

**Zoning Board of Adjustment
Town of Sandwich
PO Box 194
Center Sandwich, NH 03227
Minutes November 10, 2022**

Members Present: Mary Cove, Jim Gaisser, Jon Greenawalt, Tim Miner, Katherine Thorndike, Kurt Olafsen, Geoff Tyson

Members Absent: Chris Grant (with notice), Jim Bullitt

Others Present: Applicant Ryan Milbury, Abutters Holly Cook, Vicky West

Call to Order:

Ms. Cove called the meeting to order at 7:00 p.m.

Minutes of September 8, 2022: Ms. Thorndike **Motioned** to approve as written. Mr. Miner seconded. Mr. Miner had editorial suggestions given to secretary. 6 in favor

New Business:

Case 2022-02 Application for property owned by Ryan Milbury located on Diamond Ledge Road, Center Sandwich, NH, Tax Map/Lot R18 02 in the Rural/Residential Zoning District for a Variance concerning Section 150-13B (setbacks for Private water wells) of the Zoning Ordinance. The Applicant proposes to install an artesian well along the boundary line with the White Mountain National Forest to provide water for livestock.

Ms. Cove asked if any members had a conflict of interest regarding this case. There were none. With two regular voting members absent, Chair Cove designated alternates Mr. Miner and Mr. Tyson to vote on this case. Other voting members are Ms. Cove, Ms. Thorndike, and Mr. Gaisser.

Ms. Cove noted that there was reference to conservation easements on the maps supplied and asked if easement holder(s) were included in the notification. If left out, may have to defer reviewing application tonight to send out the required notification for a continued hearing. Land Use Secretary had checked in property file and there was a filed document naming Squam Lakes Conservation Society (SLCS) as a holder on (former) Cook property. An SLSC easement may be for a neighboring property. Mr. Milbury stated that the Town of Sandwich was the easement holder for his property and was on the abutters' list (also abutter lot 4). Ms. Cove polled the members as whether to proceed with the application, and it was agreed to move forward with ability to make verification of easement holder a condition with an approval or denial.

Mr. Miner **Motioned** to accept the application. Ms. Thorndike seconded. All in Favor.

Mr. Miner **Motioned** to open the public hearing. Ms. Thorndike seconded. All in favor.

Ms. Cove outlined the process that applicant will present his application specifically addressing the hardship of the well location. Next is open to public comment, with abutters recognized for input. The members may then question the applicant and address any concerns expressed by the abutters.

Mr. Milbury explained that the artesian well is part of a National Resource Conservation Service (NRCS) grant program. On the map, the existing barn is to the left of the road, and the older hayfields are to the right and it is planned that these fields are going to be sectioned off and used for rotational grazing of the cows. The well is going to serve both the barn and the area across the road in various watering spots so the cows can be moved more regularly. As far as why the well location was chosen, it takes into account the 70-foot radius from high use areas and this location is the farthest away from area of cows producing high levels of nutrients. Mr. Milbury did receive a communication from the Forest Service that

it had no issue as it doesn't have setback requirements as long as all activity is on applicant's property. Copies were given to the Board. With the land, if the well was moved down slope, it would be on the lower side of potential runoff of high water. With the easement, this location is also least impactful to the environment being in the more developed area and not in current use. Another location would involve more trenching and be more impactful, something Mr. Milbury would like to avoid. There is no septic system on the abutting property to need the required setback, and Mr. Milbury stated that the Forest Service had no intention to add a septic system.

Ms. Cove asked to clarify that the well will provide water to both the existing cow shed and across the road to the pastures. Mr. Milbury confirmed. Then asked about the terms of the conservation easement. Does it prevent further development of the property? Mr. Milbury replied that the land can be used for agricultural purposes only and any structures would be supporting that activity. No commercial retail structures are allowed, and no residential structures would ever be allowed. The well is strictly for the livestock with no chance of any residential use or the addition of septic systems.

Mr. Greenaway asked about the location of the proposed well on the maps and Mr. Milbury pointed it out.

Ms. Cove then recognized the abutters present. Vicky West of 468 Diamond Ledge Road spoke. She stated that Mr. Milbury has communicated with her and her husband about this and they support it one hundred percent. She pointed out her property on the map, across the road from the fields on the right.

Mr. Miner asked whether the land is under current use as well as an easement. Mr. Milbury replied that the easement requires that the land meet all aspects required for current use. Mr. Miner, so might not pertain to this application, but does that limit you to put in this well? Mr. Milbury responded that he had taken the well site out of current use which puts that square footage back on the regular tax base, even though it is within the conservation easement.

Any other questions from the Board members?

Mr. Gaisser addressed the applicant to explain the unnecessary hardship criteria that will be discussed, so please present his case for that. Mr. Milbury explained that when the barn was first constructed, there was zero thought of future need for a well. So the original setup did not take a well site into consideration. The hardship would be increased financial requirements, excessive trenching of the field, and taking the area that would be the well site would decrease the available grazing area.

Mr. Gaisser explained that financial aspects are not supposed to be considered under the hardship criteria. So, explain the grazing part as a hardship again. Mr. Milbury started the with 70-foot radius around the well required. He addressed that by pouring a concrete pad inside the barn and extended it outside to build that radius. If the well was moved to another location, the 70-foot radius would have to be fenced around the whole thing and would have to be in a place with a higher grade to reduce any runoff towards the well. The proposed site is the highest location that's reasonable. So the actual hardship is the topography of the property.

Ms. Cove explained that the public hearing can be closed with an announcement that the Board may want to ask for further information in this meeting. Deliberations can also start with the public hearing still open, then close to make the final decision.

Mr. Milbury addressed one more question concerning the easement aspect of the property. Putting it elsewhere would impact the scenic nature of the property which is part of the easement. Keeping it closer to what is already developed is less impactful.

Ms. Cove, looking at the map facing the barn, if it was moved further to the left, it would be running into the stream, a zone where there would not ordinarily to be well. Is it also required to stay higher up with an artesian well? Mr. Milbury stated that it is more the topography that dictates the best location to keep it out of the potential runoff and high use area. Technically, artesian wells are supposed to be sealed so there is zero chance of contamination, but the requirement is there as a buffer.

Mr. Olafson asked about topography dictating this high point. Mr. Milbury said that was pretty much the case. How dramatically does it slope off? Answer: over the course of that area, it drops

approximately 10-12 feet. Where the barn is now it is about 7-8 feet out and quite a bit lower already. No higher place to put the well in this area.

Being no further questions from the Board, Ms. Cove called for a motion to close the public hearing. Ms. Thorndike **Motioned** to close the public hearing at 7:20 pm. Mr. Gaisser seconded. All in favor. Non-voting member Mr. Greenaway expressed that a positive motion should be made, and if it fails to go to discussion on criteria. Mr. Gaisser felt the variance criteria should be discussed prior to the vote.

The five criteria review:

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

The purpose of Section 150-13 B requiring a 50-foot setback, the section from which the variance is being sought, addresses typical residential lot development and setbacks are intended to address individual wells and septic systems being far enough apart to avoid contamination. In this case, the area is rural agricultural with an easement that prohibits development and the abutting property involved forestland that will not be developed. Ordinance says, "*B. Private water wells. Water wells servicing individual residences shall be located a minimum of 75 feet from septic system leach fields, septic tanks, and property lines.*" Mr. Miner stated that it doesn't really apply here. Setbacks are to protect drinking water of individual dwelling units, so that may be a technicality but it's worth seeing that the setback is for a different purpose than how it applies here. Mr. Gaisser added that the boundary setback is an added nuisance here. Ms. Cove summarized that the zoning ordinance here is not necessarily applicable in this situation. This proposal is not contrary to the public interest. The abutter directly involved, the Forest Service has no issue with this.

2. The spirit of the ordinance is observed:

The spirit of the ordinance is based on Master Plan that supports agriculture and maintaining open spaces. This is generally only possible if made viable and the intent here is to allow an agricultural endeavor to go forward. To locate the well behind the cow barn keeps more open space rather than locate it in the middle of a field.

3. Substantial justice is done:

The term justice was discussed and Ms. Thorndike read the definition that applies from the OPD ZBA Handbook. "*It is not possible to set up rules that can measure or determine justice. Board members must determine each case individually. Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. The injustice must be capable of relief by granting a variance that meets the other four qualifications. Any loss to the individual which is not outweighed by a gain to the general public is an injustice. Also, the court will examine whether the proposed development is consistent with the area's present use.*"

Ms. Cove, in this case there is no gain to the public by locating the well in a different site.

4. The values of the surrounding properties are not diminished:

The visual impact is minimal and would be more if located elsewhere. It does not change the look of the neighborhood in anyway. At this point, the email from the Forest Service was read aloud.

5. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship:

"A. Owing to the special conditions of the property that distinguish it from other properties in the area, no fair or substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; B. and the proposed use is a reasonable one."

Mr. Miner: The purpose of the ordinance does not apply here since it's not a residential well, and the difference is that this property is in conservation easement therefore distinguishes it from other properties and it is sensible to grant the variance. Ms. Cove stated that a variance runs with the property, and it would be an open question if this property could be developed residentially, and the well site would continue to be used. But that is not the case relative to the easement, making it a special condition of the property. Ms. Thorndike: In addition, the applicant needs to be concerned about the runoff, so this a property that faces that particular condition. Mr. Gaisser was satisfied with the applicant's explanation.

Any other questions or comments? Mr. Gaisser commented that this is a good example of why the ZBA exists. To understand the intent of the ordinance and to grant relief when necessary.

Mr. Miner **Motioned** to grant the Variance from Section 150-13B (setbacks for Private water wells) of the Zoning Ordinance to property owned by Ryan Milbury located on Diamond Ledge Road, Center Sandwich, NH, Tax Map/Lot R18 02 in the Rural/Residential Zoning District. Conditionally granted upon confirmation that the conservation easement holder is the Town of Sandwich that was duly notified.

Ms. Thorndike seconded. To follow RSA 676:3, *“The decision shall include specific written findings of fact that support the decision”*, the Board enumerated the key findings of fact:

The National Forest as an abutter is a unique situation and it has no objection to the project;

The status of the property with a conservation easement;

The other abutters did not object;

The agricultural usage of the property is in keeping with the Sandwich Master Plan.

The full **Motion** is to read: Based on the findings of fact listed, to grant the Variance from Section 150-13B (setbacks for Private water wells) of the Zoning Ordinance to property owned by Ryan Milbury located on Diamond Ledge Road, Center Sandwich, NH, Tax Map/Lot R18 02 in the Rural/Residential Zoning District. Conditionally granted upon confirmation that the conservation easement holder is the Town of Sandwich that was duly notified.

Ms. Cove called for a roll call vote.

Mr. Gaisser, Aye; Mr. Miner, Aye; Ms. Cove, Aye, Mr. Tyson, Aye; Ms. Thorndike, Aye. Variance is granted with the condition as stated.

Ms. Cove read the statement that anyone wishing to appeal this decision has 30 days from the day the Notice of Decision is posted to file an application for rehearing.

New Business:

2023 Budget: Proposed to be the same as 2022 which was underspent with only two cases for the year.

Mr. Miner **Motioned** to approve the proposed budget. Mr. Greenawalt seconded. All in favor.

Old Business:

Rules of Procedure Review: Further review resulted in:

Page 3: Change “less” to “fewer” used 3 times and delete “solely” in second paragraph.

Page 4: Under Applications and Decisions, 1 for appeals of administrative decisions, leave as 30 days until the ZO reference can be changed. It was decided to request a warrant article to amend the ZO. Ms. Cove will send a memo to the Planning Board which is currently working on warrant articles. Mr. Gaisser expressed that the ZBA can waive any part of the ordinance. Others stated that variances, special exceptions and EWDRs are waivers of dimension or use, not procedural requirements.

Under 3. Public Notice, the five-day notification was questioned as to being so short. Again, the text is probably based on the OPD Rules template that refers to RSA 676:7 I (a) that states notification in “not less than five days before the date fixed for the hearing of the appeal”. The Board can change that. The Planning Board deadline must be at least 10 days. The submission deadline must be set with adequate time to process application, mail notifications and publish an ad. The PB timeline is currently 24 days, the ZBA is 17 days. Board concurred to change and vote on amended text of Rules as a whole document.

The change from “certified mail” to “verified mail” was questioned. RSA 676:7 I (b) was amended in 2017 based on definition in RSA 21:53: *“The term “verified mail” means any method of mailing that is offered by the United States Postal Service or any other carrier, and which provides evidence of mailing.”*

Page 5: The question of timeline of seven days to request compelling the attendance of a witness was questioned. The RSA 673:15 cited, does not have a timeline. It should be in keeping with the timely notifications for someone to make the request. Original five days makes this inconsistent, so going to 10 days makes more sense.

Page 6: Top, n. on closing the public hearing. Ms. Cove had a conversation with Town Counsel regarding taking no further public comments. Counsel advised that the Board may close the hearing with an announcement that the Board reserves the right to ask further questions or hear clarifications from the applicant or public at that meeting only. Should deliberations continue to next meeting and a public hearing must open for more input needed from applicant or public, the meeting must be re-notified (at Board's expense). Or the Board can start deliberations with the public hearing still open and close when ready to vote.

Bottom of page compelling witness: Change "Interested parties" to "Any person directly affected" the language in RSA 677:2. Board decides if the appealing party has "standing."

Review of Application Forms: The Special Exception application has been reviewed by Town Counsel. It needed additional information to include all ZO requirements. The one comment from the attorney, "When considering a special exception application, the ZBA may not "vary" any of the criteria. This means that if all of the criteria are not met, the board must deny the special exception. However, the applicant may apply for a variance to permit the use in that case. The important distinction is that the board is not granting a variance from any of the special exception criteria. It is looking at the use as unpermitted (as it is if all the special exception criteria are not met) and considering whether the applicant has demonstrated that a variance is justified for the use that is otherwise not permitted." In the past, the ZBA did a two-step process of considering both a special exception and a variance.

Other applications are straightforward and separated out with an accompanying information packet. Final drafts to be distributed for next meeting.

Brief discussion on the requirement in the ZO that an applicant must have a denial of a special exception from the Compliance Officer. The ZBA is only entity to determine criteria for special exception. The Compliance Officer cannot approve or deny a special exception. Ms. Cove will include mention in memo to Planning Board regarding possible amendments.

Adjournment:

8:34 p.m. Ms. Thorndike motioned to adjourn. Seconded. All in Favor.

Scheduled Meetings:

December 8, 2022 regular meeting, January 12, 2023

Respectfully submitted,
Susan MacLeod, Land Use Secretary