

Ashland Zoning Board of Adjustment Meeting
Minutes
June 23, 2015

Members Present: Ellison Badger, Susan MacLeod, Elaine Allard, Michelle Fistek, Patricia Tucker (alternate)

Others Present:

Mark Puffer, Attorney for Ashland ZBA
Brian and Muriel Benton
Donald Lester, DVM; Attorney Daniel Muller (for the applicant)
Frank McBournie, D. Scott Bell; Attorney Chris Boldt (for the abutters)
About 30 members of the public

The meeting was called to order in the Ashland Elementary School Cafeteria at 6:02 pm by Chairman Eli Badger. All members were present by roll call. The chair appointed Patsy Tucker as a voting member for the duration of the meeting.

Variance Hearing: Brian T. Benton Rev. Trust, 320 Scenic View Drive, TML #023-003-003-002 in Little Squam Overlay district, for Variance from 2.3C of the Ashland Zoning Ordinance.

Mr. Benton explained that he intends to build a 2-story cabin (approx. 25x36) on the property, about 35 feet from the road and about 50 feet from the shoreline. A DES shoreline permit was included with the ZBA application. There is an additional cabin (17x35) owned by an uncle on the property. The property is jointly maintained by two branches of the family. Two trailers (over 20 years old, approx. 8x36) and an aluminum shed will be removed from the property. The property will be improved, the spirit of the ordinance will be maintained, and it will not be contrary to the public interest: (a) the new cabin will be further from the shore than the removed trailers and shed; (b) the trailer area will revert to woodlands; (c) the property value and the neighborhood value will increase; (d) the tax base will increase; (e) there is no encroachment on neighboring property; (f) no increased burden on public services; (g) no change in road access.

Abutter Leigh Sharps stated that it will be nice to see the trailers leave and they will welcome the look that the cabin will bring to the area.

Resident Kathleen DeWolfe asked if a new septic system would be installed. Mr. Benton replied that septic would be pending town water/sewer availability. They will be using an incinolet or a recycling system. There is currently an outhouse used on the property, which will not be removed.

Mr. Badger noted that the proposed building is right in the existing driveway. Mr. Benton said an increased curve to the driveway or access across the front of the lot will provide access. Mr. Benton also said that there are no plans to subdivide the property. A trust is being set up to manage this and other property; there is a covenant that guarantees that the lot will not be subdivided without one owner being able to buy out the other owner.

Mrs. Tucker noted that a dwelling unit needs 60,000 square feet, and that there will be 2 dwelling units on less than an acre.

The public hearing was closed at 6:15 pm.

ZBA members expressed a concern about 2 dwelling units on the same lot, even though it is decreasing from 3 units to 2 units. While current regulations do not allow the lot to be sub-divided, someone in the future could come back to the ZBA to attempt to subdivide the lot. The plan shows the proposed building over the existing driveway. If the variance is granted, there should be a condition that the house be further from the driveway or move the driveway. If the driveway is moved, DES would be involved if there is any excavation or run-off. An additional condition should be provision of a to-scale plan, showing the exact location of the building and the driveway.

Mr. Benton noted that the current driveway is not paved or structured, but is across the floor of the forest. A slight curve would make the driveway easily passable and accessible to emergency vehicles.

A motion was made (Allard) and seconded (Fistek) to accept the application as presented.

Discussion: Mrs. Tucker noted that there is no seal on the site plan and that the professional surveyor should be the one making the modification to the plan.

An amendment to the motion was agreed upon: to accept the application with the condition that the ZBA receive a licensed surveyed plat. The roll call vote was unanimous (5-0) in favor of the amended motion.

ZBA Deliberation of the Variance Criteria

#1: The variance will not be contrary to the public interest.

4 True (Tucker, Fistek, Allard, MacLeod)

1 False (Badger)

Comments:

The site has been used continuously and will be improved by getting rid of the trailers. (MacLeod)

This will be increasing the non-conformity of the substandard lot. (Badger)

#2: The spirit of the ordinance is observed.

4 True (Allard, Fistek, MacLeod, Badger)

1 False (Tucker)

Comments:

While an improvement, there will still be 2 units on 1 lot. (Tucker)

#3: Substantial justice is done.

5 True (Badger, Tucker, Fistek, Allard, MacLeod)

Comments:

This is making the situation better. (Badger)

#4: The values of the surrounding properties are not diminished.

5 True (Tucker, Fistek, Allard, MacLeod, Badger)

Comments:

The property will be enhanced with the new structure. (Tucker)

This will be an improvement to the property. (Allard)

It is an improvement, but it would be nice if the privy would eventually be addressed. (MacLeod)

#5: Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. (a-i) and (a-ii)

4 True (Tucker, Fistek, Allard, MacLeod)

1 False (Badger)

Comments:

The proposed use is reasonable. (Tucker)

This increases the density on the property. (Badger)
It would be a hardship that he could not continue to use the property as in the past unless another trailer was brought in. (MacLeod)

The variance from 2.3c was approved with the condition that an accurate licensed surveyed site plan be delivered to the ZBA. It does not become formalized until receipt by the ZBA.

A motion was made (MacLeod) and seconded (Allard) to authorize the Chair to accept and approve the site plan when submitted.

The roll call vote was unanimous (5-0) in favor of the motion.

Special Exception Re-Hearing: Donald Lester, DVM, request for a special exception for property located at 83 Depot Street (TML: 018-002-002) in the Rural Residential zone.

Mr. Badger opened the hearing at 6:41 pm with a statement:

“ . . . Following the Board’s denial of Dr. Lester’s application for special exception on April 2, 2015, Dr. Lester through counsel filed a Motion for Rehearing. This Board on June 2, 2015, voted to grant Dr. Lester’s Motion for Rehearing . . . only to hear evidence on Dr. Lester’s application for special exception. . . . The same 5 ZBA members who heard Dr. Lester’s application on April 2, 2015 are present tonight, to hear evidence, deliberate and vote on the application. All 5 members of the Board have reviewed the minutes of the April 2 hearing, and can take into consideration what they recollect the evidence to have been on April 2. If tonight’s ZBA decision is appealed to Superior Court, the ZBA’s record filed with the Court will include the minutes of April 2, 2015, together with any documents submitted to the Board on that date. . . . No one should feel that they cannot present tonight any and all evidence that is reasonably related to the special exception criteria that Dr. Lester must meet. . . .”

Attorney Boldt stated that the record is deeper than just April 2 and the ZBA should have available to it anything re: special exception previous to April 2. Attorney Puffer noted that the case was remanded back to the ZBA by the court, and the record will cover April 2 and forward.

Attorney Daniel Muller for the applicant, Dr. Donald Lester

Attorney Muller raised jurisdictional issues, asked the ZBA to address the jurisdictional issues; he will request findings of fact and rulings of law, and reserved the right to challenge the issues:

- The appeal which brought us here is a Motion for rehearing which was untimely; therefore the court lacked authority.
- It is unclear which portion of the ordinance the ZBA is relying on for the special exception.
- The only record from 1993 shows that a special exception was granted for a veterinary hospital, but no conditions are referenced.
- Once a special exception is granted for this use, it does not give you the authority to review it again.

Attorney Muller’s review of Special Exception Criteria

#1: *The specific site is an appropriate location for the intended use or structure.*

This site has been used for this since 1993 (special exception), no changes in the location or the character of the neighborhood. The business has grown and the addition is being used for the same purpose.

#2: *The use will be compatible with neighboring land uses.*

The 1993 special exception said the use was compatible with neighboring land uses and there have been no changes in neighboring uses. Agricultural uses and animals outdoors are allowed in a rural residential zone. The change of neighboring people is not relevant and their noise complaints are a reflection of unreasonable expectations. There has been no substantiation of the noise complaints; the barking dog nuisance law sets specific criteria. A copy of a memo from Jennifer Brown (April 13, 2012 incident) was again provided to the ZBA.

Dr. Lester has taken numerous steps –

- Maintains a “bark log”
- Spent \$30,000 to provide indoor kennels, which creates additional risk for dogs and staff indoors.
- Fence along outdoor area, which is only used when cleaning indoor kennels or in emergencies.
- Windows are downward facing; additional insulation has been installed.
- Willing to put additional fence along Bell/McBourne property line
- No longer boards unclaimed animals, except in an emergency.

#3: The property values in the zone and in the surrounding area will not be reduced by such a use.

The surrounding land values have not changed in 20+ years. There are no new uses in the area; the existing uses are the same. This criteria is a land-focused one, not person-focused. A letter was submitted from a realtor (BHHS Verani Realty) which indicates no negative impact on surrounding property values.

#4: There will be no nuisance or serious hazard to vehicles or pedestrians.

There has been no history of hazards and no complaints for 20+ years. The additional driveway was granted a DOT permit.

#5: Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

20 years of experience is more than adequate to judge that the addition was needed for proper operation and appropriate use. There is no impact on municipal services. There is a surveyed plan; septic and well facilities are sufficient. There is 1 additional examination room, indoor kennel space, conference room.

#6: The proposed use will comply with the minimum lot sizes, frontage and set back requirements.

The variance for the front setback was granted and there are no other setback issues.

#7: Existing road and highways are capable of carrying the additional traffic.

There is already substantial traffic on the state road. There is no additional impact on traffic or roads for this addition's use.

Attorney Boldt for the abutters, Frank McBourne and Scott Bell

Attorney Boldt stated that they were properly before the ZBA and before the Superior Court due to significant procedural issues on how the ZBA handled the first hearing and how it handled whether a condition of that approval had been fulfilled. This matter is properly within the ZBA jurisdiction and properly before the ZBA for a special exception, due to the size and location of the expansion. The original approval (1993) was for a home occupation within the bounds of the existing house; the kennels were added in 1994. Attorney Boldt reiterated that they are not trying to shut the doctor down; rather, they are trying to eliminate the outside noise.

Attorney Boldt read and presented to the ZBA 9 letters (Exhibits B through J) from friends and families explaining the noise and effects on the abutters.

Attorney Boldt's review of Special Exception Criteria

#1: *The specific site is an appropriate location for the intended use or structure.*

While the site was fine for the original use, it is not for the expansion. The abutters are requesting that: the outside kennels be removed; individual dogs be brought outside by an employee; windows be closed minimally outside of business hours; an engineered sound design be done that meets Humane Society requirements previously submitted; a site plan be filed with the Planning Board for their approval; a fence be erected inside the vegetation buffer at the 25 foot building setback line.

#4: There will be no nuisance or serious hazard to vehicles or pedestrians.

Addressing the issues of noise will therefore address the issue of nuisance as in the Town's barking dog nuisance.

#5: Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

See Criteria #1.

If these conditions are imposed, there is a reasonable use allowed for this expansion of non-conforming use that complies with your zoning ordinance; Section 6.3.1 states that the ZBA may impose additional standards.

#3: The property values in the zone and in the surrounding area will not be reduced by such a use.

A letter from a realtor (Exhibit A, Lamprey Real Estate) was supplied to the ZBA again: "... having an animal kenneling facility in a residential neighborhood has a negative impact on the value of the surrounding properties. . . ."

Attorney Boldt stated that if the ZBA grants this, the ZBA should do so with the conditions that they have asked for – they are reasonable, less onerous than technically the ordinance could allow, and is a good compromise.

Questions/Comments from the ZBA to Attorney Boldt

- Is it illegal to have outside kennels in Ashland? -- Attorney Boldt responded that it is illegal for a commercial operation to have kennels without a special exception. In this circumstance, you can't meet all the criteria to get the special exception.
- Is there confusion between "kennel" and "enclosure"? – Attorney Boldt responded that the dictionary defines "kennel" as "shelter for a dog or cat." The outside kennels and transmission of noise from the inside kennels is what the problem truly is.
- Are all shelters required to follow the sound standards from the Humane Society? -- Attorney Boldt stated that if the Humane Society is giving the money, that is what they require for compliance.

Attorney Daniel Muller for the applicant, Dr. Donald Lester

- Jurisdictional issue – If motion for rehearing is not filed within 30 days, there is no rehearing.
- The zoning ordinance does not indicate that a special exception is required if the size of the expansion is over a certain size. The use was allowed in 1993 and it is still the same use.
- The home occupation definition has not changed since 1993. There is no basis here for a home occupation.
- The abutters' demands for conditions are making running the business cost prohibitive.
- The location is a mixed use area, not purely residential.
- The outdoor area (kennels) is for temporary use, not for long-term use.
- Hiring sound engineers is very expensive, for which the abutters are welcome to pay.
- At the last meeting, the abutters said that the noise has improved. Some noise mitigation measures have already been taken.

- The abutters' realtor letter presupposes a new use, but the abutters knew what was next door. The abutters have unreasonable expectations.
- Dr. Lester is willing to put a fence within a reasonable distance of the property line, but it is not reasonable for him to give up a portion of his property.
- We are not interested in keeping the windows closed.
- Uses that are not specifically allowed require a special exception. The use that was granted was as a veterinary hospital, with no evidence of conditions. Kennels are incidental to a veterinary hospital.
- It is not reasonable to eliminate noise, but mitigation is reasonable and can be done.
- Dr. Lester noted that if the ZBA is going to take the abutters' family comments into account, he would like the opportunity to counter with other people's comments.

Questions/Comments from the ZBA to Attorney Muller

- Has the addition been in use? – Dr. Lester stated that the outdoor area has been used, but he has not used the indoor addition because he does not have an occupancy permit.
- How far back from the property line would the fence be? – Side setback is 25 feet, which would result in Dr. Lester giving up a sizeable part of his land.
- Could the fence around the outside kennels be enhanced? – Yes, the fence could be doubled or acoustical mats could be used.
- Hours of operation? – Dr. Lester stated that the hours are 8-5:30 on Monday through Friday, and 8 to 12 noon on Saturday; there are no evening hours anymore.
- If there were no outside kennels, where would the dogs go? – Dr. Lester said he would have to hire more staff if the dogs were escorted outside, especially if there were multiple dogs out at the same time.
- Attorney Muller noted that a noise abatement plan had been submitted to the Planning Board by prior Attorney Wood (2/3/2015) as an attachment (Dr. Lester, 12/18/2013).

Abutters' Comments

- Jeanette Stewart asked why the letters that Attorney Boldt presented from the abutters' friends and family were not available earlier? – Attorney Boldt noted that he requested the letters from friends and family after hearing public comments at the April hearing, to be made available for tonight's hearing. She has not heard barking dogs.

Public Comments

- Ann Lamson – She used to live in the trailer park and visits often. She has not heard the dogs.
- Tony Guyotte – He stated that when he was Dr. Lester's agent, he and Dr. Lester were not notified that the matter was being sent to the Court.
- Patty Heinz – She rented the upstairs apartment for 4 years and was not bothered by the barking dogs.
- Terry Dinger – Her father, who lives next door, has had no complaints, nor has she when she visits.
- Sherry Covell (sp?) -- She is a previous employee of Dr. Lester's. She asked why Mrs. Tucker doesn't vote last, because she is the tie breaker. Attorney Puffer and Chair Badger explained the process of appointing the alternate as a regular member for a meeting, which provides a 5-member ZBA. The presence of 5 voting members prevents the occurrence of a tie vote, but none of the members are considered tie-breakers.
- Brittany Paquette – She currently lives above the veterinary hospital and she rarely hears the dogs, even though her deck is over the kennels.

[Break]

Additional Comments from Attorney Boldt

- Attorney Boldt noted that there was a request for a re-hearing, through letters from his clients for stated reasons.
- Attorney Puffer noted that the comments go to some of the jurisdictional questions that have been raised. The ZBA is not going to decide the jurisdictional questions. They will look at the special exception criteria, re: Dr. Lester's application for a special exception. Both sides will reserve their jurisdictional and legal arguments if they ever end up in court.
- The noise has improved while under the microscope, but it will increase after special exception granted without conditions.
- The fence location is fine, with an express statement that Dr. Lester is not giving up the land on the abutters' side of the fence.
- Attorney Boldt and the abutters have not seen the specs of the mats. He requested the ZBA require an approved site plan with a condition that shows how the outside kennels will be enclosed by the mats to provide significant soundproofing.

Additional Comments from Attorney Muller

- The setback ordinance does not deal with the fence; it does deal with buildings. Dr. Lester is not interested in giving up 25 feet of his property.
- Additional expenses would be incurred by adding extra panels around the outside enclosure, erecting a fence close to the boundary, or hiring additional staff to walk the dogs.

The public hearing was closed at 8:56 pm.

Michelle Fistek proposed that the ZBA discuss what conditions will be placed on the special exception, before voting on the individual criteria for special exception. Some of the issues or proposals discussed included:

- Send the site plan to the Planning Board with a sound mitigation plan and evidence that it works.
- Going to the Planning Board next is not a condition; it is a requirement. The Planning Board will be using the same site plan (drawn up by Tony Randall), which will include the added driveway and outdoor run.
- Sound retardant fence – Does that mean acoustical mats around the dog run or a fence close to the boundary (350 feet)? Where is the best location for a fence, close to the boundary or close to the noise source?
- Do you hire an expert to recommend or verify the success of a sound mitigation plan? Or do the specifications of the materials provide sufficient evidence?
- Having windows closed is not a reasonable solution.

A motion was made (Tucker) to grant all seven criteria as being found to be true with the following conditions: that a fence is constructed with acoustical materials to be double the size that is shown on the site plan and verified by a professional. ZBA members discussed differing opinions regarding the location (boundary or outside kennels), height and length of the fence. **The motion did not receive a second and thus failed.**

Attorney Puffer recommended that the ZBA determine the conditions before voting on the special exception criteria. He noted that the Planning Board can impose stricter conditions, but they cannot relax the conditions. Continued discussion ensued regarding erecting a fence near or along the property boundary line or enhancing the fence shown on the site plan around the outside kennels.

A motion was made (Fistek) and seconded (Tucker) to consider the special exception criteria with the following conditions: (1) that the site plan review be taken to the Planning Board, and (2) that a

sound mitigation plan to be submitted and approved using certified sound barrier materials on the existing fence. The roll call vote was unanimous (5-0) in favor of the motion.

A motion was made (Tucker) and seconded (Fistek) to consider all the Special Exception Criteria to be true with the previously agreed conditions. The roll call vote was unanimous (5-0) in favor of the motion.

The notice of decision granting the special exception with conditions will be prepared.

The meeting was adjourned at 9:54 pm.

Submitted by Mardean Badger