

**Zoning Board of Adjustment
Town of Sandwich
PO Box 194
Center Sandwich, NH 03227
Minutes January 26, 2023**

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

Others Present: Applicant Frederick Surrette, Carla Miller

Call to Order:

Chair Cove called the meeting to order at 6:59 p.m.

Minutes of December 8, 2022: Mr. Gaisser pointed out “Greenaway” should be “Greenawalt” in several places. Mr. Olafsen wanted to change “land” to “property” to reflect statutory language from criterion on p. 2, lines 41 and 46; p. 3, line 30 and 38; page 4, line 27. Mr. Greenawalt asked for clarification that land is without buildings and property includes buildings. Mr. Olafsen stated that sometimes terms used interchangeably in the book, but the statute says property. Mr. Olafsen noted that Mr. Kimball pointed out the use of the word land suggesting that we didn’t look at the buildings so it’s more accurate to use property. LU Secretary MacLeod countered by stating what is written is what was said. Mr. Olafsen said they used it interchangeably when talking about the buildings as well as about the land – talking about the whole thing there, not just the physical environment.

Mr. Gaisser **Motioned** to accept the minutes as amended. Mr. Bullitt seconded. 6 in favor, 3 abstained (Ms. Cove, Mr. Miner, and Ms. Thorndike)

New Business: Requested Motion for Rehearing Case 2022-03 Application for a Variance

concerning Article III Section 150-10 A (minimum lot size for Multiple-Unit Structures) of the Zoning Ordinance for property owned by Frederick Surrette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural/Residential Zoning District. The Applicant proposes to renovate an existing dwelling structure into two dwelling units.

Ms. Cove started by outlining the standards for a rehearing and reasons for a Board to decide to grant one or not. The Board will review and discuss the two-page request letter from the applicant’s Agent Frank Marino that states the reasons for a rehearing. Ms. Cove read the RSA regarding who can request a rehearing and that the motion must state why the ZBA decision was unlawful or unreasonable. A decision to rehear will be based on the issues stated, and the Board may decide based on the record to rehear to clarify the record and/or address any alleged errors raised by the applicant or expand on the deliberation results. Being that the next step would be an appeal to Superior Court, it might be better to rehear to clarify the record and address any legal issues raised.

Ms. Cove named the voting members, herself, Mr. Bullitt, Mr. Gaisser, Mr. Grant, and Ms. Thorndike. Alternates Mr. Greenawalt, Mr. Miner and Mr. Tyson may participate in discussion, but not vote.

Mr. Gaisser brought up the other standard to consider for a rehearing which is additional information not available at the first hearing is now to be presented. Mr. Greenawalt asked if it was omitted unintentionally at the time or must it really have not been available. Ms. Cove expressed that it was her understanding that it would be new information that was literally not known at the time of the public hearing when an applicant was asked to present their full case. The assumption is that they

did. In general, Ms. Cove felt the new information should not bring up a whole different argument – that is not the purpose of a rehearing.

Mr. Greenawalt stated that the motion is in front of the Board, so it is whether to grant or deny a rehearing. Ms. Cove stated that a formal motion has not yet been made, and after that motion to accept the motion for a rehearing, discussion can begin to come to that decision.

Mr. Grant asked about the statement in the letter that it was a special exception that was required not a variance -- was that considered “new” information to be considered? Mr. Gaisser pointed out that the hearing was on the application that had been submitted for a variance, and the ruling was on what was presented. He hadn’t realized the full text for a special exception in the ordinance allows this possibility. The Compliance Officer apparently didn’t know or interpret this section when denying the building permit. Now that this possibility of a special exception has been brought up, it needs to be addressed. Citing a previous case, it’s not an either/or, both variance and special exception must be met. The variance for a building permit and to then meet special exception criteria. Must proceed with the variance first, then the special exception is a separate next step. Mr. Gaisser continued that based on what had been submitted for the case previously, he is in favor of a rehearing. General agreement that it must be addressed now that it has been pointed out.

Ms. Cove agreed it must be discussed and asked for a motion from the floor to accept the motion for a rehearing so the discussion could begin. Mr. Gaisser **Motioned** to approve the Surette request for a Motion for a Rehearing. Ms. Thorndike seconded. Mr. Grant clarified a rehearing of the variance application.

Ms. Cove began the discussion of the two-page request letter with citing the ordinance section [150-10 B] that to build anything on a pre-existing nonconforming lot needs the special exception, she questioned whether it does apply to an already existing building in which it may be change of use from a single family to a multi-unit. Also in the ordinance is a section [150-8] regarding grandfathered existing nonconforming use that states it cannot expand or change without a variance. So, changing from single family to multi-family building, is that use or building?

Mr. Miner expressed disagreement that a variance is needed. He asked if it was established that it was a multi-family in the past.

The building has been abandoned for a long period of time. Being pre-ordinance there had been no restriction that it couldn’t have been multi-family. In the first hearing there was information presented to believe it was, Ms. Cove pointed out that having been abandoned so long that grandfathering ends when the use ends. Mr. Olafsen pointed out that there has been no actual confirmed finding of fact to confirm multi-family use in the past so it may be inappropriate to rule that it is a change of use with no records of its use as a residence. Ms. Cove is not convinced that this particular article is determinative in this situation. Mr. Olafsen felt the section [150-10 B] does not only apply to new construction. Mr. Miner concurred that as a nonconforming lot of record, a variance wouldn’t be needed for the change from single family to multi-family.

Mr. Greenawalt asked for clarification of the motion and why it was not voted on. Ms. Cove explained that in order to discuss it, a motion to accept the request had to be made, but a vote to grant or deny it will come after the discussion.

Mr. Gaisser disagreed with Mr. Miner’s interpretation and read from the land use book regarding special exceptions. They are allowed uses that must meet all zoning ordinance requirements. The variance must be granted prior to the special exception.

Mr. Miner referred to 150-105 Special Exceptions and 150-10 A & B:

§ 150-10. Lot area.

- A. (1) In the case of Multiple-Unit Structures, the minimum lot size permitted shall be 175,000 square feet of unrestricted area or, if the slope of the terrain is 15% or greater, 455,000

square feet of buildable area.

- B. Exceptions to permitted lot size and road frontage on a public or private way. Lots of record as of March 11, 1969, which do not meet the minimum lot size requirements and/or frontage requirement on a public or private way, may not be built on until given a special exception by the Board of Adjustment. See also § 150-105. The Board of Adjustment shall determine that all structures, septic systems, etc. will conform to current setback requirements and that building on the lot will not be detrimental to public health or in violation of the purpose of this ordinance as expressed in § 150-4.

Since the lot is a pre-existing nonconforming lot of record (prior to 1969) it seems to comply with this section of the ordinance. Ms. Cove again mentioned Section 150-08 as it may apply. Mr. Gaisser disagreed with this interpretation that granting the special exception would comply with the ordinance. To do that would circumvent. It says it allows for a smaller lot. It does not say in here it allows for a smaller lot and building.

Mr. Olafsen concurred with Mr. Miner. It allows for a special exception from a minimum lot size in the ordinance.

Mr. Grant suggested that this is getting beyond what to discuss here. It should be discussed in the public hearing next meeting if the rehearing is granted.

Mr. Gaisser stated that it is a rehearing of the case denial decision on the variance and not to hear a new special exception application that has not been received.

Ms. Cove felt it was to be determined whether this Special Exception was new information and the Board should have identified this, will be discussed at a rehearing. This is an open question but going back to whether there is consensus to hold a rehearing for clarifying the record for the decision on the variance and address some of concerns expressed by the applicant on the motion. And to provide more detail on the two prongs of the test for hardship, rather than just the first one. Both were discussed but the decision could be expanded to include more reasoning on both.

Mr. Greenawalt brought it back to granting a special exception would make the variance moot. One or the other. This is contrary to what Mr. Gaisser is saying. Mr. Olafsen expressed that maybe the wrong thing was applied for, so the variance would not be necessary, just a special exception. Mr. Greenawalt asked if there was anything in the ordinance that says one has to be done before the other is acceptable. That is what is at issue – the interpretation. Ms. Cove: It makes sense if you are applying for a special exception that your land, your property has to meet all the criteria up front. And if you've got some issue that requires a variance, you're not going to get the special exception because the land doesn't meet all the requirements. Mr. Gaisser's point is that the variance is addressed first then the property can come for a special exception. The variance fixes whatever the issue is with the property prior to applying for the special exception. This particular order has been done in the past in a single meeting. Ms. Thorndike asked if this would have to be done in another meeting. There would have to be an application for special exception to review.

Mr. Grant asked whether this disagreement over interpretation should be brought to the Town attorney for advice in order to address this at the next meeting, especially if it's a public hearing for the rehearing. And if an application for a special exception is received. If the rehearing is granted, it will be down to the legal opinion if the variance denial stands, whether to proceed to a special exception.

Discussion returned to whether to go ahead with a rehearing. Mr. Grant noted the motion application and letter, and the letter from abutter Mr. Kimball expressed concerns about the detail provided for the denial. He supports holding a rehearing. Mr. Olafsen stated that business tonight is that a special exception is not here, so the vote is to rehear the application for the variance.

There is no need to pursue this further, if an application is submitted and public notice is given,

a special exception will be reviewed and decided upon. Ms. Thorndike added that if the next meeting decides on the variance again and a special exception is also needed, does that have to be further down the line. Ms. Cove responded that if it was decided that part of the zoning ordinance is applicable, it is the next step. Mr. Gaisser stated that it is the applicant's decision on how they want to proceed. The Board can't tell them. Ms. Thorndike just wanted to know if it would be a Board decision at the next meeting. An application would have to have been submitted.

Mr. Bullitt expressed that it appears there's a question as to whether the Board went far enough in determining what the variance was. There are enough questions there that a rehearing is needed.

Ms. Cove asked if all were ready to call the question. The motion on the floor is to approve the request of Motion for a Rehearing for case 2022-03 Application for a Variance concerning Article III Section 150-10 A (minimum lot size for Multiple-Unit Structures) of the Zoning Ordinance for property owned by Frederick Surrette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural/Residential Zoning District. The Applicant proposes to renovate an existing dwelling structure into two dwelling units.

Mr. Grant: In favor; Mr. Gaisser: Yes; Ms. Thorndike: Yes; Mr. Bullitt: Yes; Ms. Cove: Yes.

Mr. Greenawalt expressed if he were voting, he would vote yes also.

Ms. Cove acknowledged Mr. Surrette who had a question regarding the meeting in two weeks (February 9) and whether he should be filing tomorrow for a special exception. LU Secretary MacLeod explained that the certified mail and ad placement had to be done the next day to meet notification deadlines. The Town Office is closed on Fridays and the application could not be accepted until Monday and that would be too late to add to the notifications (deadline for Feb. 9 meeting was Jan. 16). Mr. Surrette countered that the one abutter on three sides and the agent would know immediately. Ms. MacLeod explained that by law there are timelines for notifying all abutters and the public and to get the application processed Monday is still too late. It would have to be scheduled for the March 9 meeting. Mr. Surrette then wanted to clarify that he would have to file another application for another meeting. While the Board cannot make recommendations to the applicant, it was suggested the options are: proceed with the February meeting for the Rehearing only and submit a Special Exception application for a later date; or that both the Rehearing and the Special exception be scheduled for the March 9 meeting.

Mr. Surrette was not sure how to deal with the variance and a special exception based on the disagreement on interpretation he heard tonight. It makes sense to have the one meeting and get it done at the same time, but it's pushed later. Expressed desire to consult with his agent. Ms. Cove apologized that the circumstances of having to reschedule the original meeting to the next available time two weeks later has made the timeline tighter.

Mr. Surrette stated he would then have to pay another \$150 to do the whole thing over again. The LU Secretary will combine the notifications for the one meeting so the applicant would not have to pay twice. The check submitted with the Motion for Rehearing would cover it.

Mr. Surrette then asked if it was settled that he would need a formal application for a special exception, just can't be added in [for Feb 9 meeting]. Doesn't make sense to separate the two. Both can't be combined?

Ms. Cove responded that on his end it will save the mailing and ad costs. Mr. Surrette interrupted to say to just go ahead with the meeting, there's two arguments and now two meetings.

Ms. Cove responded that he is obviously in a situation in dealing with the number of abutters and acres and more. The issue for the Board is dealing with statutory requirements for posting advanced notices and filing deadlines for each meeting. Notices for a February meeting are all set to go out because they were prepared in advance of this meeting to be ready if decision was to go ahead with rehearing. Those notices to abutters must reflect what is on the agenda to be discussed and to add something now is passed the filing deadline and the conversation is going to be something

different. A special exception application is separate from first rehearing for variance decision.

It was confirmed by applicant that the Rehearing will not be on February 9 but moved to March 9 and combined with a special exception application (if received on time). Mr. Surette and Ms. Miller left the meeting at 7:43 pm.

Discussion on consultation with Town Counsel to get clarification on how to interpret and apply the zoning ordinance sections, the questions raised on the application [Motion for Rehearing], the requirement for an application for a special exception in the applicant's request, the variance standards and the decision sequence if both variance and special exception are required. Ms. Cove will request a written response to share with the Board. It was offered that other attorneys may also be consulted. Mr. Gaisser believed he has asked about this issue in the past and will search for the email or will send question to NHMA again and share response with the Chair.

Ms. Thorndike asked what the special exception would be for. That the lot existing before 1969 to have a multi-unit built on it. Any undersized pre-existing lot needs a special exception to be built on according to the ordinance, even a single family. Mr. Bullitt added that this lot is just barely under the minimum acreage for a single family. For a multi-unit it is less than half the minimum. Should not speak about the case now but add this information in questions to Town Counsel.

Review variance explanation for information packet: LU Secretary had distributed a draft write up that could possibly be distributed with the variance application to explain the meanings of the criteria. It is long with information including wording from court decisions for Board to review and it should be edited down. Also handed out was a copy of the criteria chart created by OPD that is in its ZBA handbook appendix section. Ms. MacLeod explained that in her experience of serving on a ZBA and now working for two, it has been rare to see an application filled out with satisfactory narratives on the criteria, unless done by an attorney or surveyor. Using information available to Board members, it was an attempt to have explanations in laymen's language. Another approach suggested could be that the criteria are provided on the application (as now) for an applicant to be prepared, but it is the Board's job to elicit the information to determine if each of the criterion is met. A Board usually has to talk the applicant through it anyway.

Mr. Grant felt that even working on this over time, applicants will still be confused. And when trying to put things into laymen's terms, you're writing something different from what statutes say. We can get in trouble with that. Ms. MacLeod responded that the RSA references to what a zoning ordinance purpose is and what it must include are on the write up to give some guidance. The application instructs applicant to get familiar with the pertinent RSAs, so you have to give them something. Town created disclaimer to try to address being accountable for information provided, [*"Town employees are not trained or licensed to give legal advice or to provide answers to any substantive questions (those requiring interpretation of the Town's Zoning Ordinance and/or Regulations)"*].

Mr. Gaisser stated that everything you need to know is in 674:33. It's six pages and that's all that pertains to requirements. Ms. MacLeod stated that if he was referring to the *NH Planning and Land Use Regulation* handbook [RSA language is 1½ pages; helpful court decision notes are 5½ pages in 2022 edition], it is not readily available to the public in every library. Municipalities buy them from OPD. Googling just the RSAs online is not easy for people unfamiliar with how to search them.

Mr. Olafsen offered that if made confusing enough for the applicant, maybe they would retain a professional. [laughter] Ms. MacLeod expressed that in some recent cases, the applicants have asked for guidance on these terms and without interpreting, she has had to get them to understand through questioning them about their proposal. Maybe Board should provide a script so when asked for explanations, she says the official version. Mr. Grant felt a handout more appropriate.

Discussion on the value of having this information led to deciding it was best to use the State agency produced chart as handout and LU Secretary will add a line to the chart citing the source. The write up can be for Board members and if it were ever to be made available to the public, it should be reviewed by Town Counsel first. Mr. Miner suggested to refer to the Zoning Ordinance Section 150-04 for the question one explanation as it states the actual criteria on which the ordinance regulations were created.

Looking at the write up, Ms. Thorndike noted it mentioned that financial hardship was not a consideration. This started a general discussion on the hardship criteria always having some financial element to it for an applicant. It has some merit when applying the test to how unreasonable the use becomes due to costs tied to working around the hardship the property creates. Some examples of past cases were cited. Court decision used the language that it cannot be the sole factor for hardship.

Old Business:

Review of Application Forms: Discussed previously and Mr. Olafsen did provide comments as promised, but there are a few outstanding questions to resolve. Ms. Cove will work with LU Secretary to complete and post online.

Other Business:

By consensus, the Board decided to move the meeting time to 6:00 pm starting in March, at least during the winter and spring months. Time may be changed again in the future.

Adjournment:

8:04 p.m. Mr. Grant motioned to adjourn. Seconded by Mr. Olafsen. All in Favor.

Scheduled Meetings:

February 9, 2023; March 9, 2023; April 13, 2023 at **6:00 pm until further notice**

Respectfully submitted,
Susan MacLeod, Land Use Secretary