

**Zoning Board of Adjustment
Town of Sandwich
PO Box 194
Center Sandwich, NH 03227
Minutes May 11, 2023**

Members Present: Mary Cove, Jim Bullitt, Jim Gaisser, Chris Grant, Tim Miner, Kurt Olafsen, Geoff Tyson
Members Absent: w/notice; Jon Greenawalt, Chase Rozelle

Others: Applicant Frederick Surette, Carla Miller arrived at 7:00 pm just before adjournment

Call to Order: Chair Cove called the meeting to order at 6:00 p.m.

Minutes of March 9, 2023: Mr. Gaisser had two corrections, page 2, line 17 add “and”; page 14, line 6 delete “out of order”. Mr. Gaisser **Motioned** to accept the minutes as amended. Mr. Olafsen seconded. 6 in favor. 1 abstained (Mr. Miner)

New Business:

Election of Officers: Ms. Cove announced the roles of Chair and Vice Chair are open for nomination. Mr. Miner Motioned to put forth the Slate of Ms. Cove for Chair and Mr. Grant for Vice Chair. Mr. Olafsen seconded. Ms. Cove and Mr. Grant agreed to continue in those roles. All in favor.

Two Motions for Rehearing from applicant Frederick Surette: An application and email were submitted requesting that the Board reconsider the denials of the Variance (12/8/22 and 3/9/23) and to rehear the Special Exception application (3/9/23). Ms. Cove referred to the advice of Town Counsel that there is no legal obligation to rehear the variance again. No new information has been submitted so the Fisher Doctrine, [If there has not been a significant change in circumstances, then the board should reject the application and end further consideration.] applies. Mr. Gaisser added that the application does not materially differ in nature and degree from its predecessor, so the board of adjustment may not lawfully review the merits of the petition. Mr. Grant and Mr. Olafsen concurred. There was consensus that there should be no reconsideration.

Ms. Cove moved to the Motion for a Rehearing for a Special Exception under Article III Section 150-10 B of the Zoning Ordinance for property owned by Frederick Surette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural/Residential Zoning District.

Section 150-10 B in question, *“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.”* In the March 9, 2023 public hearing it was determined that this paragraph did not apply to a conversion on the property. [SE Notice of Decision (NOD) distributed to the Board along with original SE application, latest request for a rehearing, and advice from Counsel on process]

Mr. Gaisser **Motioned** to open discussion on the Motion for Rehearing the Special Exception. Mr. Olafsen seconded. All in favor. Ms. Cove began with reviewing the standard for rehearing a case. The applicant should set forth why the ZBA decision should be deemed unreasonable or unlawful. This is the opportunity for the ZBA to correct its own mistakes by reconsidering the decision, or to hear new evidence not formerly available to reconsider. This is the last recourse prior

to the applicant going to Superior Court to appeal the decision. The Board should not reopen a case without new facts or proof that the decision was unreasonable or unlawful. The abutters were in support of this proposal, but in general the Board has no right to reopen a case based on the same set of facts previously presented and examined. The Board fully considered the advice from Counsel that this interpretation of Section 150-10 B had been established and consistently applied by Town officials in relation to building on nonconforming lots of record as opposed to conversion of an existing structure. Is there a need to correct the record or rectify any mistakes by rehearing the case?

Mr. Grant cited that on March 9 Agent Mr. Marino had wanted time to research court cases to refute that interpretation, but nothing was submitted with this request. Ms. Cove cited the OPD guidance that it is the petitioner's job to prepare a thorough case and provide any new evidence. The purpose of a rehearing isn't to redo just because the case wasn't fully prepared the first time.

Mr. Gaisser expressed that the rehearing should be granted. Looking at the findings of fact, it is his understanding that it is irrelevant to apply previous decisions of prior boards. It was cited in the minutes that this was the interpretation by the Town in the past so the applicant should have heard some of those decisions if they do exist. The language is so clear to him personally that he finds it strange that the language in the ordinance has been challenged. But maybe the Board owes the applicant past examples.

Ms. Cove clarified that what was said in the hearing was that it was a legal interpretation used by the executive office (Compliance Officer and office staff) to apply as policy for issuing building permits when this situation has come up. It is reasonable for the ZBA to interpret it this way. She did not say that it was a previous ZBA interpretation but felt there should be consistency in its application. The Board was told by the applicant that he was advised to seek a Variance not a Special Exception. In addition, Town Counsel confirmed this first when asked after the January 26 meeting and reiterated in the email on March 9. The Board agreed with this in its decision on March 9. She further stated that she felt the minutes did not say it was a previous ZBA interpretation, just that the it has been applied consistently by Town officials based on the same legal advice.

Mr. Gaisser agreed that in the course of the meeting that was how he interpreted it. His misgivings are with the findings of fact, that with three things stated, two basically say the same thing. So, the decision was based on two points, and it cannot be based on just that.

Ms. Cove felt the decision can be based on the fact that the section of the ordinance does not apply -- is it reasonable for the Board to interpret the zoning ordinance this way? Town Counsel expressed it was reasonable and the Town employees utilize this interpretation in making decisions with building permits. So, again, is the decision reasonable because it was not the Board that interpreted this with the set of facts presented.

Mr. Gaisser said the thing about Counsel saying how it's been interpreted in the past is insignificant. Previous court case that he referred to determined it was not a relevant fact.

Ms. Cove stated that Counsel was asked by the ZBA about this ordinance section in January and she gave the same interpretation to the Board as to the Town office for a past situation and it has been applied by the Compliance Officer and staff.

Mr. Miner stated that in the time he has served in Town he has no recollection of applications to convert single-family into multi-family units. Mr. Grant recalled Mr. Miner's statements in January were that he included renovations as building and discussion focused on the words "may be built on". And if the words are clear, the Board's accepting the interpretation is reasonable.

Ms. Cove stated that they should not relitigate, only determine if the Board has made an error with an unreasonable decision that should be readdressed.

Mr. Gaisser felt there was a procedural error and misinterpretation of the State law.

Ms. Cove felt comfortable with the findings of fact and record (minutes) and that the decision was not a grave error. She noted that in some past cases a court could see that Board may have found it

was reasonable either to grant or to deny. The unreasonable standard is a high bar for the applicant to prove. Without strong evidence to counter a decision, courts generally uphold a board's decision.

Voting regular members: Ms. Cove, Mr. Bullitt, Mr. Gaisser, Mr. Grant, Mr. Miner. Mr. Miner then apologized for missing the previous meeting when this decision was made and pointed out that others had voted on the case. He was willing to recuse to allow those same members vote on this.[Mr. Greenawalt, not present, also voted on decision]. Mr. Grant was also willing to recuse. Alternates Mr. Olafsen and Mr. Tyson, who had voted expressed that it is an interpretation of the ordinance, and the facts are the same, so regular members Mr. Miner, Mr. Grant and Mr. Bullitt should vote now.

Mr. Grant felt the decision was reasonable based on relying on the attorney's interpretation of the ordinance as how it is applied and that there are other places where the terminology "to build" is interpreted the same way.

Mr. Bullitt, in addressing the facts outlined on cover letter with packet on May 1, noted the inspections on the property cards has use in 1995 identified as a single-family and "extra kitchen" not checked, so if a second unit with a kitchen was added between 1995 and 2000 about the time it was abandoned, there is no record of permits or a special exception from ZBA to have made it legal. The fact that it was abandoned for 20 years makes the "grandfathering" of that kitchen null and void.

Mr. Gaisser said if that was new information that was not available at the time, a rehearing should be granted for it to be presented.

Ms. Cove replied that the Special Exception application submitted by applicant in February had the attachments of property cards from 1993, 1995 and more recent ones. So, to get back to whether the decision was unreasonable, what do you think Mr. Bullitt?

Mr. Bullitt felt that it was not an unreasonable decision at all.

Mr. Gaisser said not to relitigate this and again expressed that he felt there was a procedural error to base decision as stated in the findings of fact on past history when we don't know what the past history is. And then that the applicant could not be told what that past history is.

Ms. Cove disagreed. This goes to the reasonableness standard. The minutes reflect that the advice to seek a variance given to Mr. Surrette was based on the Compliance Officer and administrative staff being given prior legal guidance to establish a policy with this interpretation.

Mr. Miner tended to agree with Mr. Gaisser on that point but agreed that the decision was not unreasonable. He expressed that had he voted on it previously he would have granted because he felt that language is vague with "to be built upon" and does not address a whole category of work that the Town permits to be done. It does allow renovation. The language is deficient and should be amended. It is not unreasonable to deny based on the language in the ordinance, the ZBA is allowed to put its interpretation on it. Building new on a nonconforming lot is allowed, and renovation of existing buildings is allowed.

Ms. Cove rebutted that there is difference between renovating an existing building and thought the legal point here is that it is not just a renovation, it is a conversion, a change of use.

Mr. Miner answered that a change of use under certain circumstances is allowed with a Special exception so that language, he thought personally, is unfortunately too specific in a way that it shouldn't be. The Master Plan promotes additional housing, and this seems contrary to that. It is particularly challenging now to provide adequate housing for our workforce at a reasonable cost. The Planning Board is working on addressing this. The location near the Commercial District on the edge of Town in this instance and in his mind the perfect place to grant a Special Exception for a reasonable use of the property. He stated that he didn't feel the Board erred on the decision, just that he believed it was also reasonable to have granted the Special Exception.

Ms. Cove explained that this section addresses nonconforming size lots of record, usually taxed as buildable, so the Special Exception is to allow building on it without going through the Variance

process, provided ZBA determines that all other requirements -- setbacks, septic, etc. are in compliance. A “grandfathered” nonconforming size lot has something already built and a variance would be required for any changes. If it was a change of use, the way this section is interpreted, a variance is what would be required. Personally, this doesn’t seem inherently unreasonable. If someone buys a substandard sized lot with an existing building and desires to make changes, why wouldn’t they be held to a higher standard? Other sections of the ordinance with requirements for lot size and setbacks relate to this section. Any other comments, or is the Board ready for a motion?

Mr. Grant **Motioned** to deny the rehearing for the Special Exception as the decision was reasonable to not grant it based on legal advice. Mr. Bullitt seconded. Roll call: Ms. Cove, aye; Mr. Bullitt, aye; Mr. Grant, aye; Mr. Gaisser, nay; Mr. Miner, nay. The Motion passes 3-2 to deny the rehearing.

Old Business: Review amendments to the Rules of Procedure: Mr. Grant **Motioned** to approve the amended Rules. Seconded by Mr. Bullitt. Discussion: Three changes were made, two based on the Town vote in March. On page 2, under “Meetings” the time was changed from 7:00 pm to 6:00 pm by vote of the Board. On page 4, under “Applications and Decisions” number 1, Appeals of Administrative Decisions: “or when such decision becomes known or reasonably could have been known by the petitioner as determined by the Board based on evidence presented.” was added after warrant removed the 30-day deadline from the ordinance and returned the determination to the ZBA rules to allow some flexibility in certain circumstances, usually building permits appealed by an abutter. Attorney Mitchell advised to have standards to determine applicability of deadline extension. The Board felt it would have to be on a case-by-case basis and the rationale would be recorded in the minutes.

Number 5 under “Decisions” added the revised RSA 676:3 language concerning written findings of fact for approvals and denials that came into effect in August 2022.

Motion on floor; call to approve the *Rules of Procedure* as further amended. All in favor.

Other Business: Mr. Gaisser suggested that the court case he had quoted regarding language (Berkowitz vs Town of Sandwich) be distributed to the Board and the applicant and his agent. It is difficult to find via Google or other searches, but he has it and can send to LU Secretary.

LU Secretary suggested going back to March 9 minutes and amend to include the reference with the exact quote (~~as asked for when draft sent to members~~). The applicant has requested minutes in the past. Mr. Gaisser stated that it is improper to communicate on minutes prior to meeting. LUS tried to clarify that the minutes could be amended now.

7:00 pm applicant Frederick Surrette and Carla Miller arrived. They were informed that the meeting had started at 6:00 pm as posted and that it was a meeting not a public hearing so no testimony would be taken. The decision had been made to deny the Motion for rehearing the Special Exception. The Board declined to reconsider the Variance based on Counsel’s advice that it was not legally required or appropriate. Minutes will be available within 5 (business) days for them to get a copy. Mr. Surrette had a question about the potential purchase of acreage from neighbor to meet the lot size requirement for multi-unit housing. The ZBA should not advise on this. He was referred to meet with the LU Secretary to discuss it as a Planning Board issue.

Adjournment: 7:02 p.m. Mr. Grant motioned to adjourn. Mr. Tyson seconded. All in Favor.

Scheduled Meetings: June 8, 2023; July 13, 2023

Respectfully submitted,
Susan MacLeod, Land Use Secretary