

Town of Milford
Zoning Board of Adjustment Minutes
August 16, 2007
Wiggin & Nourie/Sherwood & Rochelle Wolcott
Case #21-07
Variance
Tabled from July 19, 2007

Present: Len Harten
 Katherine Bauer
 Fletcher Seagroves
 Richard Westergren
 Steve Bonczar

Absent: Ron Pieper, Jr.
 Robert Levenson

Secretary: Kathryn Parenti

The applicant, Wiggin and Nourie, P.A., along with Sherwood and Rochelle Wolcott, owners of Map 56 Lot 44-4, 362 Federal Hill Road, in the Residence "R" district, are requesting a variance from Article V, Section 5.044.A to subdivide the 11.07 acre property into two (2) lots with less than the required frontage on a principle route of access.

Motion to Approve: _____

Seconded: _____

Signed: _____

Date: _____

L. Harten, chairman, opened the regular meeting of the Milford Zoning Board of Adjustment at 7:37 pm. He then stated that this board operates in accordance with the Town of Milford Zoning Ordinances and any and all applicable New Hampshire statutes; he then introduced the members of the board. He noted the board had been struggling with this case and had some concerns. He noted they had heard the case in September of 2005 and it was denied at that time, as well as a request for a rehearing, as there was no new evidence and no error in the board's decision.

Attorney Greg Michael, who was representing the Wolcott's, stated he had spoken with Kevin Lynch, Zoning Official, and K. Lynch stated the Wolcott's could not keep coming back before the board without any new information.

L. Harten noted the state RSA's state the Zoning Board of Adjustment cannot rehear a case if there is no new evidence or any material change.

G. Michael stated this was not a state RSA but it comes from some towns' internal bylaws. Some towns have a year to 18-month window after which it is presumed there has been a change. He noted towns can enact their own bylaws but there were no state RSA's prohibiting the rehearing of cases without any new evidence; it's not a statutory prohibition but a case law prohibition that drives this issue. He noted in this case, case law drives the issue and since there has been an 18 month hiatus and change is presumed. He noted he had spoken with his clients who agreed it would be fine with them if the board sought advice from town counsel in order to handle this in a fair and appropriate way. He continued by saying the Wolcott's had applied for an area variance and their case was heard on September 1, 2006. In *Fisher v. Dover*, 120NH 118, it restricts the hearing of a matter over and over again. In *Fisher v. Dover*, it is shown there needs to be a material change and the suggested change could be factual, as a change in the plan or a change in legal rulings. An example of this is if a variance was heard before 1999, it was pre-Simplex; if heard after 1999, it was post-Simplex and there would be material change present. In this case, the law had changed significantly, allowing the matter to be heard. In this case the plan is substantially the same but the legal differences are significant since much case law had occurred since September 2005. Attorney Michael stated he would like to clarify a number of issues relating to the standards used in a variance case. In *Boccia*, from 2005, an area variance was needed and the criteria of: "1. *Special conditions of the property make and area variance necessary and* 2. *The applicant cannot achieve the same benefit by some other reasonably feasible method that would not impose an undue financial burden*". He noted this issue has been clarified as well as issues not contrary to the public interest and to the spirit and intent of the ordinance. In *Malachy Glen Associates, Inc v. Town of Chichester*, from March 20, 2007, it gave guidance to boards by stating it is presumed to be reasonable if use is allowed under the town ordinance. If use is allowed by the ordinance, it can't be denied if the ZBA disagrees with the proposed use of the property. In *Leonard Vigenat v. Hudson*, the board is not the arbiter of what is and isn't reasonable, as long as it is an area variance and the use is allowed. In *Chester Rod and Gun Club v. Chester*, decided on September 2, 2005, one day after this hearing, it provides guidance and links the "not contrary to the public interest" and "the spirit and the intent of the zoning ordinance". They sound similar and zoning boards have had difficulties with this. There needs to be precision with subjective standards and the supreme court has acknowledged this. The variance must duly and to a marked degree conflict with the ordinance thus that it violates the basic zoning ordinance objectives. He noted the frontage restriction is an arbitrary number and nothing in this case violates the basic zoning ordinance objectives. In *Malachy Glen Associates, Inc. v. Town of Chichester*, it is clarified

by asking if the request threatens the public health, safety and welfare. In this case, it doesn't. Finally, is there economic loss? In Boccia, after this case was presented, clarifies this. In Garrison v. Henniker, August 2, 2006 the hardship criteria interferes with the landowners use of the property. The Wolcott case came before the board before Boccia, Simplex and Vigeant. In prior cases, the board could never consider economic factors and now they can. In Malachy Glen, "whether an area variance is required to avoid an undue financial burden on the landowner which includes the relative expense of alternative methods to use the land as proposed by the applicant". It is important to this case. The board is allowed and required to look at the cost of doing this and is it fair or reasonable. Under Malachy, it is not. It makes no sense, in this case, to construct a public road to create the required frontage. The changes mentioned have come after the first hearing and alter the landscape and how boards think about this. The legal issues can now be material changes. He stated his clients would be willing to table this case to allow the board to talk with town counsel, as there are significant changes and ideas, prior to moving forward.

L. Harten asked if there were any thoughts on this by the board members regarding rehearing the case versus talking with town counsel and have him bring them up to speed on the latest changes and ideas.

K. Bauer stated it would not be a bad idea to consider town counsel's opinion but she wanted to state two things that were misleading in Attorney Michael's statement. The first is in September 2005, both Boccia and Simplex were in force and the board was already considering economic hardship in their decisions and that was part of their vote in 2005. The second was in the case studies mentioned, she noted the board must vote yes to every condition for the request to pass. She felt the vote would be the same if the case were heard again. She felt it was misleading for Attorney Michael to state that all case law has changed the material aspect of the case. She noted the board is aware of the changes and the board attends seminars and OEP lectures and are given plenty of literature regarding any changes in case law.

R. Westergren stated in light of the attorney's presentation, he felt the board should refer to Attorney Drescher for input.

F. Seagroves agreed.

S. Bonczar agreed as well. He felt that the definition of material change, in The Board of Adjustment in New Hampshire – A Handbook for Local Officials, the case of Fisher v. Dover, he had some questions of what constitutes change, as noted by Attorney Michael. He noted he was not on the board when the case was heard the first time. He also noted that every case is unique and case law does not necessarily apply to every individual case before the board. He felt the case should be tabled and it would be wise to get some clarification on this issue.

L. Harten felt this was the only fair way to do this in order to be able to make a reasonable decision.

G. Michael stated he would write a letter and summarize what he had said tonight and it may help give Attorney Drescher some guidance as to how to handle this.

Alan Woolfson, an abutter, asked if he could speak. He noted there were four (4) abutters present and noted they would like to be informed of the results of the consultation with Attorney Drescher. He noted there was a covenant that prevented this subdivision from occurring. In addition, he wondered if they needed to have an attorney present at the next hearing.

L. Harten clarified that they were seeking legal advice for the reasons presented by Attorney Michael regarding whether the board needs to hear the case or not and to clarify the reasons presented by their attorney. He noted the board will table the case to a later date and if they had not heard back from Attorney Drescher by the agreed upon date or the applicant is not prepared, they would then table it again until all parties are ready.

K. Bauer stated for clarification, they would get Attorney Drescher's opinion in the form of a memo; he would not come into the hearing and be a part of a hearing. She noted, in the Handbook, it states that: "*When a material change of circumstances affecting the merits of the applications had not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition*". She noted the board should make sure Attorney Drescher knew where they were getting their advice to not rehear the case.

S. Bonczar stated the opinion is about the legal definition of material change in order to make a decision whether or not to hear the case again and not about the case itself. The opinion they are seeking is whether there is material change and he noted he was not convinced there was.

G. Michael requested to table the case until October 4, 2007.

S. Bonczar made the motion to table case #21-07 be tabled until October 4, 2007 to obtain counsels definition of material change.

K. Bauer seconded the motion.

All were in favor of tabling case #21-07 until October 4, 2007.

A. Woolfson requested to be notified when Attorney Drescher's memo arrived.