

**Town of Fitzwilliam
Zoning Board of Adjustment
Meeting Minutes
March 7, 2019**

Members Present: Steve Filipi, Chairman; Gretchen Wittenborg, Vice Chairman; Members: Bob Handy; Chad Beede; Cathy Davis; Dan Sutton, Alternate; Selectmen’s Representative, Charley Kenison for Dan Baker; and Laurie Hayward, Land Use Administrative Assistant (LUAA).

Members Absent: Alternates: Sue Wood, Susan Massin, and Dan Baker, Selectmen’s Rep.

Other’s Present: Paul Grasewicz and Jon Le Claire, representatives for David Spicer; Benny Warnke, Applicant and Darlene Warnke.

Call to Order: The Chair called the meeting to order at 7:00 PM

Public Hearing:

The Chair opened the Public Hearing, which is a Continuance from the Public Hearing on February 12, 2019:

“7:15 PM. Public Hearing. ZBA Case # 19-01, David & Phyllis Spicer application for Special Exception to allow a 30’ x 23’11” expansion of the dwelling at 12 Spicer Point, on Laurel Lake, in the Wetlands Protection Overlay District, Tax Map 21, Lot 19.1, in the Rural District, reference Zoning Ordinance 127-19.f. to allow a 4-foot setback where a 20-foot setback is required.”

Additions to non-conforming Structures. The Chair asked if Members had the opportunity to read the email from Margaret Burns. Members had read it. The Chair explained that legal support was provided by Margaret Burns of New Hampshire Municipal Association (NHMA) regarding the issue of porches and additions to non-conforming structures. Wittenborg noted that there are actually multiple issues of non-conformance. Wittenborg explained that the discussion included that the Ordinance, to be applicable, must specifically name non-conforming structures as being permitted. Grasewicz told Members that he did not disagree with that; but he feels that the Ordinance does make specific reference to “additions” by Special Exception. Grasewicz also stated that there is no change of use; the use is two single-family dwellings on one lot and that does not change.

The Chair said that he has considered some other sections in the Ordinance, for example, that “no more than one building for dwelling purposes shall be located upon one lot”. He noted that there are provisions for “accessory dwelling units” and for “accessory structures”. These provisions did not seem to fit. The Chair further explained that the two dwellings on a single lot is allowed because they

were built before the Zoning requirement was enacted, and ,therefore, are “grandfathered”; but the proposed addition represents a significant change as it doubles the size and doubling the size expands the use. Wittenborg added that this also expands the density of the use and the density had been previously increased when the other structure on the lot was similarly expanded. The Chair stated that he sees this as the reason that this should be considered as an application for a Variance rather than a Special Exception. Grasewicz stated that the rebuild of the other dwelling on the lot was not an expansion. Wittenborg questioned Grasewicz’s statement, stating that the square-footage pretty much doubled in the rebuilt house. Wittenborg referred to the plan that Grasewicz provided that showed that “as-built”, the new house was not on the original footprint and was significantly expanded.

Wittenborg read more regarding the application of statutes under state law; “It shall apply to any alteration to a building which is substantially different from the use to which it was put before alteration.” She added this seems specifically applicable to any expansion outside the original footprint and to any change of use such as from seasonal to year-round and case law in New Hampshire seems to support that understanding. Le Claire spoke stating that that he does not see the addition to a dwelling as a change of use. Wittenborg corrected her statement to say that the addition would be a substantial expansion. Grasewicz asked if this means that they need to apply for a Variance.

What sections of town Ordinance apply? The Chair asked if Ordinance section 127-9 was all that they should be looking at for an application for a Variance. Handy asked if it was yet clear whether the Applicant was looking for approval of a seasonal or a year-round dwelling. Grasewicz and Le Claire both stated that they are applying for a year-round dwelling. Grasewicz pointed out that the DES requirements are under Rule 104.17 B Env. 1000 and this dwelling meets that. He further stated that they will apply to DES for a five-bedroom septic system. Wittenborg asked about the current location of the septic system for 12 Spicer. Grasewicz stated that the current septic system is underground and will be under the addition once that is built. Grasewicz gave members copies of the DES Well Release given by Jeanne Drugg and allowing the new septic system/leach field to be within the 75-foot setback from her well. The Chair asked again if there are other portions of the Fitzwilliam Ordinance that should be considered. Fitzwilliam Ordinance section 127.36.B was pointed out as another section that the Applicant should consider.

What represents a substantial change? Wittenborg referred members to the February 22nd letter from NHMA Legal that speaks to the concept that structures or uses that will be “substantially different” are subject to zoning. That is what brings the need for a Variance. Wittenborg pointed out that the previous expansion should have come to the ZBA and she questioned the process that allowed the first expanded dwelling to be approved without following the process laid out in the Ordinance and in statutes.

The Chair made a motion to have the Applicant amend his application to request a Variance from 127.36.B and 127.9; Wittenborg seconded the motion and it was voted unanimously. The calendar

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was consulted and the Chair moved that the Public Hearing be continued to April 9th at 7 PM; Wittenborg seconded and it was voted unanimously to continue the ZBA Case # 19-01, David & Phyllis Spicer application for Special Exception to 7 PM on April 9, 2019.

The Chair recognized Herb Drugg. Drugg explained that he attended because his mother, Jeanne Drugg, the abutter to Spicer was unable to attend. Drugg spoke about his mother's concerns regarding the septic system. Mrs. Drugg had given a waiver to allow encroachment; but, now, the septic system would again need expansion. Also, the proposed 2 stories high addition would impact her view. Drugg stated that there are multiple non-conformances. He mentioned that the Wetlands Protection Overlay District (WPOD) comes into play. He feels that in every instance the proposed addition would make the property even more non-conforming – side setback, lot size, two dwellings on one lot, inadequate road frontage. He ended by stating they are strongly opposed. The Chair explained to Drugg that it is important that his mother, the abutter, be present at the next meeting or provide the LUA with a signed letter expressing her concerns.

This ended the Public Hearing on ZBA Case # 19-01, David & Phyllis Spicer application for Special Exception

Grasewicz and Le Claire left the meeting at 7:32.

The Chair opened the Public Hearing, which is also a Continuance from the Public Hearing on February 12, 2019:

ZBA Case # 19-02, Benny Warnke application for a Special Exception to allow a hammerhead lot, off Fullam Hill Road, Tax Map 12, Lot 39, in the Rural District, reference Zoning Ordinance 127-19. D.1.

Warnke showed members a Cheshire County Registry of Deeds certified copy of the Boundary Plan showing three lots. Warnke also showed the Board the tentative changes to the lots and the numbers on a proposed change that increases the size of the back lot as required in the Ordinance. It shows the frontage requirements met and that includes the just over 50-foot access to Fullam Hill Road. It does somewhat reduce the two front lot sizes.

Chair moved that they approve the Special Exception to allow a hammerhead lot in a three-lot subdivision; however, it would be conditional upon:

- 1. Meeting the dimensional requirements of the Fitzwilliam Zoning Ordinance as outlined in section 127-19. D.**
- 2. Completing an Application for Subdivision Approval and obtaining Planning Board approval.**

Wittenborg seconded the motion to approve with Conditions.

Warnke asked if the Chair was saying that the survey [Boundary Plan] he has wouldn't work. The Chair clarified that the only thing that the Board is approving is the use of a hammerhead as long as all of the dimensional requirements are met and that Warnke must hire a surveyor to see if they can create a subdivision plan. Assuming they can create such a plan, Warnke will then have to apply to the Planning Board and must get that Board's approval.

The Board to up the Criteria for Special Exception, approval:

- 1. Is in harmony with the purpose and intent of this chapter.** Chair agrees because the appeal does seem to meet the purpose for the specific section of the Ordinance. Wittenborg noted that the state currently is moving away from the use of hammerhead lots; however, Section 127-19. D is specifically for use in limited situations involving older lots. **All members agreed.**
- 2. Will not be detrimental or injurious to the neighborhood in which it is to take place.** SF would recommend that the applicant get approval from the road agent before going to the PB to make sure that the access is designed so the driveways have safe sight-lines. **All members agreed.**
- 3. Is appropriate for the site in question.** Wittenborg said she feels that it is if all the requirements for Subdivision can be met. The Chair and **all members agreed.**
- 4. Complies with all applicable requirements of this chapter.** It does to the extent that the Applicant and his surveyor can meet all of the requirements for Subdivision Regulations.
- 5. With respect to dimensional requirements establishes that there exist special conditions that make the meeting of these requirements unduly burdensome. This does not apply because the details are not worked out on the sketch and the final form that a subdivision should take is the purview of the Planning Board upon which the approval is conditioned.**

Wittenborg restated the motion that they approve with conditions a Special Exception to allow a hammerhead lot in a three-lot subdivision; Subject to:

- 1. The Approval of the Planning Board upon the Applicant showing that a subdivision can be created that meets the dimensional requirements of the Fitzwilliam Zoning Ordinance as outlined in section 127-19. D and the Fitzwilliam Subdivision Regulations for a three-lot subdivision.**
- 2. The approval of the Road Agent as to the location of the proposed driveways with respect to sight-lines and other driveway requirements.**

The motion was voted unanimously to Approve with Conditions.

The LUA let the Warnke know that they can get the application for the Planning Board from her. She told him that he should hire a surveyor to determine whether they can draw a plan for a three-lot subdivision that meets the dimensional requirements.

Old Business:

New Business: The need to revise the Fitzwilliam Zoning Ordinance. Wittenborg pointed out that they are repeatedly being tripped up by having a Zoning Ordinance that is very out of date. She

stated that she believes that the Ordinance has been in place more than 30 years and has never had a really comprehensive review by a person with Land Use experience.

Complex language, poorly organized in the Ordinance may lead to confusions in the correct process for handling permits.

Wittenborg stated that working on this Spicer application and finding that there was a previous expansion of one of the two dwellings on the property and that expansion did not come before the ZBA, but should have, have leaves her concerned about the ordinance and the process. Wittenborg pointed out some concerns about the ordinances including that sections are located oddly making it difficult to find the applicable language. For example, the language for hammerhead lots is on the same page with a statement about dimensional requirements that really should be located in the section on dimensional requirements. Wittenborg pointed out that there are parts that are excessively complex and obscure. Wittenborg asked Kenison for his thoughts. Kenison stated that he spent some time preparing for this hearing by reviewing the Ordinance and he also considers it difficult to find sections that apply.

State laws generally preempt local laws and state laws change frequently. The language in Town Ordinances and Regulations should also change to reflect current state law. The LUA gave a couple of small examples of problems with the Ordinance, noting that there are places where the Ordinance is simply off due to the changes that have taken place over the years. The LUA explained that, in general, the state language determines the law whether the state language is more strict or less strict. The LUA stated that, in the case of water, that is wetlands or shoreland, the state language does not necessarily preempt local language. When water quality is involved, it is the stricter of the state or the local language which applies. The LUA also used cell towers as an example where there are federal and state laws that have changed and the changes are not reflected in the ordinance. Specifically, both federal and state laws say that town land use boards are prohibited from requiring any review of co-locations on existing towers unless there is “substantial modification” and that is clearly defined. The current Fitzwilliam Ordinance does not equally clearly state how to handle co-location and could be construed to require Site Plan Review which is not legal unless there is “substantial modification”.

There was further and much more discussion about the problems with the Zoning Ordinance. Regarding process, there was also some discussion of why some issues go to the Planning Board first and some to the ZBA first. The LUA stated that recently, the Planning Board seems to direct Applicants to the ZBA first. She said one possible benefit to the applicant is that the ZBA fees are lower and the ZBA does not necessarily require a plan drawn by a licensed surveyor. The Chair pointed out that the Planning Board could have handled the Warnke three-lot subdivision itself and not even involved the ZBA and if they turned it down because of the hammerhead, the Applicant could then appeal that to the ZBA. It was reiterated that the ZBA is an appeal board. The LUA stated that the Planning Board definitely has the responsibility for the Zoning Ordinance. There was a discussion about having the ZBA identify problematic language in the Ordinance and make recommendations. The Chair asked if there might be a motion to draft a letter to the Board of

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Selectmen. There was a discussion about whether there should be something informal at a Select Board meeting. It was agreed that they have discussed this problem in the past and this seems like the time to write to the Select Board with their concerns. Wittenborg asked whether they should put some examples in the letter so that it is not just a generic request. Wittenborg suggested that they consider asking someone with known experience like Bernie Waugh to review the Ordinance.

The Chair suggested that it would be very useful to have a chart in the back of the Ordinance that shows when a Variance is required and when a Special Exception is required. It was agreed that the LUA would find some examples of problematic wording in the Ordinances to back up a request that the Ordinances be revised to reflect current statutory language.

There being no further business, it was moved and it was voted unanimously that the meeting be adjourned at 8:45 PM. The next meeting will include the continuance of the Public Hearing on case 19-01, Spicer, and will be held on April 9, 2019 at 7:00 PM.

Respectfully Submitted,

Laurie Hayward
Land Use Administrative Assistant