



**TOWN OF PITTSFIELD
ZONING BOARD OF ADJUSTMENT
TOWN HALL, 85 MAIN STREET
PITTSFIELD, NH 03263**

MEETING MINUTES of Thursday, August 23, 2018

CALL TO ORDER

The Zoning Board of Adjustment Meeting for August 23, 2018 was called to order by Mr. Hetu 7:00p.m.

MEMBERS PRESENT

James Hetu
Scot Palmer
Brigham Bosen
Pat Heffernan
Jason Rokeach

OTHERS PRESENT

Pittsfield Residents: Larry Konopka, Mike Courchene, and Brenda Courchene.

Others Present:

Other Public Officials:

Pittsfield Staff: Jim Pritchard, Zoning Secretary; Adam Gauthier, Planning Board, and Clayton Wood, Planning Board.

REVIEW AND APPROVE MINUTES

Motion. Mr. Heffernan made a motion to accept August 9, 2018 minutes. Mr. Palmer seconded the Motion. There was no additional discussion.

A Roll Call Vote was taken: Mr. Hetu – Yes; Mr. Palmer – Yes; Mr. Heffernan – Yes; Mr. Rokeach – Abstained; and Mr. Bosen - Yes. The Chair declared the Motion passed.

**PUBLIC HEARING ON AN APPLICATOIN FOR VARIANCE FOR A
NONCONFORMING LOT FROM PITTSFIELD ZONING ORDINANCE,
ARTICLE 4, SECTION 5, (B), REQUIRING THAT A NONCONFORMING
LOT RECENTLY CONTIGUOUS TO OTHER PROPERTY NDER
COMMON MUST HAVE BEEN MERGED IN ORDER TO BE
DEVELOPED. THE TIME AND PLACE OF THE HEARING IS**

THURSDAY, AUGUST 23, 2018, 7:00PM, IN THE LECTURE HALL OF THE PITTSFIELD HIGH SCHOOL, 23 ONEIDA STREET, PITTSFIELD, NH 03263. THE APPLICANTS' NAMES AND ADDRESS ARE MIKE COURCHENE AND BRENDA COURCHENE, 1009 UPPER CITY ROAD, PITTSFIELD, NH 03263. THE OWNERS' NAMES AND ADDRESS ARE LAWRENCE J. KONOPKA AND NORMA M. KONOPKA, 160 SHAW ROAD, PITTSFIELD, NH 03263. THE SUBJECT NONCONFORMING LOT IS TAX MAP R-16, LOT 3-3, ON GRANNY WHITE ROAD, A CLASS VI HIGHWAY, IN THE RURAL ZONING DISTRICT. THE PROPOSAL IS TO SELL THIS NONCONFORMING LOT AWAY FROM OTHER PROPERTY UNDER COMMON OWNERSHIP AND THEN BUILD A SIGNLE-FAMILY DWELLING ON THE NONCONFORMING LOT.

Mr. Konopka explained it is Mr. and Mrs. Courchene's applicant pending a sale from him.

The Chair asked for a brief explanation for what they are looking to do. Mrs. Courchene explained they were interested in buying the piece of property off of Mr. Konopka to build a single-family home on. Mr. Konopka had said there had been an approval for a building to go on the property. She said they started the process to see if they could build on it and that is what led them to coming before the Board today.

Mr. Konopka explained in 2003 he went before the Planning Board for permission to do a subdivision on a class six road. The Planning Board sent him to the Select Board to see if they would agree to give him a building permit. On January 5, 2004 the Planning Board received a letter accepting Mr. Konopka for a building permit on a class six road. The Planning Board made a motion to approve the subdivision and a lot line adjustment at the time. He went through a lot of preparation work and expense to have the lot on the class six road. He had intended to build on it right away but things changed. He asked a few people if it held off would it be an issue and he was told since it was already approved he would be grandfathered in.

Mr. Konopka explained there was an amendment made in 2017 which puts it into a nonconforming lot which he never knew. He knew Mr. and Mrs. Courchene were looking for a lot so he sought them out. He thought everything was all set and found out from Mr. Anderson he would need a variance because of the amendment in 2017. He is asking for a variance on the fact that this would be a hardship because they already went through all the effort in 2004.

The Chair read Criteria A: the variance will not be contrary to the public interest. Mrs. Courchene responded this is a private road and wish to keep it this way and

add a small home to have privacy. The Chair asked about maintenance. Mr. Konopka said they would have to sign a waiver saying they wouldn't hold the town liable. He said Mr. Bachelor, the Road Agent, only problem is mud which they discussed not doing the driveway in the muddy area and Mr. Bachelor has no concerns.

The Chair read Criteria B: the spirit of the ordinance is observed. Mrs. Courchene said they will keep the spirit of the ordinance by its remaining a single-family home on two plus acres of land.

The Chair read Criteria C: substantial justice is done. Mrs. Courchene said by this remaining a single-family home in a rural zone.

The Chair read Criteria D: the value of the surrounding properties will not be diminished. Mrs. Courchene said they want the property to stay as close to the way it is today. They want to move there to be alone and out of the way.

The Chair read Criteria E: literal enforcement of the Zoning Ordinance would result in unnecessary hardship. He explained this is where Mr. Konopka was discussing the hardship is that money has been spend and leg work has been done. Mr. Konopka said that is correct and if he had known he would have gone and pulled the permit. It was his understanding the amendment was on something completely different than this.

The Chair asked which Article the amendment was on. Mr. Konopka said he believes it is Article 5. The Chair reviewed the amendment. Mr. Pritchard said they amended Article 4.

Mr. Palmer asked Mr. Konopka if he had gotten a permit before the amendment he would have been okay. Mr. Konopka said yes, he would have gotten a permit approved before the amendment.

Mr. Bosen asked why the article was changed. The Chair showed Mr. Bosen the meeting minutes which give their reasoning.

Mr. Konopka said he understood the amendment was dealing with a lot of the small properties in town not taking away his subdivision.

The Chair asked Mr. Konopka to show them on the map the property he currently owns. Mr. Konopka showed them he lives on Lot 3-3.

The Chair opened the hearing to the public.

Mr. Wood believes if this ordinance was brought forward by the Planning Board he cannot get a permit ahead of the amendment being approved. It must be complied with until the vote of the town. Mr. Pritchard said Mr. Wood is correct. Once the Planning Board posted notice this was going to be on the ballot, for purposes of getting a building permit the ordinance is effectively in effect during that time.

Mr. Wood said Mr. Konopka had said if he had known about the amendment he would have gotten a permit but as soon as it was posted he could not have gotten the permit.

The Chair asked if he had heard the Planning Board was going to discuss it, Mr. Konopka could have gotten the permit before it got put it on the ballot. Mr. Pritchard explained once it is posted it is as if it has been done. If they are just discussing it, there is a little bit of a grey area but there is a pamphlet which discusses it by Attorney Roy. He said the pamphlet might be helpful because Mr. Konopka is talking about grandfathering concepts through money spent on surveying.

Mr. Pritchard said the Supreme Court has held that money spent on surveying, unless land is improved, doesn't count. He said RSA 674:39 Five Year Exemption requires something is done to the land within five years. They are fourteen years out without anything being done so any thought of grandfathering is wiped out.

Mr. Pritchard said the money Mr. Konopka spent on it is regrettable but it doesn't factor into it as a hardship.

Mr. Pritchard explained the town did this because the town sold off a bunch of lots that had been taken for tax purposes and it was the Selectmen's hope these distressed properties would be purchased by abutters. At the time, the requirement was in order to build on the lot it had to be merged with abutting property. Planning Board recognized the rule in existence at the time had a loophole in it. The loophole was if developer A owned two lots, one nonconforming, he could sell it to someone to develop it and then sell it back to him. The Planning Board decided to close the loophole so the Select Board could do what they wanted. He said Article 4 only had Section A before the amendment.

Mr. Pritchard said Mr. Konopka wouldn't be able to put a building on it even under the old zoning ordinance because it's been nonconforming since 2013. Mr. Konopka could have sold the property to someone else to develop it and then bought it back and the purpose of the 2017 amendment was to close that loophole. It was an issue for Mr. Elliot who had to merge nonconforming lots in order for it to be buildable.

Mr. Rokeach asked about the variance request for Article 4, Section 5(b) which is applicable to Article 4, Section 5 in general which allows for nonconforming uses for expansion. The Chair said Mr. Rokeach is asking if this is the right variance. Mr. Rokeach asked if they are approving a variance on Article 4, Section 5 (b) which allows them to approve a variance on Article 4, Section IIIA: 3, but it doesn't apply because it would no longer be a single lot.

The Chair said the issue is if Mr. Konopka sells the lot there is a different issue then if he develops the lot. Mr. Konopka the application is from Mr. & Mrs. Courchene and the Zoning Administrator told them to come to the ZBA for a variance. The Chair doesn't think they need a variance from Article 4, Section 5(b) because Mr. & Mrs. Courchene will be developing it. The actual variance is the need for developing a property on a class six road.

The Chair asked if there was anything else on the lot that is not conforming. Mr. Pritchard said the problem is the variance won't change the fact that it is a nonconforming lot and he is not sure it will get around Article 4, Section 5. Because the Courchene's haven't bought it yet, Article 4, Section 5 is not in play until they do so. The Chair said there are two problems then because of the frontage. Mr. Pritchard said no because Article 3, Section 4 makes Article 4, Section 5 an exception to the frontage issue.

Mr. Rokeach said Article 4; Section 5 specifies that the lot may be developed for structures or uses as provided in Article 4, Section 3. The Chair responded that is correct; however, the problem is it says with the exceptions A-E and it matches B. Mr. Rokeach said even if it matches B and they grant a variance on B it still needs to comply with Article 4, Section 3. This article allows for development based on certain parameters.

Mr. Rokeach asked if there is already a nonconforming use. Mr. Pritchard said no because the lot is vacant. Mr. Rokeach doesn't think Section 5 applies at all. Mr. Pritchard asked why Section 5 the only thing that applies. Mr. Rokeach responded because the wording says the lot may be developed with structures or uses as provided in Article 4, Section 3 nonconforming uses or RSA 674:39 5 year exemption. Mr. Pritchard responded that is if a structure is already there.

The Chair thinks the variance is correct. The question is does allowing development of structures on a house with no class five road frontage meet the standards for a variance.

Mr. Konopka said at any time during owning the property for fourteen years, if he thought he was going to lose his rights, he would have had someone build on it. He didn't understand the new amendment.

Mr. Bosen asked if there was anything different about the property. Mr. Konopka said no; it's off a city road in a country setting. Mrs. Courchene said it's near their shop. There has been a lot of dirt work done on the class six roads. The Chair said the only difference is everything around it has frontage on a class five road or higher and this lot doesn't.

The Chair said he would like to see the road as he hasn't had a chance to go there yet. Mr. Heffernan said he doesn't think it should be before them. He thinks Mr. Konopka should take his permit and go home. It is a class six road with a bike trail. The Chair said if they are going to vote on not contrary to public interest and spirit of the ordinance being observed he would like to see it. Mr. Konopka said that is Mr. Bachelor's area. The Chair responded he is being asked to overrule the ordinance which is designed to protect the town.

Mr. Konopka said he is asking for a variance because of the amendment. This was already approved fourteen years ago. He went through all the labor work about the ambulance and everything then and it was approved.

Mr. Heffernan said he doesn't think there is going to be any problems with it at all. Mr. Rokeach said public interest in the case they are talking about is the public interest of those who are trying to purchase it. Mr. Konopka said they may have to do some trimming of trees but it should be wide enough.

The Chair said he would like to continue this hearing to look at the property and the legal ramifications as well. Mr. Heffernan said he would like to move on it tonight. Mr. Palmer said he thinks there are some issues they need to look at. He is confused on the class six aspects of it and why it is nonconforming. He asked if it is because it's not on a class five road and surrounded by land only on a class six road. The Chair responded he was correct.

Mr. Konopka said they have to sign a waiver taking all the liability off the town for maintaining the road. The Chair asked if there was anything from Mr. Bachelor. Mr. Konopka said Mr. Bachelor didn't have any concerns. The Chair said he is not comfortable with going through tonight. He asked the other members where they were at. Mr. Bosen wanted to see the property. Mr. Palmer said he doesn't see a problem with it.

The Chair read Criteria A: the variance will not be contrary to public interest. The applicant said it is a private road they wish to keep it that way and they are willing to sign a waiver. The Board agreed it was not contrary to public interest.

The Chair read Criteria B: the spirit of the ordinance is observed. Mr. Bosen said with the spirit of ordinance just being changed he wanted to see the lot. The Chair said the amendment was to prevent recently reprocessed properties that were nonconforming from being developed without a contiguous lot being owned by the owner. Mr. Pritchard said it wasn't just for recently reprocessed properties; it was for any nonconforming lots. The point was the Planning Board noticed a loophole in a previous regulation. The old

regulation was to require merging and the new amendment was to close the loophole. The Board agreed it was in the spirit of the ordinance.

The Chair read Criteria C: substantial justice being done. He said a single-family home will be built in a rural zone. He thinks this includes legwork and time that has been put into this lot. It would be justice served to allow the agreement to go forward. The Board agreed substantial justice would be done.

The Chair read Criteria D: the surrounding property values will not be diminished. He doesn't see how it will be diminished because the development of this property will not diminish those surrounding it. Mr. Heffernan said he thinks it will help the property values. The Board agreed the surrounding properties would not be diminished.

The Chair read Criteria E: enforcement of the ordinance would result in an unnecessary hardship. If they enforced it literally they wouldn't be able to develop the property that legwork has gone into. Mr. Bosen doesn't agree as the property is the same as the rest of the property. The Chair responded the unnecessary hardship from other properties in the area. It is a nonconforming lot which would distinguish it from other properties in the area.

Mr. Rokeach believes not being able to do something on a property they own is hardship and the question is rather it is necessary hardship or not. If it is necessary hardship to prevent harm to some other person than it doesn't meet that criteria.

Mr. Konopka said he has had the lot for many years, put a lot of hours and legwork and his rights are being taken away. To him, this is a hardship.

Motion. Mr. Heffernan made a motion to accept the application for variance for Article 4, Section 5 (B) Development of structures on a nonconforming lot. Mr. Rokeach seconded the Motion.

A Roll Call Vote was taken: Mr. Hetu – Yes; Mr. Palmer – Yes; Mr. Heffernan – Yes; Mr. Rokeach – Yes; and Mr. Bosen - Yes. The Chair declared the Motion passed.

The Chair motioned the variance will not be contrary to public interest. All in favor.

The Chair motioned the variance is in keeping of the spirit of the ordinance will be observed. All in favor.

The Chair motioned by granting the variance substantial justice is done because expense and groundwork was done to the property before the ordinance was changed. All in favor.

The Chair motioned by granting the variance the values of the surrounding properties will not be diminished because the property development won't affect the surrounding properties and the road will be maintained. All in favor.

The Chair motioned literal enforcement of the provisions of the ordinance will result in unnecessary hardship by preventing the property to be developed because of the prior work put into the property. Not being able to develop the property is a hardship and there is no necessary reason to enforce the hardship. Mr. Bosen abstained. All others in favor.

The Chair informed Mr. & Mrs. Courchene of the 30 day appeal process.

Mr. Konopka thanked the Board for putting their effort and time into the town.

MEMBERS CONCERNS

The Chair asked if everyone will be able to attend the September 13, 2018 meeting. Mr. Palmer asked what is on the agenda for the meeting. The Chair responded Pittsfield Self-Storage and he will work on seeing if they can get an alternate.

Mr. Rokeach said they need alternates.

Mr. Heffernan asked about the email Mr. Pritchard forwarded them from Mrs. Adams from the ADA. The Chair it is the town and town's attorney's problem once they do their job.

PUBLIC INPUT

Mr. Pritchard expressed concern with the Board and how they went about coming to their decision on the previous public hearing. He explained the State law does not protect nonconforming lots rather nonconforming uses. The State law allows towns to prohibit building on nonconforming lots.

Mr. Pritchard explained Mr. Konopka had this lot created in 2004 during a time when the frontage regulation was in flux. There was not a regulation saying he could do it and past practice of the Planning Board was to say it could be done; however the Planning Board voted it through. The town attorney had said they could do it ignoring past practices.

Mr. Pritchard said the State law protected this kind of thing in the ordinance. There was a four year exemption. Mr. Konopka was chair of the Planning Board at the time and knew or should have known about the four year exemption.

Mr. Pritchard disagrees not letting someone sell creates a hardship as there is no regulation supporting it. He asked if that regulation doesn't apply here, why it wouldn't apply to the next case and so forth. He said the Board has now set precedence to make the requirement of the variance meaningless. All of the reasoning he heard ignored all of the state law and ignored the fact the town was well within its rights to adopt this condition. Now they have precedence that anyone who wants to sell a nonconforming lot can do so.

The Chair asked if the issue is with the reasoning or the development of this lot. Mr. Pritchard thinks the application didn't come close to satisfying the requirements of the variance. He thinks the regulation the Planning Board proposed and the town approved is perfectly legal and serves a valid public purpose. If they look in the Zoning Ordinances, they will see the case law says a valid purpose of zoning ordinances is to reduce nonconforms. The Board has said this condition is unreasonable so they are going to grant relief from it.

Mr. Pritchard said the Board's decisions are precedence and if someone comes in with a similar situation they will have precedence. It lets everybody out of it so the Board has in effect judicially repealed that condition.

The Chair said his understanding the hardship was the inability to develop a nonconforming lot on a class six road. Mr. Pritchard responded Mr. Rokeach had said the fact that it had class six frontage and nonconforming in this way was a hardship. The Chair said it happened during the discussion and he tried to be very clear on the reasoning as they went through each criteria of the variance.

The Chair explained they get applications which aren't filled out very well so they try to fix it in the hearing. He agreed this application was not filled out properly. Mr. Pritchard responded that is a problem because they did all of their reasoning and fixing in discussion not when there was an opportunity for public input. The Chair agreed with Mr. Pritchard. Mr. Pritchard suggests rewriting the application during discussion was illegal because there was never a chance for public input. This creates a problem for them in the future because of the precedence. This is the kind of thing the Planning Board sought to present.

Mr. Heffernan thinks if they cut through the smoke and mirrors and legallies he thinks they made a fair decision. Mr. Pritchard responded they did what they wanted instead of what is required. The Chair said he thinks they should start rejecting applications if they are not filled out correctly instead of pushing it through.

Mr. Pritchard discussed the fact that they didn't fix Teen Challenge's application but they fixed this one they create an opportunity for Teen Challenge to say they were discriminated against.

The Chair asked if they fundamentally changed this application tonight. Mr. Pritchard said yes because their application says there is no difference between this property and the other and the Board made a reasoning which weren't in the application.

Mr. Rokeach asked if fundamentally they are unable to consider points of discussion that are not present on the application in the hearing. Mr. Pritchard said they can rely on their own knowledge to decide what is true and what isn't but they can't add their own reasoning. An abutter only has what is available on the application.

The Chair asked if they could do what they did if they had opened it up to public input. Mr. Pritchard said no because they would have to notice it. He explained it was the same situation with Mrs. Ward and the Planning Board.

The Chair asked if there is any way to edit an application after it has come before them. Mr. Pritchard said no and the Board is supposed to be unbiased. He said there is a question on notice and giving people time to prepare.

Mr. Gauthier asked how far down Granite White Road is this property from Upper City. The Chair said it is 351 feet. Mr. Gauthier said they just allowed development to a class six road that won't meet the fire code. He was disappointed the Board took Mr. Konopka's word that Mr. Bachelor was okay with things and didn't check with the fire department.

The Chair agreed to the criticism and asked the members if moving forward they agree to be careful about this. He asked if they have standing to fix this themselves. Mr. Pritchard said there is a case law that allows them to redo the hearing if they discover their error within the 30 day appeal process. The Chair asked Mr. Pritchard to send him the case law. Mr. Pritchard will send it out to the board for review. He said the Planning Board has relied on it in the past. Mr. Wood agreed with Mr. Pritchard and explained they have used it.

Mr. Wood said this is a tough case because someone felt they had a right 13 years ago. He explained the Planning Board has changed a lot in the last five years. He said they had a difficult case with a class six road come before them because it was nonbinding. He doesn't believe the Select Board's decision 14 years ago on a class six road is not in standing now because the criteria are all different. It is difficult when people think they already did the legwork.

Mr. Pritchard said in 2004, the state law said they had to do active and substantial development on the property. Mr. Konopka was chair of the Planning Board and any expectation he had to use the permit after 2008 evaporated at that point.

ADJOURNMENT

Motion. Mr. Heffernan made a motion to adjourn. Mr. Bosen seconded the Motion. There was no additional discussion.

A Roll Call Vote was taken: Mr. Hetu – Yes; Mr. Palmer – Yes; Mr. Heffernan – Yes; Mr. Rokeach – Yes; and Mr. Bosen - Yes. The Chair declared the Motion passed.

The Chair adjourned the meeting at 8:30pm.

APPROVED: September 13, 2018

JAMES HETU, CHAIRMAN

DATE