

TOWN OF OSSIPEE
ZONING BOARD OF ADJUSTMENT
Meeting Minutes
February 9, 2021

Minutes were recorded by and summarized by Laura Nash, Board Secretary. Revisions to these minutes are noted in ***bold/italic*** type.

Call to Order: Ed MacDonald called the meeting to order at 7:00 p.m.

Members Present by Roll Call: Ed MacDonald, Roy Barron, Daniel Fischbein, William “Bill” Grover, Doreen French – Alternate, and Rick Cousins, ZEO

Absent: Jim Rines

Attendees: Ian Farmer and Ruth Moynihan (via GoToMeeting),
Paul Moynihan, and Joe Deighan (in person)

Meeting Minutes: Review to Approve Meeting Minutes of January 12, 2021

MacDonald noted the omission of “***Chairman MacDonald raised Doreen French up to voting status in place of Jim Rines.***” from the minutes.

A **Motion** by Grover to approve the minutes of 01/12/2021 as amended. Fischbein seconded. No discussion. All voted in favor. **Motion passed.**

New Business:

- **Case #21-1-V:** Ian Farmer & Ruth Moynihan of 1230 Route 16. Tax Map: 101 Lot: 001 is seeking a Variance from Article 34 Section 34.1.C for a change in use to have Multi-Family units that are not allowed in Roadside Commercial Zoning District.

Paul Moynihan introduced himself as the representing agent for Ian Farmer and would answer any questions the Board may have. Ian Farmer spoke via GoToMeeting. Current plan is to have 14 apartment units at this location. Water system will be on Town water supply. Paul Moynihan read through each of the (5) criteria’s.

Board discussion:

Barron questioned if families with children were to live here, what measure would be taken to keep children from climbing on, vandalizing or getting injured at John Deere Tractors next door. The liability is a big concern which is why residential use is not allowed in the roadside commercial district and should not be a financial burden to any of the businesses in the surrounding area. Ian Farmer noted these apartments would be suited for singles or couples versus families. Plus having good tenant screening is part of their process.

Fischbein questioned the septic system. Ian Farmer noted there is a small septic system currently but would need a new system if this project were to move forward. Fischbein questioned the number of bedrooms per unit. Ian Farmer noted most apartments would be two-bedroom apartments with some being single bedroom. The final number of bedrooms would be pending engineer designs but it’s roughly mid to low 20’s count. Fischbein questioned Farmer if he has considered having commercial units.

Grover stated and distributed an updated copy of the five criteria requirements for granting a variance. He noted that he spent a lot of time researching the requirements for hardship and a lot of times it’s looked at as financial hardship. According to Ian Farmer’s response to criteria #5, which states, “This property has found itself the victim of a changing economic reality.” Grover noted per case studies “*By the 1970s and early 1980s, the Court had developed a fairly consistent approach to defining “unnecessary hardship.”*”

First, the applicant had to demonstrate “special conditions” of the land that distinguished it from other properties, so that the restriction in the zoning ordinance imposed more of a burden on the subject property than on other properties. These special conditions had to relate to the character of the land, not the personal circumstances of the owner. Most applications failed on this basis.”

Again, quoting a case study Grover read, “A review of the record reveals nothing to indicate that, due to special conditions of the land, AHU is unable to make reasonable use of the parcel. To the extent that potential hardship was discussed at all, it related only to AHU’s unfruitful attempt to locate other land on which to conduct its business. As this relates only to personal inconvenience rather than to the special character of the land, it is irrelevant to the (AHU’s) request for a variance.”(citing Hanson v. Manning, 115 N.H. 367, 369 (1975))

Grover quoted case study, “Goslin v. Town of Farmington, 132 N.H. 48, 52-53 (1989) (land was currently used for a purpose permitted by the ordinance, and there was nothing unique about the land)”

Grover quoted a case study, “In Margate Motel v. Town of Gilford, 130 N.H. 91 (1987), it was abundantly clear that the unique dimensions of the property in question did substantially affect the owners’ ability to use it, and the zoning ordinance affected them differently than their neighbors because of the uniqueness of the property. The Court, citing Richardson, stated, “The size and dimensions of a parcel do not create an unnecessary hardship when the land could still be used for the purposes permitted by the zoning ordinance.” Id. at 94. Because there were a number of permitted uses that “the defendants have not shown are precluded by the uniqueness of the land,” the Court found no unnecessary hardship.”

Grover quoted case study, “In Rowe v. Town of North Hampton, 131 N.H. 424 (1989), the Court quoted ..., stating that it was “irrelevant” that the permitted uses available to the property owner were neither reasonable nor economically viable.”

Grover stated this next case is what the courts follow today, quoting “Simplex v. Town of Newington, 145 N.H. at 731. With that said, the Court announced its new standard. Instead of the prior requirement for unnecessary hardship that the applicant show no available use without a variance, the Court ruled as follows: Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (a) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;”

“Additionally, the concurrence suggested that boards and courts must consider whether the hardship arises from the unique setting of the property and its environment via a hardship imposed solely on the subject property itself. Id., at 478-479. The concurrence noted that where a zoning restriction imposes a burden on a number of similarly situated landowners, the proper remedy is an amendment of the ordinance, not a variance. Furthermore, while stating again that a mere showing that a proposed use is a reasonable use would be insufficient to override the zoning ordinance,”

*“*** the hardship test is met “when special conditions of the land itself render the use for which the variance is sought reasonable and the ordinance interferes with that use.”*

*“*** While adverse effect must be more than a mere inconvenience, a landowner need not show that without the variance the land would be rendered valueless or incapable of producing a reasonable return.”*

*“*** a determination of whether the zoning restriction as applied interferes with a landowner’s reasonable use of the property” and that “reasonable return is not maximum return.”*

*“***the lack of ... reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence” of such interference with reasonable use.”*

“The Court in Harrington continued with a “second” determination—whether the hardship is a result of the unique setting of the property; and the Court stated that this requires that “the property be

burdened by the zoning restriction in a manner that is distinct from other similarly situated property.” While the property need not be the only one so burdened, “the burden cannot arise as a result of the zoning ordinance’s equal burden on all property in the district.”

“Furthermore, that burden must arise from the property and not from the individual plight of the landowner.”

“interferes with their reasonable use of the property, considering the unique setting of the property in its environment and the burden of proof must arise from the property and not from the individual plight of the owner.”

Cite: The Five Variance Criteria in the 21st Century LECTURE TWO 2009 Municipal LAW LECTURE Series

Grover concluded stating, it’s not about the proposed use and the zoning ordinance interferes with it. If the uniqueness of the property from surrounding properties or properties in the district would hinder it from making any sort of valuable income from any of the approved and allowed businesses that can operate here, then there’s a hardship. Grover noted according to the Table I – Chart of Uses for Roadside Commercial district there are 15- 20 other approved uses that can be operated from this property without having to change the use of this particular property.

Barron inquired and Grover denied Ossipee having a historical district.

Grover read from the Requirements for Granting a Variance: A Suggested Approach, under #5- explanation which states, *“As an alternative to (a) and (b) above, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use ...”* Grover stated this is not the case because there are other approved uses that are viable.

Grover commented when the Master Plan was created, and the zoning districts were established there was a reason for not mixing residential with roadside commercial zoning. He understands the applicants proposed use but noted this is not the location to have it. Board discussion ensued.

Chairman MacDonald opened discussion to the public.

Joe Deighan presented as an abutter, noting he is opposed to having apartments at this location, it not suited with the traffic in the area, and the zoning ordinance speaks to this area being for businesses versus residential use. Deighan noted he feels bad because housing is needed but this is not the location for it.

Chairman MacDonald closed public input.

Board discussion ensued over public safety, traffic and school bus hazards.

Paul Moynihan called for discussion from Ian Farmer, who spoke of reasoning of the hardship and had consulted with Jim Rines, who offered advice. Discussion ensued over zoning, hardships, Master Plans intended use and other businesses that could operate from this location without having to come before the ZBA. Grover noted the all the court cases refer to the land use not the building use and referred to several other potential uses. Discussion continued over the process for changing zoning and presenting to the Planning Board and subsequently to the Town’s people for voting.

Ruth Moynihan spoke of kids being on the property no matter the use of apartments, which is not allowed and why they came before the ZBA or operating a Bed & Breakfast which is allowed. She noted they were trying to provide a need to the community of affordable housing for the people that live and work here.

Grover agreed that housing is needed throughout NH but the ZBA has to follow current laws and zoning ordinances and spoke again about going to Planning Board for any changes to current zoning and/or ordinances.

Chairman MacDonald was asked to and explained the voting process to the applicants. ***“The voting procedure for a variance utilizes the five criteria set forth in RSA 674:33, I, and all criteria need to pass in order for the variance to be granted. Each criteria needs at least 3 votes to pass and all 5***

criteria must pass in order for a variance to be granted. As required by SB 339 – Voting by Zoning Board of Adjustments: The Bill amends RSA 674:33, III.”

Chairman MacDonald called for a roll call vote on each criteria. A vote of Yes is a vote in favor and a No vote is to deny.

Vote by Criteria:

1. The variance will not be contrary to the public interest:

Grover – Yes Fischbein – Yes Barron – Yes MacDonald – Yes French - Yes

2. The spirit of the ordinance is observed:

Grover – No Fischbein – No Barron – No MacDonald – No French - No

Grover explained per the application #2 it states, “This project would not alter the essential character of the local, but instead preserves it.” The local is zoning district. Does it change the character... yes, it does. Fischbein, Barron, MacDonald, and French all agreed with the same.

3. Substantial justice is done:

Grover – No Fischbein – No Barron – No MacDonald – No French – No

Grover explained based on the sentence that “this property is not financially viable as is currently used.” Based on the court cases it has to do with the condition of the property, the land itself and not the financial viability to the property owner.

Fischbein commented he agrees there is a need for housing but does not agree this is the location for it.

Barron agreed with Fischbein but commented there are other viable businesses that could do quite well at this location.

French agreed based on all three comments stated.

4. The values of surrounding properties will not be diminished:

Grover – No Fischbein – No Barron – No MacDonald – Yes French - No

Grover commented although the surrounding properties probably would not have a financial diminishment. But per the application “...a property that is financially functional will typically be better maintained.” Grover continued by stating with this statement it indicates that with it’s current use the property is financially viable. So that negates the argument.

Fischbein agreed with Grover’s statement.

Barron commented he believes it would diminish the value of surrounding properties.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because the “Special Conditions” of this property that distinguish it from other properties in the area are as follows:

Grover – No Fischbein – No Barron – No MacDonald – No French – No

Grover reiterated they are not looking at any special conditions” of the property and not the “economic reality” as stated on the application.

Fischbein thinks it could be run as a commercial business and not as housing.

Barron agreed with Grover’s statement.

MacDonald said no because there are other uses that are allowed.

French agreed with MacDonald.

(B) Owing to the special conditions, set forth above, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it because:

Grover – No Fischbein – No Barron – No MacDonald – No French – No

Grover voted no, because of the 15 – 20 other allowable uses in the district. There's nothing special about the land that makes it a "special condition."

Barron voted no because there are a lot of other businesses that would do very well there.

Chairman MacDonald announced the **Motion Failed**. The Variance has been denied.

Note: The Selectmen, any party to the action or any person directly affected has a right to appeal this decision within 30 days. To avoid lapsing of the approval, there should be substantial construction or liability within 2 years of the decision. See New Hampshire Revised Statutes Annotated, Chapter 677, available at the Ossipee Town Hall.

Deighan stated workforce housing is needed and suggested it would be a good place to have it, since the 500 ft. roadside set back is no longer in affect.

- Letter from BOS response to COVID allegations: The Board acknowledged the receipt.

Mr. Moynihan thanked the Board for their time.

Discussion: Grover noted there have been cases heard on hardship and thinking it was financial but it's not. It's based on the land and what's different between your land and the surrounding land. Along with keeping that in mind going forward. Times have changed and if someone does agree with an ordinance, they can draft a petition warrant article requesting an ordinance to be changed and voted on by town's people at the Annual Town meeting. Discussion ensued on meeting the criteria's, zoning changes, Mater Plan, and being fair to all applicants.

Any Other Business Which May Come Before This Meeting: None heard.

Adjournment:

A Motion by Barron to adjourn the meeting. Fischbein seconded. No discussion. A unanimous vote was taken. **Motion passed.** The meeting adjourned at 8:01p.m.

Next Meeting:

Regularly scheduled meeting will be on **March 9, 2021 @ 7:00 pm**

Minutes were approved by majority vote of the Board:

_____	_____	Or	_____	_____
Ed MacDonald, Chairman	Date		Roy Barron, Vice Chair (In the absence of the Chairman)	Date