

Milford Board of Adjustment Minutes
January 4, 2007
Patricia Berntson
Case # 30-06 – Appeal from an Administrative Decision
Tabled from December 21, 2006

Present: Len Harten
 Fletcher Seagroves
 Katherine Bauer
 Ron Pieper, Jr.
 Bob Levenson

Secretary: Kathryn Parenti

Case #30-06 Administrative Appeal

Patricia Berntson, owner of Map 43, Lot 26, located on Tonella Rd, in the Residential “B” district, is requesting an appeal from an Administrative Decision denying a building permit for property located at 0 Tonella Rd based on Article VI, Section 6.025.B.1.1.

Motion to Approve: _____

Seconded: _____

Signed: _____

Date: _____

L. Harten opened the regular meeting of the Milford Zoning Board of Adjustment at 7:30 pm. He then stated that the hearings are held in accordance with the Town of Milford Zoning Ordinances and the applicable New Hampshire statutes. He continued by informing all of the procedures of the board. Patricia Berntson, owner was present, along with Andrea Kokko and Bob Kokko, who would be representing her.

L. Harten read a letter from P. Berntson stating her authorization of Bob and Andrea Kokko to present her case.

L. Harten invited the representatives forward to present their case.

A. Kokko stated that Kevin Lynch, Zoning Official, stated in his letter to the owner that he was recommending she apply for a variance. This statement is what they are appealing. In Section 6.025 of the Milford Zoning Ordinance, it states that a special exception is not required for B, Buffer Zones. She read from 1.1 *“Buildings and structures not to exceed one hundred twenty (120) square feet ...”*. Since a special exception is not required for a structure less than one hundred twenty (120) SF, then a special exception would indeed be required for a structure in excess of one hundred twenty (120) SF. She said that it does not state in the Zoning Ordinance that a variance is required. She read from Section 6.026.B *“Buffer – a special exception is required for: Any project not listed in 6.025 that involves the impact of more than three thousand (3000) square feet of”* She said their project is impacting less than three thousand (3000) square feet and is listed under Section 6.025 and she interprets that as requiring a special exception. She didn't see where a variance would be required in this instance.

K. Bauer stated that she understood their thinking, reading from Section 6.025.1.1 that in a buffer zone *“Buildings and structures not to exceed one hundred twenty (120) square feet and without sanitary plumbing...”*, that type of structure would be a shed with no plumbing, no foundation, etc. Projects allowed in this zone are totally non-impact projects. She stated that in the Zoning Ordinance, it lists everything allowed by special exception in the district. Nothing in the ordinance states that any project under three thousand (3000) square feet would be granted relief by special exception. This is what lead K. Lynch to the decision that the only way to get relief would be through a variance.

B. Levenson stated that before size impact, the buffer zone talks of not disturbing anything at any time. You can build something on top of the soil but you can't disturb the soil. This project would be disturbing the soil due to the digging of the foundation. Section 6.025.B states you cannot dig into the soil. He would agree with K. Lynch's decision because you can't disturb the soil at any time, in the wetland buffer zone.

B. Kokko asked where that was addressed.

B. Levenson stated it was addressed in Section 6.025.B, buffer zones.

A. Kokko stated they did discuss the plumbing and everything that this type of structure would have. The ordinance says with this type of structure, a special exception is not needed.

B. Levenson read from the Zoning Ordinance, Section 6.025.B *“Buffer Zones; Any of the following uses that do not alter the surface configuration by the addition of fill, removal of soil, or obstruct in any manner the natural flow of ground or surface water, or disturb in any manner the ground itself to any depth and that are otherwise permitted....”* He stated that B. Buffer Zone, on page 38 of the Zoning Ordinance precedes B.1.1. No permanent construction can go into this area.

A. Kokko stated that in Section 6.025 that a special exception is not required for what was mentioned by B. Levenson.

B. Levenson stated only as long as you don't alter the surface condition.

B. Kokko replied that if you are altering the surface, you need a special exception.

A. Kokko stated they are appealing K. Lynch's decision that they have to apply for a variance; they would rather apply for a special exception.

B. Levenson stated that he understood that K. Lynch stated you could not just put a house there. There were three cases before them and it was up to the board to decide which was more appropriate. For this case number 30-06, his reading of B. 6.025B, K. Lynch's initial decision was justified, based on the ordinance.

K. Bauer read from notice of hearing which stated that "... *requesting an appeal from an Administrative Decision denying a building permit for property located....based on Article VI, Section 6.025.B.1.1*".

A. Kokko stated that was not what they are appealing. She stated K. Lynch wrote a letter to P. Berntson stating he was denying the application for a special exception and that she needed to apply for a variance. If she disagreed with the decision, she could file an administrative appeal.

K. Bauer stated the initial logic was wrong; she understood that the applicant was hoping to go forward without any relief.

A. Kokko stated that was not correct.

B. Levenson stated the appeal is a decision of whether K. Lynch was right or wrong.

L. Harten stated if the board agreed with K. Lynch's decision, they would move on to the variance and not a special exception.

B. Kokko stated they had originally applied for a special exception.

A. Kokko if they didn't apply for all three at once, they would have to go before the board again.

B. Levenson stated that was an oversight in this section of the ordinance; it doesn't stipulate anything that is not specified, is allowed; in essence, anything not allowed by special exception or by right requires a variance.

K. Bauer stated even there it could be granted a variance; every district except this one says such and such use is prohibited.

A. Kokko stated she was confused and thought the board had received a different letter, and that her letter from K. Lynch stated that they needed to apply for a variance.

R. Pieper stated that the source of the documents, appealing denial of the permit in K. Lynch's letter, the actual document states the petitioner submitted a request for a special exception. All board members and the applicant have the same letter.

K. Bauer replied that there was a mistake in the public notice; they are appealing the fact that the applicants need a variance, not just the fact that the building permit was denied.

L. Harten stated that the board's decision is to uphold or overturn K. Lynch's decision.

A. Kokko asked if they were to apply for a special exception or a variance.

L. Harten stated they needed to make a decision on the appeal of K. Lynch's decision.

K. Bauer stated they were appealing a different decision, not the one in the public notice; the board is voting on K. Lynch's decision that the applicant needs a variance, not a special exception.

B. Kokko stated that the building permit needed to be denied before they could apply for either a variance or a special exception.

A. Kokko stated that they applied for a building permit knowing that.

L. Harten asked for discussion on K. Lynch's decision.

F. Seagroves stated that there were two different things going on, an appeal for the denial of a building permit or an appeal for the variance decision.

R. Pieper replied that the board had gone beyond that.

K. Bauer asked which decision they were discussing.

L. Harten stated that K. Lynch failed to issue a building permit because he felt a variance was required. The applicants are here disputing this and feel that a special exception is required. He stated the board had to vote on the administrative appeal. If the vote was affirmative, they then would move on to the variance.

R. Pieper agreed with L. Harten's statement.

K. Bauer wanted to discuss the statement "denial of building permit" that is expressed in the Notice of Hearing.

F. Seagroves stated that he voted to support K. Lynch's decision. He didn't believe a special exception is needed. He read from page 12 of The Board of Adjustment in New Hampshire – A Handbook for Local Officials: "*A variance is a relaxation or a waiver... of the ordinance....*"

K. Bauer stated that the problem is the in the way the case is set up.

F. Seagroves stated the statement about the denial of the building permit confused him, if they were dealing with an administrative decision regarding the building permit.

B. Levenson stated the notice of hearing was not accurate.

K. Bauer agreed and asked what they were voting on.

B. Levenson stated the applicants were denied the ability to go forward with a special exception, as was stated in the letter from K. Lynch; they were not just denied a building permit.

L. Harten stated that K. Lynch denied their building permit. To grant their building permit, a variance is required.

B. Levenson stated that K. Lynch didn't agree with the need for a special exception but they do need a variance. The applicant is correct in their assessment of the need for an appeal of an administrative decision. The overriding principle is that K. Lynch refused to grant a building permit; his refusal to grant the building permit is different from the applicant's interpretations. The permit was denied because K. Lynch felt a variance was needed. The appeal is because the applicants felt a special exception is needed. The basic premise is whether the applicant is right in their interpretation or the building inspector is right; that's what the board is voting on.

L. Harten stated they needed to vote to uphold K. Lynch's decision or overturn it.

K. Bauer reiterated that K. Lynch stated the applicants needed a variance and not a special exception.

B. Levenson stated this section of the ordinance does not state that in an overlying district that a variance is required for anything that is not allowed by right or special exception; in every other district it states that.

L. Harten said except that it does not state that it is allowed by special exception.

K. Bauer stated in a district where a special exception is not allowed, the next step would be a variance is implied and understood. The only other option for the lot would be a variance.

R. Pieper agreed with K. Bauer's statement. He felt the Zoning Ordinance poorly addresses this subject; it is awkwardly worded. You need a special exception for a project with more than three thousand (3000) square feet of impact. There is nothing listed for smaller projects. This lets them think that less than three thousand (3000) feet is not specifically permitted.

The rule of explanation is on page 34 of the Zoning Ordinance. Section 6.021.E: “A *special exception approved by the Milford Zoning Board of Adjustment shall be required except for those listed in 6.025*”.

K. Bauer stated that because of her struggle to understand this, she talked with the Zoning Official. Section 6.021.E special exception lists wetland only and not the wetland buffer.

R. Pieper replied that section 6.023.D, the definition of buffers, states: “*The buffer is the area adjacent to a wetland...*”. It states it is different from a wetland area and it supports that statement.

K. Bauer said she was heading down the wrong path with that one.

R. Pieper stated if the structure is less than three thousand (3000) then the variance would be more appropriate. It would lead him to support K. Lynch’s decision that a variance is needed versus a special exception.

B. Levenson stated that any disturbance in the wetland area is not allowed.

L. Harten replied that he was referring the buffer zone.

B. Levenson stated that in Section 6.025.B, it states you can’t dig that hole; there is no allowed disturbance at all.

A. Kokko stated a special exception is not required for it.

B. Levenson replied that a special exception is not required if project doesn’t do the listed items.

A. Kokko used the analogy that if you can’t play basketball on Monday, it would mean you can play every other day. She stated she sat down with K. Lynch in the beginning, he felt they would only need a special exception because of the language. He then sent her the letter stating that a variance would be needed. She said they worked with the plan to create the least amount of wetlands that would be impacted. The whole project is less than three thousand (3000) square feet and only a small portion is located in the wetland buffer. It has minimal impact. Two thousand three hundred seventy five (2375) square feet would be impacted and eight hundred five (805) square feet of the foundation would be located in the buffer once the house was constructed. They reiterated that three thousand (3000) square feet requires a special exception and any other project under three thousand (3000) square feet would need a variance.

B. Levenson stated that in this district, a disturbance of the soil, such as digging a hole for a permanent structure, is prohibited in the buffer zone. A permanent structure is very different from disturbance in the buffer zone.

A. Kokko stated that in past wetland buffer cases such as Giorgio’s Restaurant, which impacted five thousand nine hundred twenty five (5925) square feet of wetland buffer with their parking lot and retaining wall, and St. Joseph’s Hospital Office building, which impacted seven thousand one hundred forty (7140) square feet of buffer with it’s parking lot are much larger areas of impact and were allowed. She read from a letter from the Conservation Commission, dated August 16, 2004 regarding the hospital project; “*This project impacts as large area of buffer, nearly all the buffer to the wetland on the site*”. She stated that both cases were approved and built and only needed a special exception. If those projects were able to impact the wetland buffer with a special exception, why couldn’t they impact it by two thousand seventy five (2075) square feet, with eight hundred five (805) square feet of permanent disturbance and why do they need a variance.

K. Bauer stated they needed one because they are digging into the buffer zone.

B. Kokko stated it was not required.

A. Kokko said the impact is different from building.

K. Bauer stated she was not sure the other cases came before the board. She stated the disturbance can be minor, which could be paving and correcting drainage, versus major disturbance, which would be the digging of a foundation as in this case.

B. Kokko stated that Giorgio's retaining wall is bigger than any foundation.

R. Pieper replied that any impact that exceeds three thousand (3000) square feet requires a special exception. He said he was not disputing the criteria and wasn't sure where they wanted to be. He understood they wanted to build something. He also wasn't sure why they had their hearts set on variance versus special exception.

B. Kokko stated they wanted a special exception because they are much easier to prove hardship than a variance.

A. Kokko replied that it was explained to her that a special exception was in their best interest.

R. Pieper stated that special exceptions are easier to get, for uses that are specifically listed in the district. He submitted that this might not be the case here.

A. Kokko stated that if they impacted six hundred twenty five (625) square feet more, they would not have this discussion.

R. Pieper stated that he felt the Zoning Ordinance should be worded differently.

K. Bauer stated that a special exception is allowed for impact over three thousand (3000) square feet. She said that if you go back to under that amount, nothing in the wetland ordinance says what they want it to say, that lists what they want it to list.

A. Kokko stated there was nothing in there to say what they didn't want either.

K. Bauer replied other districts are very specific as to what is allowed.

B. Kokko asked how could they get their variance if the other cases were granted as special exceptions?

K. Bauer stated the other projects were over three thousand (3000) square feet.

B. Kokko said the house will be nice looking building but they are in a quagmire because of the ordinance.

K. Bauer stated they were here to uphold the Zoning Ordinance the way it's written, whether it's written well or not.

B. Kokko stated that in the ordinance, a special exception is not required for all these things then for anything else, it is required. In the appeal, that will come up, that the Zoning Ordinance is incorrectly written and the other cases were approved.

B. Levenson stated that they can't dig a hole; it's not permitted in the area.

A. Kokko asked if they could alter their request to impact three thousand (3000) square feet.

B. Levenson replied that if they did that, they would need a dredge and fill permit, would need to go to the Conservation Commission. He asked how far the foundation goes into the wetland buffer.

A. Kokko replied that it goes twelve (12) feet into it and seventy (70) feet along it.

B. Levenson stated there is a thirty (30) foot front setback in that district.

A. Kokko said that they were told it would be easier to get a special exception to enter into the wetland buffer.

K. Bauer stated the different front setback, if they were into that, would be a different route.

B. Levenson reduced side and front setbacks

A. Kokko said they were advised by K. Lynch that this would be the better route to take.

R. Pieper asked why they couldn't move the structure forward a bit.

B. Kokko stated they were advised by K. Lynch that this would be easier to get.
R. Pieper asked why this was the case.
A. Kokko stated if they moved the building forward, it would be ten (10) feet away from the road at one point and eighteen (18) feet from the road at another point. K. Lynch felt that the board wouldn't allow that and it wasn't the best way to go.
R. Pieper felt that K. Lynch overstepped his bounds.
B. Kokko said that was the reasoning for going for a variance versus a special exception.
K. Bauer stated some of the building would still be in the buffer. She said there were two forms of relief - relief from wetlands or relief from setbacks.
L. Harten felt the board should go forward with what they have or table the case and have the applicants apply for a special exception for setbacks.
K. Bauer felt they should do that if the buffer is not involved; two forms of relief are not required.
L. Harten asked if they could move the building forward.
B. Kokko said it would still be disturbing the buffer.
L. Harten restated disturbing the buffer and not replacing the disturbance.
A. Kokko stated that some of the building would be 18 feet from the road and some would be 10 feet from the road, due to the wetlands area.
B. Kokko stated that they should go through the criteria and then look at the alternatives
R. Pieper stated that nothing precludes them from coming back with another plan; they still have that option.
B. Kokko stated they could place two narrow modular homes on the site.
K. Bauer asked why they didn't do that.
B. Kokko felt that it would look silly.
A. Koko felt that if they build the modular homes, the Ledgewood residents would not like that. The surrounding area consists of mainly condominiums and the modular homes would look out of place.
K. Bauer stated that the wetlands ordinance is strict for a reason and there is a narrow envelope that restricts what you can do without relief.
A. Kokko stated that was why they wanted to come in for a special exception. "*Proposed use is similar...*". She felt that what they were trying to do had precedent.
K. Bauer felt that these cases were not similar, like comparing apples to oranges. Because those cases were allowed, superior court remands the board not set precedence. The letter from the Conservation Commission strongly opposes this.
B. Kokko stated there was history and bitter feelings with the Conservation Commission. He felt that the other buffer cases were similar to this case.
K. Bauer stated that this type of building is allowed in Residence "B" and some conditions apply to wetlands and not to Residence "B".
B. Levenson stated the Zoning Board's mandate is that past cases are not applicable; each decision is based on the information that is specific to the case being heard.
R. Pieper stated that he partially agrees with B. Levenson's statement and he partially disagrees with it. He felt that B. Levenson was correct in stating that elements of each case apply to each case. A precedent decision is based on the elements of previous cases. The board grants the use. Decisions can set precedent; the cases cannot. There are other uses in the area, as long as they don't expand too far. Either way, they make progress.
K. Bauer asked if they were tabling the case or not.

B. Kokko felt they would continue on.
A. Kokko stated they were very confident and would continue.
L. Harten stated that the board would vote on the appeal.
K. Bauer replied that she wanted it stated in the minutes that the board was voting on K. Lynch's decision that the applicants needed to apply for a variance and not a special exception. She wondered if they needed a motion to incorporate the language.
L. Harten then closed the public portion of the hearing and called for a vote.

1. Do you uphold the decision of the zoning official?

K. Bauer – yes R. Pieper – yes F. Seagroves – yes
B. Levenson – yes L. Harten – yes

L. Harten asked for a motion.
R. Pieper made the motion to deny the administrative appeal of case number 30-06; he moved to disapprove the administrative appeal seeking a special exception and recommending a variance.
B. Levenson moved to deny the administrative appeal.
R. Pieper stated they should deny the applicant's appeal for an administrative appeal of case 30-06 and to uphold the decision of the zoning officer.
B. Levenson made the motion to uphold the decision of the zoning official that a variance is required.
R. Pieper seconded the motion.
K. Bauer stated they are voting against the appeal, do they uphold the decision of the zoning official.

Final Vote:

R. Pieper – yes F. Seagroves – yes B. Levenson – yes
K. Bauer – yes L. Harten – yes