



ZONING BOARD OF ADJUSTMENT

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Meeting Minutes September 22, 2011

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Members in attendance: Rob Sylvester, James Smith, Mike Tabory, Lue Snyder, and Bob Srnec. Also in attendance was recording secretary Wendy Keane.

Public in attendance: Art Nickless, Mac Ford, Robert Gourlay, Joan Tasker Ball, Jody Gourlay, Linda Semco and Bob Walsh.

Chairman Smith called the meeting to order at 6:00 pm

The Pledge of allegiance was recited.

1. Continued case Steve Strogoff: Case 2011-2: Steve Strogoff, property owner, is requesting a variance from Article VII, Section 3C of the Milton Zoning Ordinance to permit a permit a garage on lot which does not meet the setbacks as required in the Table of Dimensional Requirements. Property is located at Map 38, Lot 80, St. James Ave, Milton, NH.

Chairman Smith opened the meeting for public comments. Art Nickless stated that he is at this meeting to speak on behalf of Mr. Strogoff. Mr. Nickless recapped that at the previous meeting where this application was discussed and he was asked to find the original subdivision approval. He did so and presented this information to the Board (see attached). He reiterated that at the time of the subdivision when the lot was created there were no zoning regulations. Mr. Nickless also stated that he has touched on the five points of law which are required and in summary; there is a lot that at the time it was created did not have any zoning requirements. When the existing garage (abutting proposed building lot) went up it met the zoning requirements (or lack thereof) at the time. In the adoption of zoning ordinances in 1989, it has rendered the lot unusable unless by variance which is why they are here to appeal to the ZBA.

He also presented the Board with information from a Realtor that it is her professional opinion that there would not be any diminution of value in the property which sits behind and directly abuts the site of the request. He reminded the Board that when the subdivision was approved there was not a zoning ordinance in place.

Mike Tabory inquired if when a subdivision was approved at that time (circa 1979/1980), was it normal for the Department of Environmental Service (DES) to put all of that information (criteria, allowances and or stipulations) in such an approval. Mr. Nickless stated that the form presented to the Zoning Board of Adjustment (ZBA) is a pretty standard form and if there were any conditions of approval they would be noted on the form. Mr. Nickless explained that what the state subdivision process does is prove there is also land enough for septic. He stated he does not doubt the information that Ms. Tasker-Ball presented at the last meeting, that she was told she had to create these small lots for future utilities such as septic and well, however the requirements over the years have changed and at the time the subdivision was created it can be surmised that some of the lots on the water were not large enough to accommodate the needed land so they required land on the opposite side for land value only for approval of a septic. Mr. Nickless further stated that if DES wanted the septic to be on those small lots it would have been noted clearly.

Mike Tabory asked if the realtor who submitted this opinion has reasonable experience to give this sort of opinion. Mr. Nickless stated that the realtor who constructed the letter has, he would guess, over 15 years of experience. Mr. Tabory inquired if there are similar comparable properties in the realtor's evaluation. Mr. Nickless stated that the realtor did not do an appraisal but just gave an opinion. Mike Tabory then asked if it would be typical to use comparable properties which have a similar set-up to the subject property. Art Nickless stated that if there were a panoramic view or significant view then there may be a diminution of value but that is not the case in this piece of property.

Lue Snyder inquired if Mr. Nickless solicited the realtor. Mr. Nickless stated he has but has not received a bill.

Chairman Smith asked for clarification of her (the Realtor's) letter (see attached) in regards to the proper setbacks and stated that we are here because the proposed structure will not meet the setback requirements.

Mac Ford stated that this gentleman has been paying taxes on the lot and if the town does not let him build on this property then the town should rebate some of his past taxes.

Mr. Gourlay also submitted a letter from a realtor (see attached) with the opinion that it would affect his property value and stated that it would diminish his property significantly. He further stated that he may not have a panoramic view; however it is their only view, even if only of the street.

Joan Tasker Ball stated that in the 70's she decided to subdivide and hired Graham Davis to work on the plans. There had never been any description of the vast amount of property involved. She further stated that back then, septic requirements were loose and 55 gallon drums were common which leached in to the lake. She was told at that time that the additional small lots were to be used for future utilities. This was mandated by the state regardless of what it written down. When the Gourlay's bought the property from her she told them that no-one could build on that small lot per the State as she was told.

Joan Tasker Ball stated that the garage, which abuts the subject lot, was put up illegally and she fought it. She further stated that she and her husband tried to protect the people who bought the lots and now some of the garages that have gone up illegally have turned in to rentals and such. What was done at the time of subdivision was right and fair (in creating the lots for future utilities).

Linda Semco, an abutter to the Gourlay's, spoke regarding the approval for the subdivision and stated that it has been said that the reason they did this (create the smaller lots) is because the soil is suitable and it seems to her that if they did the test it implies that it was meant for future septic. If the septic fails on the water side lots where would he (Mr. Strogoff) put a new one and why can't he put the garage on his house lot? Ms. Semco further stated that on the application, in the first several points it mentions that it would be in keeping with the other garage which abuts the property however, it has been stated that the indicated garage was not built legally.

Art Nickless stated that the garage next door was not built illegally and a permit was pulled for it prior to zoning. He further stated that there are limits as to where you can go to put a leach field on your property and to put a septic across the road there would have to be agreements with the selectmen for pipes under the road. Mr. Nickless also made the Board aware that there is already a state of the art septic system on the site and there is no room left for a garage.

Ms. Semco stated that if this gets passed then it will set precedence and her concern is that there is a similar lot on the other side of her driveway, similar to the one the existing garage is on, and is fearful of potential building and the affects it would have on her property.

Mike Tabory referenced the opinion of value from Keller and Williams and asked how long James Wolcott has been in business. Mr. Gourlay stated he would assume 20+ years.

Robert Gourlay stated that he would think that a garage on Mr. Strogoff's property which has the home would be an option.

Mac Ford stated that because of the location of the septic there is no room.

Chairman Smith asked those in attendance if there were any further comments or statements. There being none he requested a motion from the Board.

He explained to those present that once the Board entered the executive session they would not take questions or comments from the public.

MOTION: Rob Sylvester moved to enter in to executive session. Seconded by Mike Tabory. Motion carried 5-0.

Mr. Smith stated that the Board will discuss each criterion for vote:

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

Bob Srnec stated that he does not see a public safety issue. He further stated that at this stage of the game we are not dealing with the past but are dealing with the present and anything that comes in today has no affect on what may have been done in the past.

Mike Tabory stated that if this application for a variance were granted, there are a number of other lots like this out there and others could come in for a variance also at which point there could be 15 more little garages which would then impact the future. Since we cannot predict the future and have to look at it case by case he would have to say it does not affect the overall area but he does have a concern that this could

be the beginning of a character affect. Rob Sylvester stated that the case we have today is not affected by the older garage. He also does not see an issue with public safety, health or welfare.

MOTION: Bob Srnec moved that the proposed garage would not affect the character of the area, health safety or welfare. Seconded by Rob Sylvester. Four yes, 1 no. Criteria 1 passes.

2. The spirit of the ordinance is observed because;

Chairman Smith stated that if you read 7C of the Milton Zoning Ordinance (MZO), you have to take the zoning at the time the lot was created, but if you look at D3 you need to use setbacks of today causing the zoning ordinances to contradict one another. Because the MZO is fundamentally at odds and that there is this contradiction in the MZO he does not feel this request would be against the spirit of the ordinance.

Bon Srnec stated that the way he interpreted this is to take in to account the MZO at the time but to utilize the MZO that is in affect today.

Rob Sylvester read rules and regulations change and you have to meet today's zoning and the rules that are in affect now.

Bob Srnec stated that we may have to put this on hold again to get legal opinion.

Mike Tabory stated that it is somewhat contradictory but the first one says that you can build on setbacks at the time. He may disagree with the wording and intent but has to go with the words. So he would have to say it is not contradictory to the spirit of the ordinance.

MOTION: James Smith moved that the spirit of the ordinance is observed. Seconded by Mike Tabory. 3 yes, 2 no. Criteria passes.

3. Granting the variance would do substantial justice because:

Mike Tabory stated that based on 1st criteria where he commented on setting a precedence, we have to look specifically at this property and not down the road at what other property owners may choose to do even if it does change the character of the neighborhood he has to apply the same level to this question by saying that the garage next door is not part of this equation. The fact that it does exist is separate from this property. He does not necessarily agree with the premise that granting the variance would do substantial justice nor does he agree that not granting it would be unjust. When the property was purchased it was known and understood that if he ever wanted to put a garage on the lot he would have to appeal to the ZBA for a variance, as such so there is no guarantee it would be approved. There had earlier been a comment that he should not have to pay taxes on it and again, the owner knew he would be paying taxes on a lot he owned and not that he could do as he pleased with it because the zoning does not make all things allowed. Zoning variances as they are designed by the law are intended to be very difficult to get, so he would have to say that he does not agree with criteria #3.

Rob Sylvester stated that he has also has had a problem with this criteria for the same reason as Mike brought up in that you cannot prove or disprove substantial justice. He does have a question of the

property owner's use of the property of the ability to do something with the property. He stated that there are other issues but right now he is at a 50-50 on his views.

Bob Srnec stated that he does not believe that there would be any injustice because the owner has been using the property all along to park vehicles and has had use of the property. He further stated that he may not have the use of the proposed garage on it but he has had use of the land in the time he has owned it by storing items on the land.

Motion: Rob Sylvester moved to table criteria 3 until the end. Seconded by Bob Srnec. 4 yes, James Smith abstained.

4.) The values of surrounding properties are not diminished because.

Bob Srnec stated that he disagrees with and that the value of the surrounding properties would be impacted and that he does not necessarily agree with the realtor who gave the opinion to Art Nickless. He stated that if he walked out to buy the property and saw a garage he would not be so inclined to buy the property and that it would inhibit the fair market price. He further stated that it is his opinion that if a permanent structure would decrease the property value of the property behind the lot.

Rob Sylvester stated that he agrees and that NH does have a view tax. Bob Srnec stated that it is not technically a view tax. Rob Sylvester continued to state that he knows both realtors and that if we take the net difference between the two realtor opinions then there would be a diminished net value of \$10,000. He feels strongly that if you go from a non structure view to a structure in your front yard, then it will diminish the value.

James stated that we have one realtor who says yes it will diminish and one who says no it won't. He assumes that both are very proficient in their jobs, however his opinion differs. He stated that it was explained to him in this way: it is like a pool, some people may like a pool and some may not, some may like the privacy the garage would provide and some may not, which means that in his opinion that we cannot say for sure that the surrounding properties will or will not be diminished in value and given the potential harm to the surrounding property. He does not feel he could vote yes because there is so much room to move in this criteria because the criteria does not read "values would probably not be diminished", it says "would not be diminished", therefore he cannot say definitively if the values would be affected either way. He does not think it has been proven beyond a reasonable doubt either way and given that the potential harm done to the abutting home outweighs the fact that it may or may not be diminished, he cannot vote in favor of this criterion due to the uncertainty.

Bob Srnec stated that the reason why he thinks it would diminish the value is because there would then be a permanent structure on the parcel in front of the existing home. Chairman Smith inquired if Mr. Srnec thinks that trailers would also diminish the property value. Bob Srnec stated that the difference is that they are not permanent.

Lue Snyder stated that putting this garage on the property will limit the sight of movement of traffic on the street and in the winter people would not be able to see snow plows or other vehicles. Lue Snyder also stated that this would be similar to putting a drive-in theater screen in front of the house.

Mike Tabory stated that he is weighing more heavily on the two realtor assessments.

Discussion was held on how to vote on this criterion using either a yes or no process or pass/ fail process.

MOTION: James Smith moved to reject criteria four on the grounds that values of the surrounding properties will be affected based on the professional opinion of at least one realtor. Bob Srncac seconded. Motion carried to fail criteria four with 5 in agreement – 0 against. .

Chairman Smith made the applicant's representative aware that at this time the variance has been denied based on the failure of one criterion. He then gave the representative the option of carrying on with discussion of the remaining criteria or to end the hearing. It was the opinion of both the Board members and the applicant's representative to complete the criteria vote process.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Special conditions of the property distinguish it from other properties in the area because:

(A) Denial of the variance would result in unnecessary hardship because:

Rob Sylvester stated that he does not feel the application meets the requirements because there are other properties in the area that are similar in the restrictions. Chairman Smith stated that he would like to speak on each sub criteria separately and he would like to start with:

- (i) No fair and substantial relationship exists between the general purposes of the ordinance provision and the specific application of that provision to the property because:

Chairman Smith stated that the general purpose of the MZO is in effect to keep properties from being too close together or encroaching on abutting lots. He feels there is a relationship in that the structure will encroach on the Gourlay's property. Given that the ordinances are designed to prevent encroachment he feels there is a substantial relationship between the application and the MZO.

Bob stated that he would tend to agree that the general reason for the setbacks was to keep these things off of or from encroaching upon another person's property. He believes the ordinance was put in for a purpose and part of that was to keep property disputes down and keep enough distance between property lines to keep things clean and encroachments down to a minimum.

Rob Sylvester stated that under 7D 3 front and rear yards it allows for a deviation from front setbacks but there is no relief from the rear setbacks.

Discussion was held on right of way setbacks. Rob Sylvester stated again that there is an out for that in the MZO and based on the lining up to existing structures, however there is not the relief for a back line.

MOTION: James Smith moved to deny criteria 5A (i) because a fair and substantial relationship does exist between the general purposes of the ordinance provision and the specific application of that provision to the property. Seconded by Bob Srncac. In favor 5 against 0. Criteria fails.

(ii) The proposed use is a reasonable one because:

Bob Srncac stated that the reason it is not reasonable is that it would really encroach on the setbacks in the ordinance. It is reasonable to be used for parking spots but does not believe it is reasonable to build a garage which will encroach on the abutter's property.

Rob Sylvester stated that he agrees in principle but because of some of the other homes and garages that are in and around the area that the applicants notion that it is reasonable because there are similar uses by other properties in the area that the applicants belief that it is reasonable because they would meet the test although denial of the variance would not deny him other uses of the property.

Bob Srnec stated that the applicant is using the property at this time for storage of trailers and will continue to have the use of the property even if the variance is denied. Mr. Srnec stated that the decision is not based on what is there but on this property at this particular time.

James Smith stated that if you drove down St. James and saw other properties having garages etc, a person could reasonably assume you could build a garage, he does agree with Bob that the applicant already has reasonable use of the property in being able to store his items on the lot.

Rob Sylvester stated that in looking at item A, there are other garages similar in nature, certainly if there is room on his other side of the property he should explore if a garage could be placed without affecting an abutters property. Chairman Smith reminded the Board that Mac Ford had stated previously that due to location of the septic it would not be possible for the applicant to place the garage on his house lot.

Lue Snyder stated that as learned people, no one should assume anything because rules, regulations and laws change.

Rob Sylvester stated that in this case some assumptions need to be made because what may be a reasonable use for one may not be a reasonable use for another and that the Board as a whole has to take that in context.

Mike Tabory stated that the reasonableness of using the argument that “others are doing it” does not make it a reasonable argument in this case and he thinks that part of this is the reasonableness of scale and that a work shed or storage shed may be reasonable, but a full scale garage, considering the encroachments and other factors presented, would not be reasonable.

Bob Srnec stated that there is also a precedent setting issue and that the applicant has reasonable use of the property in the way he has been using it in the past for storage of trailers.

MOTION: Bob Srnec moved that to place a garage on the site and to encroach on the setbacks would not be a reasonable use and does not create a hardship. Seconded by Lue Snyder. 5-0 failed.

(B) If the criteria in subparagraph (A) above are not established, explain why the property cannot be used in strict conformance with the ordinance and why a variance is therefore necessary to enable a reasonable use of it:

Bob Srnec stated that the structure will not meet setbacks therefore making a variance necessary.

James stated that it is his opinion that it is reasonable to store trailers and things on that property and other items could be put in a small shed. He understands and sympathizes with the want for a garage but that does not mean that without the variance the applicant cannot use his property reasonably.

MOTION: Chairman Smith moved to deny the criteria of 5B. Seconded by Bob Srnec. Motion carried 5-0.

The Board then returned to discussion of #3: Granting the variance would do substantial justice because:

Bob Srnec stated that he cannot argue that it would do substantial justice to the applicant but does not believe it would do substantial justice to the neighbors and it comes back to a precedence setting ruling.

Rob Sylvester stated that the Board has heard testimony from two abutters, one being the property owner directly behind the proposed site who stated that it would be an injustice. There was also testimony from two realtors in which one stated it would diminish value and the other stating it would not. Rob Sylvester continued to stated that weighing these factors, the overall injustice would be to all parties.

MOTION: Rob Sylvester moved that substantial justice for all parties has not been created. Seconded by Bob Srnec. Motion carried 5-0. Criteria failed.

MOTION: Bob Srnec moved to deny the application on the failure of items #3, #4 and all of # 5 criteria. Seconded by Rob Sylvester. Motion to deny the application carried 5-0.

Chairman Smith explained the appeals process which must be done within 30 days of the ruling.

MOTION: Bob Srnec moved to approve the meeting minutes of August 25, 2011. 4 yes, Rob Sylvester abstained as he was not present at that meeting. Motion carried 4-1 abstention.

MOTION: Bob Srnec moved to approve the meeting minutes from July 28, 2011. Seconded by Rob Sylvester. Motion carried 5-0.

Chairman Smith reminded the Board that previous discussion had been held in regards to recording decisions with the Strafford County Registry of Deeds (SCROD). Discussion ensued with the overall consensus being that the ZBA should record their decisions as they follow the property and not the owner.

MOTION: Chairman Smith moved that the ZBA should increase the fee accordingly for recordings at the SCROD.

Mike Tabory stated that it could be a double edged sword, in that if it is registered it could always be used. James Smith reminded the Board there is a one year time period to use a variance,

Send out fee schedule to the zoning board.

Mike Tabory stated that the procedure we went through with this application was cumbersome. He suggested that in the future the Board should vote to pass or fail criteria with those words specifically.

MOTION: James Smith moved to adjourn. Seconded by Rob Sylvester. Motion carried 5-0.

Meeting adjourned at 7:25.

Respectfully submitted,

Wendy L. Keane
Land Use Clerk