NEWMARKET ZONING BOARD OF ADJUSTMENT

JULY 16, 2018

MINUTES

Present: Chris Hawkins (Chairman), Diane Hardy (Zoning Administrator), James Drago, Wayne Rosa, Richard Shelton (Alternate), Steven Minutelli (Alternate)

Absent: Bob Daigle (excused)

Called to order: 7:00 p.m.

**Agenda Item #1 - Pledge of Allegiance**

**Agenda Item #2 - Review & Approval of Minutes:** 04/23/18 & 04/30/18

Chairman Hawkins appointed Richard Shelton and Steven Minutelli to replace Bob Daigle and the vacant full board member position.

*04/23/18*

Action

Motion: James Drago made a motion to approve the minutes of 04/23/18

Second: Richard Shelton

Vote: All in favor

*04/30/18*

Action

Motion: James Drago made a motion to approve the minutes of 04/30/18

Second: Richard Shelton

Vote: All in favor

**Agenda Item #3 - Regular Business**

***Phil Trial - Public hearing for an application for Variances from Section 32-50(b) and the Table of Permitted Uses, of the Newmarket Zoning Ordinance, to permit placing a single family residence, a double-wide manufactured home, on the lot. The lot is located at R Sleepy Hollow Cooperative, Tax Map U3, Lot 117A, B2 Zone, a zone where single family residential, including manufactured housing, is not a permitted use.***

Phil Trial stated, if he did not get this variance, there is absolutely nothing he can do with the land. It is landlocked. It is land that has been in his family. It was a separate lot from the trailer park. The trailer park was owned by his grandparents. The people who purchased the trailer park from his grandparents decided not to buy this particular lot, so it has been handed down through the family to him. There has always been a deeded right of way from New Road to get in and out of the lot. There is no frontage on New Road. What the B2 zone allows could never happen without frontage on a street. The zone was changed from R2 to B2 in 1998. He was never aware of that change. The tax card still says R2. He wants to put a single family home on it for himself and leave the rest of it as woods. The right of way is off of New Road and goes through the trailer park to the back.

Diane Hardy read the written responses to the five criteria Mr. Trial had submitted with his application.

**CRITERION 1.**

The property, in question, has been in my family for nearly three generations. My grandparents bought the property and the adjacent mobile home park in 1963. They owned and operated the mobile home park until approximately 1989. My immediate family moved into the mobile home park for a brief period and later moved into an adjacent house on New Road, which abutted Tax Map U3, Lot 117A. I, therefore, am very familiar with the adjacent 13 acre vacant tract, having roamed the trails and played there in my youth. My present interest is to prepare a house site on the land and either build a single family home or locate a double-wide manufactured home on the lot for my personal use. I am not interested in developing the land for a commercial or business use, which is allowed under the current zoning, but just to make this my permanent residence in my retirement. I wish to live there quietly in a low-impact and compatible way. I know and appreciate the land and want to preserve its aesthetic qualities and protect the natural and cultural resources that are there. So, granting a Variance to allow me to have a residence here would not be contrary to the public interest.

**CRITERION 2.**

If the Zoning Board grants this variance then the spirit and intent of the Zoning Ordinance would be observed. Specifically, this proposal is consistent with the character of the neighborhood, being adjacent to an existing mobile home park cooperative, and would preserve and enhance the natural and aesthetic qualities of the land and would create a desirable place to live without resulting in the overcrowding of the land, which are among those stated purposes and objectives as set forth in Section 32-2 Purposes of the Zoning Ordinance.

**CRITERION 3.**

Granting of the variance would provide an affordable place for me to live. I will comply with all the Town’s requirements, with respect to water and on-site sewer systems, which will serve to protect the public health, safety and welfare. The benefit to me as the property owner would not be outweighed by any harm to the general public or neighborhood. The addition of another dwelling unit in this vicinity would not be detrimental or adversely affect property values as the proposed use is consistent with the character of the neighborhood.

**CRITERION 4.**

The proposed single family home will not diminish the value of surrounding property. Due to the size of the lot upon which the home will be built or placed and the woodland character of the land, which will buffer it from adjacent homes and properties, there will be no diminution in value to adjacent properties. Also, the home will be similar in character and value to other homes in the Sleepy Hollow Housing Cooperative, which will fit into the fabric of the existing neighborhood. The remaining acreage will remain in current use assessment, which will preserve and protect the natural qualities of the land, so surrounding property values will not be deflated.

**CRITERION 5.**

**A.**

As indicated above, the property has been in the family for many years. Unbeknown to us, the Zoning changed in 1998 from allowing residential uses to only business and industrial uses. See Amendment 4, that states that “all of Tax Map U3, Lot 117A shall be placed in the B-2 zone.”

Although the zoning changed in 1998, my family was not aware that it had changed. It was always understood that the 13 acre vacant lot could someday be built upon. As a matter of fact, it was not until recently when I met with the Planning and Building Department, that I learned that this property was not in a Residential zone (R-2) but in a Business zone (B-2), which precludes single family homes, including manufactured housing. This information came as a surprise, as information on the Town’s assessment card indicated that the property was in an “R-2” zone district, which I learned was “an error”. (See Town’s assessment card.) We also learned from the Town that the Lot 117A was a “legal” grandfathered non-conforming lot. Although it is not “landlocked”, because the owner has rights of access to it, it does not have frontage on an approved Town road, which significantly limits our ability to subdivide the 13 acre tract or develop it in manner that would be permitted under the Town’s current regulations.

The property, due to its irregular shape and lack of frontage, is burdened by the Town’s regulations, unlike other properties in the general area. The application of the Town’s regulation unduly restricts the property and does not serve in a “fair and substantial’ way. Literal enforcement of the ordinance results in an unnecessary hardship to me, as the property owner, due to the special and unique physical conditions of this land that differs from other parcels in the B-2 area.

It should be noted that although the Town changed the zoning in 1998 from Residential (R-2) to Business (B-2), there has been virtually little commercial and development interest at all in this area due to the poor access to these lands off New Road, constraints posed wetlands and steep topography, the proximity and potential nitrogen loading into Great Bay, the lack of a suitable railroad crossings off Route 108 providing direct access to a major highway, and the structural condition of the New Road bridge over the railroad.

The appropriateness of the B-2 zoning in this area has been discussed by Town leaders and the Economic Development Committee in recent years with an eye to possibly changing the zoning back to its former R-2 zoning classification.

**B.**

We believe the proposed single-family residential use of this land is a reasonable one and due to the regulations, it can’t otherwise be reasonably used. We feel given the limited access and configuration of the lot, there are no other reasonable uses that can be made of this land, therefore, it should be allowed to be used for at least one single family home, because of the hardship that has been imposed.

Diane Hardy asked if Mr. Trial wanted to add anything else to his narrative. He stated he did not.

*Chairman Hawkins opened the public hearing.*

No comments.

*Chairman Hawkins closed the public hearing.*

Richard Shelton stated he had no questions. James Drago stated he agreed.

Action

Motion: Richard Shelton made a motion stating addressing the five criteria of the Zoning Ordinance the applicant has shown that the property is restricted from developing a business and there is no access to the land on the east and south, railroad tracks to the west, and limited use through the existing roadway of the existing mobile home park. Although the purpose of the B2 district, under Section 32-50 shall exclude residential uses in the Table of Permitted Uses that we grant the variance from Section 32-50(b) and Table of Permitted Uses on this thirteen acre parcel for a single family residential, including manufactured housing with the remaining eleven acres remaining in current use. He moves that they grant the variance and that the variance criteria, as submitted by the applicant, be included in their decision.

Second: Steven Minutelli

There was discussion of whether to change the wording from specifically stating “eleven acres” to “remaining acres”, as the applicant had made this change to his application shortly after submittal.

Chairman Hawkins stated the presentation by the applicant is very thorough and the Board will accept that as its findings and the basis of their decision. The Board was in agreement with that.

Action

Motion: Richard Shelton amended his motion to change the wording from “the remaining eleven acres remaining in current use” to “no less than ten acres would remain in current use”.

Second: Steven Minutelli

Vote: All in favor

Vote: All in favor (on original motion with amendment)

***Leo Manseau, Jr. - Public hearing for an application for Variances from Sections 32-89 and 32-51(b), of the Newmarket Zoning Ordinance, to permit construction of a residential structure/use in the B3 zone, where single-family is not permitted, and to allow a side setback of 30’, where 50’ is required. The lot is located at Ash Swamp Road, Tax Map R6, Lot 4-2, B3 Zone.***

Leo Manseau stated this is a 5.6 acre lot. He showed a plan of the lot. He indicated the frontage of the lot on Ash Swamp Road. He has a 30’ deeded right of way and he showed it on the plan. He showed Wilfred Hamel’s property and also the location of Newmarket Sand & Gravel. He outlined on the plan a structure to scale detailing where the residence would be with on outside deck. The plan does show the setbacks for the B3 zone. The setback along the Hamel property is a 50’ setback for the B3 zone and it is also shown on the Davenport property. In the B3 zone, when an abutting use is residential, the sideline setback is 50’.

They are proposing to access a residential home over this 30’ deeded right of way. That also serves as a 6’ wide walking right of way to go to the cemetery, which is on his property in two locations and Newmarket Sand & Gravel’s property. There is a State law of a 25’ setback from any cemetery. That is also shown on the plan.

The proposal is to build a residence. It used to be a residential zone. In 2003, the area was rezoned as B3, a commercial zone. He has owned this property since 1993 and made a rather good sized proposal for site plan and had it approved in this zone, but was unable to market anything in the B3 zone. What they were told when the Town was proposing to change the zoning to B3 was that services would be brought there, like water and sewer. It never happened. It is now 2018. He did not see it coming soon. He has been to Planning Board meetings, where they talk about revisiting the zoning, but there has been no activity. His daughter, Michelle Whitcomb, is also here and is interested in building a home there, should this pass.

He had his answers to the criteria and read them.

CRITERION #1.

Mr. Manseau stated the public would have to be adversely affected for them to have any interest. Allowing a residential use would enhance the tax base and a residential home would be built and taxed increasing the available tax revenue to the Town. He looks at that as a positive thing for the town, as he is also a taxpayer. They can gain more taxes, instead of a property sitting idle, even though it is taxed at twice what the residential tax was. The day after this property changed to the B3 zone, his taxes were doubled. They have been double ever since and no activity.

CRITERON #2.

The ordinance was written to promote commercial business development in what is known as the Newmarket Plains area of town and along Route 152. Route 152 is a State highway and allows all types of truck use. All available vacant land in the zone has a frontage connection to Route 152, except his lot, Lot 4-2. Its primary entrance is on Ash Swamp Road, which the Town of Newmarket has posted as “No Through Trucking”.

CRITERION #3.

The Town has limited the truck use for Ash Swamp Road, which restricts the use for Lot 4-2 in the B3 zone. In his multi-year effort to sell this lot as a commercial property, he has only found three potential buyers. They were only interested, because the listed price for sale was only a fraction of the tax card value. Once they learned of the truck traffic restriction on Ash Swamp Road, they were no longer interested.

CRITERION #4.

Lot 4-2 literally surrounds its two closest neighbors. The abutters are both pre-existing, non-conforming residential uses in the B3 zone. Granting of a variance to allow a residential use would only enhance the current value of these properties, since the residential use would be consistent with the use of the properties on each side of it. Those properties are the Hamel and Davenport properties. He showed their lots on the plan. He has a deeded right of way across the Davenport property.

Chairman Hawkins stated it was one of the most unusually shaped lots he had ever seen. It is shaped like a sickle.

CRITERION #5.

A-1.

Mr. Manseau stated the general purpose of the ordinance is to provide land where commercial enterprise would be able to exist and thrive. Since the Town has limited the use of truck traffic on Ash Swamp Road, the ability of a business to take hold and thrive is questionable to say the least. The cross easements required, as a condition of the subdivision approval to create Lot 4-2 should have been considered when the Town restricted the use of Ash Swamp Road, which has eight properties within the B3 zone. This is just another contributing factor to the failure of the B3 zone.

A-2.

The proposed residential use is reasonable, because this lot surrounds the adjacent lots, which are both pre-existing residential uses.

B.

The shape of the lot is unique in that it surrounds two homes, the lot frontage is in a wetland, and the Town has posted Ash Swamp Road for no through trucking. A residential use is a reasonable use for this unique lot. This lot also has a cemetery on two portions of the lot.

*Chairman Hawkins opened the public hearing.*

George Davenport spoke for him and his wife, who are abutters. He wanted to make it clear where the property boundaries are distinguished. The yellow highlighted lines are intended to mark the property. The driveway on the plan is on his property. There is a deeded right of way from 1964 that is on his lot. That 30’ x 125’ parcel is his own property. He would like that clear on the plan. He agrees with Mr. Manseau’s perspective on the success of the B3 zone and the current tax burden. He acknowledges his desire to build a residence on that lot. He understands his position for the variance for the setback, however, the prescribed 50’ setback better supports the desire to preserve the aesthetics to all of the surrounding properties. He believed there was sufficient land to support that and still accommodate his request to build. He stated as owners of the property through which the right of way traverses, if Mr. Manseau’s variances are approved, he requests that he and his wife be consulted with regard to any improvements and modifications to the right of way, including paving, tree removal, or consideration of expanding the use of the right of way to include utilities. He stated the scope of reliance on the right of way provided by he and his wife is questionable due to the fact Lot 4-2 had additional frontage on the northern end of the lot, as well as the fact Mr. Manseau owns the abutting property that could provide access and utilities. He brings this up, because of his perception of over-reliance on his property for convenience.

Mike Hamel stated he is not going to add anything to what Mr. Davenport said, as he had it right. He stands by that. With all of that property, he should be able to move the house a little bit.

No further comments from the public.

*Chairman Hawkins closed the public hearing.*

Richard Shelton stated the applicant wanted the setback from 50’ to 30’. He asked if that was to better locate the house on the lot. Mr. Manseau stated it was and to also provide the ability to get around the house on the right side. They are restricted by the cemetery. The grade to the cemetery is considerably higher than the rest of the land in the area, so you have to keep to the 25’ setback, but you almost double the setback, because of the grade involved. An area for a well would be located with a proper well radius in an area he indicated on the plan for the Board. If you had to service that well, you need room to get by on the property. The idea for this home is to create a walk-out on the side of the building to let some daylight into the basement area. Since this is the southwestern side, it would get daylight into that basement. Knowing the grade in this area and keeping it 30’ off of that lot line would allow that to happen. With a strict residential use, the sideline setback is only 25’. He did not ask for the full residential setback of 25’, because he felt this home would be able to be developed in that location using 30’. He would be able to get by on the driveway side. They are encumbered by the 6’ walking right of way for the cemetery. He came before the Planning Board a couple of times over the years and, back in 2004, he and Newmarket Sand & Gravel made a proposal to move the cemetery to the Riverside Cemetery, so people could visit the gravesites of their family members a lot more easily than trudging up to the top of this hill and where the wind is doing its job and taking its toll on the gravestones and grave sites. There are huge trees up there that have been toppled by the wind and they are breaking the gravestones up. He made that proposal years ago and the Town did not think it was a fitting thing to do. That was okay, but here we are today and we are still dealing with that. Trying to let the public get to that is difficult. That is the purpose for the house location.

There were two test pits done to the rear of the home and that would be the area for the leach field, parallel to that property line. They tried to think this through and not just plunk a rectangle on a plan.

Richard Shelton stated, on the deeded right of way, the abutter stated he did not want to lose his land where the right of way is. The applicant is not taking the right of way away from him, he will just be using it according to his deed. Mr. Manseau stated he met with Mr. Davenport and Angela and spent an hour or more last week and he told them exactly what he intended to do. The intention is to develop a driveway over the right of way and bring the electricity up the driveway, maybe underground, maybe overhead. They are dealing with two different electric companies. One ends at one point on the property and he indicated the location on the plan. The other one is across from the Hamel home and he showed that location on the plan. There is nothing in between the two. He told Mr. Davenport it was their hope to bring a pole to the corner of the right of way and then go to the other corner of the right of way and then go up the right of way to another pole overhead and then go underground to the house. He had not met with the electric company yet. Mr. Davenport was relieved and told him that what they did not want was a pole and wires running across the front of their property. They are entitled to do either underground or overhead. They have a deeded right of way. There are probably three trees that would have to be cut in that 30’ right of way to be able to maintain and drain and develop a driveway. There is a huge pine tree that has a 40’ cut on it and is dead as a doornail and probably 50’ tall. It’s a mess. That tree has to come down and is on one side of the right of way. The right of way is staked and pinned. Public Works has said they would issue a driveway permit there. They have been using that entrance since 1993 and Mr. Filion, the previous owner, had also used it. A comment was made to come in from some other way. They are talking a B3 property. When we start crossing a B3 property to a residential property, you have trouble, in his experience. It is an awfully long way out to Route 152.

Richard Shelton stated he appreciated the comments from Mr. Manseau and Mr. Davenport. He knows the land well and has been there many times over the years.

Chairman Hawkins stated the north side of the property is impinged by wetlands. He has walked, jogged and driven by many times. Mr. Manseau stated you can see that on the plan and he explained it, while indicating it on the plan. Chairman Hawkins stated, the deeds say what they say and there is nothing the Board can do to alter what they say. You own what you own and you have to work things out between you. He just wanted to make sure that was clear.

He was not familiar with the precise location of the house. He asked what the elevation was by the Hamel property and what the view is over the house from the proposed house location. Mr. Manseau showed the Hamel house on the plan and stated there is no view over it. There is a lawn area and a hedgerow of bushes ten feet tall. He showed on the plan what the view would be. It would be on the back side of the bushes and through a bit of woodland. The septic system would end up behind the Hamel property, a pretty good distance. There is a wooded buffer. They are in the middle of the Hamel and Davenport houses. From the Davenport’s there is quite a distance. They tried to do the least amount of development to the lot and create a driveway and stay out of everybody’s way.

Wayne Rosa stated this area has been regulated as a B3 zone, which is useless. The services are not available, it is over taxed. As a result, Mr. Manseau is trying to do something with his land and he has a right to do that. He is entitled to this and something has to be done, by the Planning Board, to redo this and make it more feasible. If the Town wants B3, something has to change. He sympathized with the applicant. He has the right to use his property and those rights are being taken away.

Mr. Davenport wished to comment and this was allowed by Chairman Hawkins. He told Mr. Hamel he should also feel free to comment.

Mr. Davenport wanted to acknowledge that he met with Mr. Manseau and appreciated his time and the opportunity to understand his plan. He understood the handling of the deed issues. He and Mr. Manseau will have to work through the utilities discussion.

Richard Shelton stated CRITERIA 1. *Granting the Variance would not be contrary to the public interest: In the case of Gray v. Seidel, 143 NH 327 the NH Supreme Court clarified that RSA 674:33, 1(b) should not be read to imply an applicant must meet any burden higher than required by statute but merely must show that there will be no harm (i.e., “will not be contrary” to the general public interest if granted. As this lot fronting Ash Swamp Road amongst residential homes will not be contrary to the general public interest.*

CRITERIA 2. *The spirit of the ordinance is observed:* The Master Plan supports thoughtful development that preserves our natural resources and enhances the aesthetics of Newmarket while creating a long term tax base. And by granting the variance it would not alter the essential character of the neighborhood nor threaten the public health, safety or welfare the spirit of the ordinance is observed.

CRITERIA 3. *Granting the variance would do substantial justice because:* Any loss to the individual which is not outweighed by a gain to the general public is an injustice and the proposed residential use is consistent with the area’s present use. By granting this and the other 4 criterion, substantial justice is done.

CRITERIA 4*. If the variance were granted, the values of the surrounding properties would not be diminished:* The applicant has said it best, “the neighbors/abutters are both pre-existing non-conforming residential uses in the B-3 zone”. By granting the variance to allow a residential use would be consistent with the abutting properties on Ash Swamp Road and it is more likely than not that the residential use overriding a business use will not decrease values but rather enhance their values; criteria 4 has been granted

CRITERIA 5. Unnecessary Hardship

1. **Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:** 
   1. **No fair and substantial relationship exist between the general public purpose of the ordinance provision and the specific application of that provision to the property because:**

This property in the B-3 Zone, over many years has not met the intended purpose and permitted uses in the area as well as other abutting properties in the B-3 Zone. The applicant’s property of 5 + acres, with an access from Ash Swamp Road, has lost a reasonable use from uses allowed in the B-3 Zone by the Town posting, “NO THRU TRUCKING”, thus creating a hardship to the applicant to develop the land, as was proposed through the zoning change. This leaves no alternative other than to allow a residential use, which is consistent with the abutting properties on Ash Swamp Road, as was intended when it was an R-1 Zone.

* 1. The proposed use is a reasonable one because:

Though the zoning was changed in the area from a R-1 zone to the B-3 zone in the year 2003, and throughout these many years no substantial development has occurred in this created B-3 zone, to be more correct no development has occurred as was intended by the zone change, the proposed use as requested by the applicant is a reasonable one.

**Explain how, if the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owning to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable reasonable use of it.**

The applicants’ property located at 376 Ash Swamp Road, in distinguishing it from other properties in the area, has road frontage of 175’, primarily wetlands to the West of 370 Ash Swamp Road that includes a single family residence, and to the East is bounded by another residential home at 360 Ash Swamp Road. A special condition on this property is an early burial ground on the property, as noted in Doucet survey map of 1/23/2004, see note 11. “No construction or excavating shall occur within 25 feet of boundaries of cemeteries”, per state law.

**To further Unnecessary Hardship,**

I refer to the Board of Adjustment of NH decision, page D-8 - Husnander v, Town of Barnstead, 139 N.H. 476,660 A.3d 447 (1995) In determining whether a hardship exists sufficient to prevent the owner from making any reasonable use of the land, the operative use is “reasonable”, a word that has been central to the development of common law. The lot in this case had a strange configuration due to the shoreline and the only reasonable use of the property was for a single family home.

The Plaintiff appealed the decision of the superior court upholding the defendant’s grant of a variance to the intervener to construct a single family home on Lower Suncook Lake. After reviewing evidence and taking a view, the trial court found that granting the variance was the only reasonable action that could have been taken under the circumstances. Because of setbacks, the building envelope on the lot was an elongated, somewhat curved strip roughly 70 feet long. The slope of the lot, abundance of ledge and remote location prevented other uses permitted under the ordinance: The Supreme court affirmed the decision. Unnecessary Hardship has been met.

**Action**

Motion: Richard Shelton made a motion to approve the applicant’s request for Variances from Section 32-89 and 32-51(b) of the Newmarket Zoning Ordinance to permit construction of a residential structure/use in the B-3 zone, where single-family is not a permitted use, and to allow a side set back of 30’ where 50’ is required. The lot is located at 370 Ash Swamp Road, Tax map R6. Lot 4-2, B3 Zone.

**With conditions, the applicant has the use of the Old Gravel Way as shown on Doucet Survey, map of 1/23/04, see note No. 8. As noted prior, relating to cemeteries, that no construction occur within 25 feet of boundaries of cemeteries, a 6 foot wide pedestrian access easement, in favor of Newmarket Historical Society to the cemetery shall be provided across the subject’s parcel. A proposed location for said access is shown hereon, also as shown on Doucet Survey map of 1/23/2004, Notes No. 6 & 11**

**Second: James Drago**

**Vote: All in favor**

**Agenda Item #4 - New/Old Business**

Richard Shelton stated they needed more members to apply for the Zoning Board. Chairman Hawkins encouraged people to get involved.

**Agenda Item #5 - Adjourn**

**Action**

Motion: James Drago made a motion to adjourn

**Second: Richard Shelton**

Vote: All in favor