

*These minutes were approved at the October 13, 2009 meeting.*

**Durham Zoning Board of Adjustment  
Monday September 8, 2009  
Durham Town Hall - Council Chambers  
MINUTES**

**MEMBERS PRESENT:** Chair Jay Gooze; Vice Chair Robbi Woodburn; Secretary Jerry Gottsacker; Ruth Davis; Carden Welsh; Chris Mulligan

**MEMBERS ABSENT:** Edmund Harvey; Sean Starkey

**OTHERS PRESENT** Tom Johnson, Director of Zoning, Building Codes and Health; Victoria Parmele, Minutes taker

Mr. Mulligan was introduced as the new alternate to the Zoning Board of Adjustment.

**I. Approval of Agenda**

*Jerry Gottsacker MOVED to accept the Agenda as presented. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.*

Chair Gooze noted the ZBA's policy that alternates would be able to be at the table, but would not be part of the discussion in that it might unduly influence the Board.

**II. Public Hearings**

- A. PUBLIC HEARING** on a petition submitted by Michael Moriarity, Heirs of Bertha Moriarity, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to install a septic system within the frontyard and sideyard setbacks. The property involved is shown on Tax Map 15, Lot 7-1, is located at 4 Bennett Road, and is in the Rural Zoning District.

Mr. Moriarity spoke before the Board. He said the proposed system was taking the place of an outdated, failing system that was not on the property, and was on Nature Conservancy land that he had sold to the organization the previous spring. He said the system would coincide with plumbing in his house, and also said there was ledge on his property that limited where the system could be placed.

Chair Gooze noted the importance of understanding how the Zoning criteria were met with this application.

Ms. Davis spoke and pointed out that a new well was proposed, and asked where the existing dug well was located.

Mr. Moriarity said it was some ways into the Nature Conservancy land. He said there was a pump house about half way between that well and where the farmhouse was. He said

ultimately the existing well would be pulled off, but would be used for the time being, until the new well was put in. He noted that he had to make sure he had a septic system that could handle the new well.

There was discussion by Board members that they didn't have the full drawing of the property in the packet they'd received.

Mr. Welsh asked why the septic system couldn't be moved back, and Mr. Moriarity explained that it was almost all ledge.

Jamie Long, NHSC Environmental, said his company had designed the new system. He said the old system was on the conservation land granted by the family, and said although there was an easement to allow a new system to be put back on that land, the family was trying to put it on what would be Mr. Moriarity's property.

He said they had received State approval for the new septic system in July, but needed the variance because it was too close to the new property lines. He said they were trying to keep everything on the property that was being conveyed to Mr. Moriarity. He also said the proposed location was the only place it would fit on that property.

Ms. Woodburn noted the existing easement access going diagonally across the property to the right of the house, and pointed out an area of land beyond that. She said she didn't know the nature of that land, and also said she understood they wanted to go with where the existing plumbing on the house was.

Mr. Moriarity said an issue was that the area Ms. Woodburn had described was a working yard, and was one of the access points for the cleaning out of the power line area by the power company.

Ms. Woodburn asked what the nature of this piece of land was.

Mr. Moriarity said it was largely ledge. He also noted that the existing well was on the far side of the power lines.

Chair Gooze asked what the purpose was of taking the septic system off of the Nature Conservancy land.

Mr. Long said it just made everything cleaner so there would be no possible issues with the Nature Conservancy later on. He said he and the applicant felt the system would fit better in the proposed location.

Ms. Woodburn said the reason the Board was pursuing this was that the regulations said the variance was allowed if there was no feasible alternative. She said looking at the entire property, there was this other piece of land beyond the easement access, but she noted that they didn't know anything about this piece of land.

Mr. Moriarity said it became an issue of the ledge, which came right down into that area.

Mr. Long said if they couldn't put the system where they were proposing to put it, they would put it back on the Nature Conservancy land.

Chair Gooze asked what could be envisioned in the future that would be a problem, if the system was put on the Nature Conservancy land.

Mr. Long said it probably wouldn't be a problem, but said it was felt it would fit better on Mr. Moriarity's property. He noted that if the property line drawn as part of the conservation easement had been moved over 15 to 20 feet, they wouldn't even be having this discussion.

Mr. Welsh asked why they were so sure a septic system wouldn't work in the area Ms. Woodburn had suggested.

Mr. Long said they hadn't said it wouldn't work, but said Mr. Moriarity had said the proposed location would work better with the existing plumbing, and also had said it wasn't good to have power company equipment driving over the leach field.

Ms. Woodburn said the leach field in theory could go on the other side, and it would be the sewer pipe they would be driving over.

Mr. Long said he hadn't mapped the soils on the entire site, and there was discussion that it wasn't known yet what the soils were there.

Chair Gooze asked if there were any members of the public who wished to speak for or against the application. There was no response.

Mr. Long provided a copy of the Nature Conservancy's notice of grant agreement. to the Board.

Mr. Welsh asked where the abutters lived in relation to the property.

Mr. Moriarity said the Beaudette farm was across the street from his house on Bennett Road.

Mr. Gottsacker asked when the land transfer with the Nature Conservancy had taken place, and was told this had happened the previous year.

Chair Gooze read out loud the Nature Conservancy notice of grant agreement.

Ms. Woodburn received clarification that the existing septic system on the Nature Conservancy field was essentially an old pit, and asked if there were wetlands in the area.

Ms. Davis discussed the fact that if a new system was put in where the old system now

was, test pits would have to be dug, and any wetlands would have to be mapped.

Mr. Long said Mr. Moriarity would pretty much have to start from scratch, and also said they felt that it was neater to put the system on Mr. Moriarity's property. He stated again that they probably would have to move the property line over a little more if they'd known this was going to be an issue. He said they were putting in a better system to meet State regulations, and local regulations other than the setback requirements.

Ms. Davis asked if the cost of putting in plumbing would be prohibitive if the system was placed beyond the easement access area.

Mr. Long said the applicant would probably not go that route, and would put the system on Nature Conservancy land.

Ms. Davis noted that the ZBA was tasked with determining if there was no feasible alternative in terms of putting the system on Mr. Moriarity's property.

Mr. Long said this was an old house that was slowly being renovated, and said they were trying to keep the system with the existing plumbing.

Ms. Davis asked if putting this system somewhere else on Mr. Moriarity's property would be very expensive, and there was discussion with Mr. Long.

Ms. Woodburn said the Board had to be assured that there was no feasible alternative on the applicant's property that was within the setbacks. She said the ledge on the property could be blasted, but this was not feasible. She said the plumbing could be reworked but this might be more expensive than working with the existing plumbing. She noted that there was no test pit information to indicate if the soils in that area beyond the easement access were viable.

Mr. Long said if this application was denied, the applicant would put the system on the Nature Conservancy property because it would be the cheaper alternative.

Mr. Gottsacker said he didn't see the relevance of these other possible positions for the septic system because either the variance was granted and the system was put in the proposed location, or it was denied and the system was put on the Nature Conservancy property.

***Jerry Gottsacker MOVED to close the public hearing. Robbi Woodburn SECONDED the motion.***

Mr. Welsh asked if the house was located within the setback, and Mr. Johnson said the house was 23 ft off the front setback.

***The motion PASSED unanimously 5-0.***

Chair Gooze said the Board tried to be really fair and work with the variance criteria. He said one of the criteria involved determining if there was another feasible alternative to the proposed location so the variance wasn't needed.

He said in this instance, there was another alternative, But he said the deed indicated that it was not a "no brainer" that Mr. Moriarity would get approval from the Nature Conservancy for putting the system on its property, and that this request could be turned down. He said it was important to keep this in mind in thinking about the variance criteria.

There was discussion on whether approving the variance would decrease the value of surrounding properties. The public hearing was reopened to discuss with Mr. Moriarity whether the new septic system would be visible to nearby properties.

Mr. Johnson noted that the Beaudette farmhouse was way down Bennett Road, and was about to become conservation land.

Chair Gooze closed the public hearing.

Board members agreed that approving the variance would not decrease the value of surrounding properties.

Regarding the public interest criterion, Mr. Gottsacker said he believed this criteria was met because the Nature Conservancy wanted the system off its property, and this was clear in the easement. He also said the proposed system would be new as compared to the old one, and would be on the applicant's property.

Other Board members agreed with this.

Regarding the hardship criteria for an area variance, Chair Gooze said the factors to consider were that the Nature Conservancy would like the system off their property; that there was ledge; and that the plumbing hookup to the house would have to be changed if the system was placed in the other location the Board had discussed. He said he felt these were the special conditions of the property, and that the first criterion for an area variance was met.

Regarding the second area variance criterion, which considered whether the benefits sought by the applicant could be achieved by some other method that was reasonably feasible for him to pursue, Chair Gooze said there was no guarantee that the Nature Conservancy would allow the system to be put on its property. He also said saying it could be put someplace else on the applicant's property would mean that it would cost more money.

Ms. Davis noted that the Nature Conservancy might say that the applicant should explore other parts of his property before it would consider allowing the system on their property. There was discussion that this would be an expense to the applicant because of site issues

and having to change the plumbing.

Ms. Davis said to her, all the other options, whether exploring other areas of the applicant's site, or doing investigative work on the Nature Conservancy site would result in an undue financial burden to the applicant. She said she therefore felt this hardship criterion was met.

Mr. Gottsacker said he thought the applicant's argument that as a property owner he wanted the septic system on his own property rather than on someone else's was completely reasonable.

Ms. Woodburn agreed that the hardship criterion was met.

Chair Gooze said if the Nature Conservancy easement language said that no matter what happened the applicant could put the system on its property, he would feel a bit differently about this.

Mr. Gottsacker said an easement was always subject to legal argument down the road, so if the septic system was on the applicant's property, that issue went away.

Mr. Welsh said the Board could say the other side of the property should be tested, but he said there was really no reason to ask for this. He said the system wouldn't be visible to abutting properties, and said there would be a cost to test the soils, and to run a pipe over the ledge and under the ground so power company equipment wouldn't wreck it. He said he thought the ZBA could make the judgment that the variance criterion was met.

Chair Gooze said that concerning the spirit and intent of the Ordinance criterion, the application said the proposal was to replace an outdated system with one that met today's standards, and would not be a detriment to the frontyard or the sideyard. He said this went with how far away from things they were, and said the septic system was protected in this area. He said if the lay of the land were different, this criterion might not be met.

Chair Gooze said he believed the substantial justice criterion went along with the spirit and intent of the Ordinance, and was met with this application.

He asked if any Board members thought any of the variance criteria were not met, and there was no response.

***Jerry Gottsacker MOVED to approve the Application for Variance from Article XII, Section 175-54 of the Zoning Ordinance to install a septic system within the frontyard and sideyard setbacks of the property shown on Tax Map 15, Lot 7-1, located at 4 Bennett Road in the Rural Zoning District as presented in the plans at the meeting. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0.***

### **III. Approval of Minutes**

July 28, 2009

Page 6, last two paragraphs should be separated with a space

Page 8, bottom paragraph should be separated with a space

Page 13, 2<sup>nd</sup> paragraph from bottom should be separated with a space

Also, that paragraph should read "...would somehow be good for the stream."

***Jerry Gottsacker MOVED to approve the July 28, 2009 Minutes as amended. Carden Welsh SECONDED the motion, and it PASSED 4-0-1, with Robbi Woodburn abstaining because of her absence from the meeting.***

#### **IV. Other Business**

##### **A.**

Chair Gooze noted that the Municipal Law Lecture series would take place at various locations over the next few months.

There was discussion about proposed State legislation that would have combined the area and use variance criteria, and that this might or might not be covered in the lecture series. Mr. Johnson said any bills pending would probably be covered at the law lecture series in Exeter on October 14<sup>th</sup>.

It was also noted that the NH Office of Energy and Planning fall conference would take place on October 17<sup>th</sup>, and would be held at Loon Mountain.

Chair Gooze said the Seacoast Repertory Theatre decision was being appealed in court, and had been filed.

He also said he was pretty sure there would be a request for rehearing on the application before the ZBA the previous month regarding having multiple residences on the property. There was detailed discussion on the timing for this.

##### **B. Next Regular Meeting of the Board: October 13, 2009**

#### **V. Adjournment**

***Carden Welsh MOVED to adjourn the meeting. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.***

Victoria Parmele, Minutes taker

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Jerry Gottsacker, Secretary