TOWN OF ALLENSTOWN
Zoning Board of Adjustments
16 School Street
Allenstown, New Hampshire 03275
November 8, 2017

Call to Order

The Allenstown Zoning Board of Adjustments meeting of November 8, 2017 was called to order by Chair Feustel at 7:00 p.m.

Chair Feustel called for the Pledge of Allegiance.

Roll Call

Present on the Board: Keith Klawes, Jeff Gryval, Chad Pelissier and Eric Feustel; (Dawna Baxter arrived late.)

Others present: Roy Tilsley, attorney with Bernstein, Shur; Mike Gallo, Principal, 4NH Homes; Justin Pasay, legal counsel from Donahue, Tucker & Ciandella; Mike Juranty, abutter; Lorraine Vincent, abutter

Chair Feustel stated the purpose of the meeting, to hear the Administrative Appeal of Mr. Dana Pendergast's August 16, 2017 decision regarding 4NH Homes and the property at 166 Pinewood Road. The applicant has agreed to be heard with only four members present.

Mr. Tilsley stated that, per a discussion before the start of the meeting, the Chair will vote and will not abstain from voting unless there is a tie.

Chair Feustel asked if anyone required a recusal or needed to abstain. There was no response.

Mr. Tilsley said that he was present on behalf of 4NH Homes, and Mike Gallo, the principal was with him. He asked if the Chair had the record generated for this decision.

Chair Feustel responded that their attorney has it.

Mr. Tilsley said that yesterday he submitted a memo of law to Attorney Somers, and that memo has also been distributed to Board members. He referred to the property which is the subject of this appeal: Map 102, Lot 8, which is 32.7 undeveloped acres in the R2 zone at the intersection of Route 28 and Pine Acres Road. This is an administrative appeal of the August 16, 2017 decision of Mr. Dana Pendergast, Code Enforcement Officer, which determined that the cluster variance received a year ago required a 200-foot buffer, a special exception criterion. His decision was submitted by memorandum to the ZBA. Mr. Tilsley said that this is a legal issue, a matter of law. The ZBA granted a variance for a cluster development on September 28, 2016. The applicant took the proposal to the Planning Board and was told a special exception was needed for the 200-foot buffer per Article VI, Section 602(n). The Board

then held a hearing at which a variance for the buffer was denied. The applicant appealed the decision, and the Board denied the appeal, as was their right. The applicant reserved the right for this administrative appeal. At that time the applicant's property was in the R2 zone and also in the agricultural-conservation overlay district. The special exception was for the open space-farming zone, which is not the zone Mr. Tilsley's client is in. Section 2203(d) of the 2016 ordinance says that cluster development is required in the agricultural-conservation overlay district if it has more than 15 lots and more than 200 feet of road frontage. Therefore, the applicant didn't need a variance. In fact, it was obligated to do a cluster development. Since the variance had to provide relief from some aspect of the ordinance, the applicant assumed they didn't need the 200-foot buffer. He addressed the members of the Board, saying he assumed they were versed in the difference between a special exception and a variance.

Chair Feustel noted that the minutes for this meeting are lost because the recorder was not working.

Mr. Tilsley stated that he was not part of that discussion, but it is clear that his client did not plan to comply with the buffer because, according to his proposed plan for development, five of the eight lots (1,2,3,7 & 8) couldn't be built if a 200-foot buffer was required. His client thought the variance was for the cluster plan he presented, without a special exception for the buffer. He read from the August 2017 decision of Mr. Pendergast: "The applicant originally came to the ZBA in 2016 intending to seek relief to allow a cluster residential subdivision in the R2 zone with density as allowed by the R2 zoning ordinance under Article VII, while also using the cluster criteria described under Article VI, Section 602(n)." Mr. Tilsley said that the last phrase is Mr. Pendergast's error. In the agricultural-conservation overlay district, a variance is not needed if the applicant is meeting the requirements of 602(n). The variance has to give some relief. The purpose was to avoid 602(n). The applicant was not proposing to meet the buffer requirement; most of the lots are completely within the buffer. The variance has to be relief from something. Logically, the variance allows a cluster without the buffer. Mr. Pendergast's decision should be reversed. A variance was not needed. Some confusion exists because the applicant's property is no longer in the agricultural-conservation overlay district, per the new 2017 ordinance. The Town is saying relief is needed from one or the other. There are inconsistencies between being in both the residential zone and the agricultural-conservation overlay district because land in the agricultural-conservation overlay district can't be developed in the traditional fashion, yet being in the residential zone means a cluster development can't be done without relief from the residential zoning ordinance, which does not allow clusters. Mr. Tilsley stated that this is taking of his client's property in violation of the federal and state constitutions; it effectuates taking of private property without compensation.

Ms. Baxter arrived late at this time.

Mr. Tilsley said that he still wanted her to be able to vote, and he recapped his argument for her.

Mr. Tilsley continued, saying that his client's variance is in effect for two years, beginning in September of 2017, per RSA 675:33-1(a).

Chair Feustel said that the Board had the application that was filed for at the September 28, 2016 meeting.

Ms. Baxter said that it was revised because the applicant had cited the wrong ordinance.

Chair Feustel said he remembers that Mr. Pendergast specified several times during the meeting that they were only hearing matters regarding the septic system and water. Referring to application 2016-0002, dated August 2, 2016, he read, "Why does your proposed use require an appeal to the Zoning Board of Adjustment?" Citing the wrong ordinance, the response of the applicant was as follows: "The development shall be served by an adequate water system and by either the Town sewer system or a community system approved by the State Water Supply and Pollution Control Commission, proposing construction of individual sewer systems for each lot."

Mr. Tilsley referred to the certified record, saying there is another application, also dated August 2, 2016, which is for a use variance for a cluster residential subdivision, per 701-A.

Chair Feustel said 601(a) and 602(n)(2)(c) were also cited. He said that #5, regarding the spirit of the ordinance, is to allow for cluster development to protect farmland and to require adequate means of sewage disposal.

Mr. Tilsley said that the sewer variance is covered on pages 12, 13, and 14; there is also a use variance to allow a cluster subdivision in a residential area. 602(n)(2)(c) refers to the subsurface sewer disposal system.

Chair Feustel said that he is one of the few people available as a witness as to what went on that night. He said that the ZBA was only dealing with a concept at that time; there was no need for a septic design if the applicant didn't first get the cluster variance. The application hadn't gone to the Planning Board. It wouldn't pass anyway because the Planning Board wanted it changed.

Mr. Tilsley said that the request was for a use variance to allow a cluster development. The response to the first criteria says the proposed use is a cluster subdivision; the septic system is not mentioned. Since the applicant was granted a use variance, Mr. Pendergast's decision regarding the buffer is unlawful. Mr. Gallo assumed he had relief for a cluster development without needing a buffer.

Mr. Pelissier said that the buffer is part of the variance for a cluster.

Mr. Tilsley said that the buffer is part of the special exception criteria.

Mr. Pelissier responded that so are sewer and water. Why ask for relief from one and not the other?

Mr. Tilsley said that they did not need relief from the buffer requirement, 602(n).

Mr. Pelissier asked him why that was true.

Mr. Tilsley said that the were not asking for a special exception. They weren't proceeding as a matter of right. They asked for a variance to allow a cluster development in an R2 zone.

Mr. Pelissier said that in order to have a cluster, he doesn't understand why the applicant doesn't think he has to follow the whole concept.

Mr. Tilsley responded that it is because they have a variance.

Mr. Pelissier said that they don't have a variance from a cluster; it is a variance to have a cluster.

Mr. Tilsley said it's a variance they don't even need.

Mr. Pelissier said the applicant said they could not develop this property in a traditional way, yet at the last meeting and at the Planning Board meeting, their engineer kept insisting, with maps for illustration, how the applicant could go with traditional development and get more lots. He said that Mr. Tilsley was actually there for those presentations; Mr. Pelissier doesn't understand why they can't do that now.

Mr. Tilsley said there were two factors. First, at the time they were talking about density, regular R2 density. Their proposal for eight homes was well below the allowed 28. Second, the property is no longer in the agricultural-conservation overlay district, so the cluster requirement no longer applies. Under the previous (2016) ordinance, they could not do a traditional development.

Mr. Pelissier said he remembers those speaking for the applicant saying they could get 18 lots if they developed it one way and only get X-number of lots another way.

Mr. Tilsley said he had a discussion with Attorney Somers at the time and they agreed that the application should be heard based on the 2017 ordinance, not the 2016 one. The issue was density – not providing in a cluster more units than allowed. They did not ask for a special exception under 602(n).

Mr. Pelissier said the applicant did ask for a special exception regarding water and sewer.

Mr. Tilsley agreed that they did.

Mr. Pelissier said that this leads him to believe that the applicant knew exactly what he needed, or didn't know and asked for certain things.

Mr. Tilsley said his understanding is that his client had presented a conceptual plan which did not conform with the buffer; this was the relief needed, rather than proceeding as a matter of right or special exception.

Mr. Gryval said he was present as a member of the ZBA for the meeting when the variance was granted. The issue of 602(n) never came up. The Board was told that the map would probably change. It didn't mean a lot at the time because the Planning Board would be looking at it. There was a water expert and a well expert.

Mr. Tilsley said that was not the meeting which granted this variance. That was the reconsideration hearing.

Mr. Gryval said that if he had confused the meetings, he apologized.

Ms. Baxter suggested getting Matt Monahan from the Central NH Regional Planning Commission involved via a telephone call. She said that at the end of 2016 when the new ordinance went into effect, this application had not yet gone to the Planning Board. She said that she thought they had to go by the new ordinance.

Mr. Pasay offered his opinion. He said that whether you look at the 2016 or the 2017 ordinance, the provision for the buffer is in both. The issue is what relief was actually granted in 2016.

Mr. Juranty, an abutter, said that he was at the September 2016 meeting. The map was conceptual. Article 2203 requires a cluster development in the agricultural-conservation overlay district, and all of the requirements of 602(n) must be met. 602(n)(3)(c) specifically addresses water and sewer. He questioned whether or not Mr. Pendergast needed to come out and say what they could simply read in the ordinance. He said that on January 12, 2017 Mr. Monahan, representing the Central NH Regional Planning Commission, wrote that a buffer is required; on February 1, 2017, the Planning Board said the applicant could not proceed without a variance from the buffer. If the applicant didn't think he needed a 200-foot buffer, it was still required. He said there was no error on the part of Mr. Monahan, Mr. Pendergast, or the Planning Board.

Ms. Baxter said that the decision allowing a variance in September of 2016 was for 602(n)(3)(c).

Ms. Lorraine Vincent, an abutter, said her home is on the corner of Pine Acres Road and Route 28. She said that this development will cause sewer and water problems. She will have to get a new well at a cost of $15,000.

Chair Feustel reminded Ms. Vincent that this hearing is only about the decision of Mr. Pendergast regarding the buffer requirement.

Ms. Vincent said she agrees with Mr. Juranty's opinion.

Mr. Tilsley said he is not disputing the ordinance. His client got a variance under 701(a); it had to be for something. The variance request regarding septic and water was in a different application. As a matter of law, special exception criteria from one zone can't be applied to another.

Mr. Juranty said that the 701(a) variance doesn't negate all of the special exceptions.

Mr. Tilsley said that it is a taking of the property. The ordinances are inconsistent. Article 2203 requires a cluster development in the agricultural-conservation overlay district with 15 lots and more than 200 feet of road frontage. But the R2 zone doesn't allow cluster developments without a variance. If the Town's position is requiring variation from one or another, it is a taking.

Mr. Gryval said that clusters were only allowed in open space-farming zones in 2016.

Mr. Tilsley said that they are compelled in the agricultural-conservation overlay district.

Mr. Gryval said that the applicant should have requested a variance from 602(n), not just for the sewer system.

Mr. Tilsley said that because the applicant couldn't meet the criteria for a buffer, they simply asked for a variance, thus never getting to 602(n). By getting a variance for 701-A, they didn't need a buffer because the special exceptions don't apply.

Ms. Baxter said that it seems to be a matter of interpretation.

Mr. Klawes said that if you look at 701-A #5, it is about sewage disposal.

Mr. Tilsley said that there was a separate application for cluster development with R2 density.

Mr. Gryval said that the applicant stressed #5, regardingsewer disposal a lot, with no mention of the buffer.

Chair Feustel said they didn't even mention the buffer.

On motion of Mr. Klawes, duly seconded by Mr. Gryval, it was voted to enter into deliberation.

Chair Feustel asked Mr. Pasay, their counselor, for direction and instruction.

Mr. Pasay said that he was not present to instruct the Board on what or how to decide. He said that he would be glad to frame the legal issues and to answer specific questions. It said that it is reasonable to consider the actual language of the 2016 provisions which were the bases of the variance request. It is also reasonable to consider, to the extent that those who were there can recall, what was sought in the context of that discussion. The due process rights of the abutters and others should be considered. He suggested going back to the application to review what relief was sought and what was granted in 2016. He said that the Board 'may reverse or affirm, wholly or in part, or may modify the order, requirement, decision or determination which the appeal is based on'. Mr. Pendergast determined that additional variance relief was needed. The Board needs to step into his shoes.

Chair Feustel asked the Board members to be forthright in their discussion for the record. He said that the applicant goes from the big picture to a very narrow picture, depending upon the force of the argument. In September of 2016, they were requesting very narrow, specific relief. Based on that, the applicant assumed he was exempt from other provisions of the ordinance. The setback never appears; the buffer is never mentioned. This is borne out by the Planning Board. Mr. Pendergast's decision should stand.

Mr. Klawes said that the September 2016 discussion was all about water and sewer. He assumed the applicant would be back to the ZBA and the Planning Board once they were beyond the conceptual stage.

Mr. Gryval said that was his recollection as well. It was limited to water and sewer. He never believed they were granting a variance other than for specific things.

Chair Feustel suggested an analogy: If his car is overheating and he has a flat tire, and he brings it to a mechanic and asks to have the flat tire fixed, he shouldn't return and complain that the mechanic didn't fix the overheating problem. That is a different issue and calls for a wild assumption.

Ms. Baxter said that she was not present at the September 2016 meeting, but in reading the related materials and in discussing the decision with Mr. Pendergast, the buffer was not mentioned.

Chair Feustel asked why the Board would have assumed more than what was requested. It was only conceptual at the time and there was no reason to consider the buffer.

Mr. Klawes said that in September of 2016 the lot design was only conceptual. Only water and sewer were discussed.

Ms. Baxter noted that the number of lots changed from 12 to eight at one point.

Chair Feustel said that the applicant came back with more lots, so obviously it was not a firm plan. The Planning Board denied the flag lots, and it was off the radar screen of the ZBA.

Mr. Gryval asked if the first Planning Board meeting happened before this variance application.

Mr. Pasay offered a basic timeline, saying they could defer to the applicant if they don't have it right. The first application for a variance was considered at the September 2016 meeting. On January 4, 2017, February 1, 2017 and February 15, 2017, the applicant was before the Planning Board. The second application was heard by the ZBA in April of 2017.

Mr. Tilsley added that there was a conceptual meeting with the Planning Board on July 2, 2016. They were instructed to return later with more definitive plans.

Chair Feustel said they were looking for initial feedback from the Planning Board regarding single family homes on their property with frontage and driveways on Pine Acres Road. There was no mention of specific dimensions.

AN UNIDENTIFIED FEMALE ABUTTER said that abutters were first notified about the September 2016 meeting and were never notified regarding the Planning Board meeting in July.

Chair Feustel asked if the Planning Board is required to notify abutters.

Mr. Pasay said that he would have to review Town regulations, but traditionally, for conceptual meetings, abutters are not notified. These are informal, non-binding discussions of ideas.

Chair Feustel said that what he was sharing next was second hand information. Mr. Pendergast's written decision said that the Board could confer with Matthew Monahan of the Central NH Regional Planning Commission if they needed to. At the bottom of his memo to the ZBA, Mr. Pendergast said that at the February 1, 2017 Planning Board meeting, Mr. Monahan had indicated that the plan shown to that Board, which contained 12 lots, needed to go back to the ZBA to get relief from the 200-foot buffer required for cluster housing. Flag lots were denied as well. Therefore, Mr. Monahan concurred with Mr. Pendergast. Mr. Monahan could be contacted to confirm that, if necessary. Chair Feustel referred to page three of the minutes of the February 1, 2017 Planning Board meeting.

Mr. Pasay said that the Planning Board meeting minutes of February 15, 2017, page two, show discussion of the need for a buffer variance on that date as well.

On motion of Mr. Gryval, duly seconded by Mr. Klawes, it was voted to return to public session.

Mr. Gryval made a motion to affirm the decision of Mr. Pendergast. Mr. Klawes duly seconded the motion. A roll call vote was taken: Jeff Gryval, yes; Keith Klawes, yes; Chad Pelissier, yes; Dawna Baxter, yes; Eric Feustel, yes;

Chair Feustel informed the applicant that he has 30 days to appeal the decision.

On motion of Mr. Gryval, duly seconded by Mr. Pelissier, it was voted to adjourn at 8:33 p.m.

TOWN OF ALLENSTOWN

ZONING BOARD OF ADJUSTMENTS

PUBLIC MEETING MINUTES

November 8, 2017

Eric Feustel, Chairman	January 24th 2018 DATE
Chad Pelissier, Vice-Chairman	1/24/18 DATE
Jeff Gryval, Member	DATE
Dawna Baxter, Member	DATE
Keith Klawes, Member	1.24.18 DATE
	1/24/18