- 5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship - Marianne stated she had trouble with "no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property." She asked why have the ordinance but the purpose of the variance is to allow someone to question it. She added she would have liked to have seen a design. David stated it did not create an unnecessary hardship but creates unnecessary desire as they could still have a garage and breezeway if configured a different way. David added there are special conditions on the property. It is a 1.4 acre lot and with a retaining wall with a drop off and the septic system is in the back. It is not reasonable to put it down front. The applicant had stated that moving the garage would cause it to stick out in front of the house. Marianne added that it is a condition of the property that it abuts conservation land. Stan noted there are ways to build the garage and still meet the criteria but Marianne noted they did not know for sure without a design. David noted the applicant had at a previous meeting stated the reason for the breezeway was for access to the oil and propane utilities for filling them.

David made a motion to grant the variance application because he could not clearly say they do not meet the criteria. Marianne came to the same conclusion and was not happy about it but could not vote to deny it. David wanted the Board to go on record at some time that any applicant must come in with an engineered drawing. Edwin was concerned about the breezeway and noted they could have a 4 foot walkway. Stan agreed with Marianne and David and he could not come down solidly and say they could not meet any one of the criteria. Wendy stated she could not grant the variance as she would be rewriting the ordinance and she could not point to one criteria except for property values where they met the criteria.

Marianne seconded David's motion. The vote was David, Marianne, Edwin and Stan in favor and Wendy opposed. The variance was granted.

Mr. Nantel suggested to the Board that more guidance be given to homeowners to make the process easier.

The Board discussed adding to each application a requirement for a drawing prepared by a licensed land surveyor or registered professional engineer in the State of New Hampshire. All agreed and it will be added to all the applications.

The meeting adjourned at 8:40 p.m.

Respectfully submitted,

Joanne Meshna  
Land Use Manager