

TOWN OF TEMPLE, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT
MINUTES OF PUBLIC HEARING
April 30, 2015

Board members present: John Pierce, Honey Hastings, Tim Winship (alternate), Dave Martz, and Jenny Houston
Also present were board member Mary Beth Ayvazian and alternate John Kieley, neither of whom sat on this case.

Attorneys present: Silas Little, Esq. representing the Mazza family; William Drescher, Esq. representing the Temple Board of Selectmen (BOS); and Biron Bedard, Esq. representing the Temple Zoning Board of Adjustment (ZBA).

The meeting was called to order by Chairman Pierce at 7:11 p.m.

Pierce announced this was a continuation of a Public Hearing on two applications for a Variance and two applications for an Equitable Waiver, all from Herta S. Mazza. The original hearing was held on Thursday, January 29, 2015, reconvened on Thursday, March 5, 2015, and reconvened on Thursday, April 2, 2015.

Pierce asked for those who wished to provide new points in favor of the applications to speak.

Atty. Little: Mentioned one parcel with multiple units as having a common septic system and well.

Pierce: Clarified the parcel being talked about is Lot 8-40 and involved trailers known as T-3 and T-4.

Paul Jordan: During the family's investigation a couple of things were discovered:

- 1) The 1989 Town Report list of assessed properties showed an undesignated (zero) value on a lot approved by the Board of Selectmen (BOS), which should never have happened since the trailers had been approved by the BOS, and the replacement (trailer) was fully approved.
- 2) The 2001 Town Report featured a paragraph in the Selectmen's Report that indicated the town's involvement with three lawsuits had cost the town a lot of time and money.

Jordan wondered why the BOS did this now, saying the family had never been asked if the original trailers were approved. He indicated this recent action was also costing everyone too much money, and provided an estimated breakdown of the town's legal expenses in 2001-2002, in 2013, and to date in 2015. Jordan also questioned if the BOS were to make a decision that in the future the issue could come back and open up again, as for 28 years things the trailers had been fully approved by the BOS. Jordan stated he thinks a waiver is appropriate and the ZBA has that authority in this case.

Pierce: The ZBA can only do what statute allows.

Pierce asked if anyone else wished to speak in support. There was no further response.

Pierce asked if anyone else wished to speak in opposition.

Atty. Drescher: Was never a permitted use, money aside.

Pierce: It appears time for the board to deliberate – close the hearing?

Atty. Drescher: Point of order – if the board should vote to close the hearing then I will leave. The board could re-open it later, but I would need to be contacted and called back.

Atty. Little: Agreed, and would also leave given that situation.

Atty. Bedard: If the meeting is recessed without date and time certain, the board would have to re-notice.

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Houston: Motion to close the hearing, seconded by Martz. The vote was unanimously in favor. Attys. Drescher and Little both departed.

Pierce requested the board begin deliberation and first consider a variance. Atty. Little's submission titled "Application for a Variance" was reviewed one point at a time.

Criteria #1 pertaining to "not contrary to the public interest":

Martz: This outside density requirements.

Martz: The history of being in place since 1998 has relevance?

Hastings: A case from last fall indicated we can factor in fairness arguments (not estoppel).

Martz: A third trailer shows as being partly on the property.

Hastings: That is Chet Mazza's trailer and needs a lot line adjustment, which the family has indicated they would work on.

Martz: It would be contrary to public interest with a partial trailer on the lot. If the board approved this, would need to be conditional upon a lot line adjustment being made. That trailer – Chet Mazza's – would have to meet requirements. Hastings quoted brief text from past minutes.

Martz: Would like that contingency.

Hastings: Dave (Martz) feels they (applicant) should have to do if variance is granted.

Atty. Bedard: The board could say they (applicant) would need to make that adjustment.

Martz: Suggest "within six months from date of order."

Atty. Bedard: Suggest, "After appeal period expires."

Winship: That would make sense.

Pierce: Asked Winship if he felt granting a variance would be contrary to public interest?

Winship: No.

Pierce: I would like to save this point for last and go on to others, but also skip #2 regarding "spirit of the ordinance".

Criteria #3 pertaining to "substantial justice":

Hastings: Consider the time period. They also had the benefit of rent money during that time.

Pierce: Atty. Drescher said the applicants have another way to resolve the issue via subdivision.

Martz: Could we grant the variance based on fact of no further subdivision on property?

Hastings: We should do properties one at a time.

Martz: Can we put in provision they must resolve uses?

Hastings: I suggest discussing the factors, then with other property we could say "same as...".

Board members agreed to first discuss factors for Lot 8-40.

Hastings: Regarding substantial justice – the family thought everything was okay, then 30 years later... Other things had been brought to the town and approved (porches, etc.).

Pierce: No substantial harm was done by complying with ordinance.

Martz: Property would continue, but could not subdivide.

Atty. Bedard: There was an offer Atty. Little made – no expansion or replacement or subdivision.

Hastings: We can find the factor is met if conditions are put in.

Houston: What if land was sold?

Pierce: Conditions go with the land.

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Hastings: The trailers were not new when put in.

Martz: The case of the 1970 trailer.

Pierce: One idea is on the table.

Hastings: Does it meet substantial justice?

Pierce: Atty. Drescher said the family should have known better. Not a strong point for 1980's, but maybe for 2000.

Hastings: The family seems to be close. The board cannot say that because one child did something that other family members should know – cannot extend knowledge.

Pierce: The BOS does not dispute earlier BOS actions.

Winship: Over and over again the family went to the BOS and was granted.

Pierce: asked for a vote on meeting the criteria for #3 regarding “substantial justice”.

Martz: Yes.

Winship: Yes.

Houston: Yes.

Hastings: Yes, with conditions.

Pierce: Yes, with conditions.

Results of vote found all five members in favor.

Criteria #4 pertaining to “values of surrounding properties would not be diminished”:

Hastings: I would like to see trees along Josiah Lane.

Martz: No trees, as adding would be a hardship – just a suggestion.

Hastings: Approval is contingent upon this (trees) if variance is approved. Could relate to value of surrounding properties. Earlier when Atty. Little lived in Temple and was on the ZBA, with the Temple Cabins matter - trees were an issue.

Martz: Trees are not an issue if no variance granted.

Hastings: No abatements were ever requested, but maybe in the future perhaps some trees would help.

Houston: Trying to make a small hardship case.

Winship: I looked at map to determine the area that would be affected by trees.

Martz: Guessing 300 feet along Josiah Lane.

Board members reviewed the map and established the area would be approximately 350 feet.

Pierce: Value not diminished subject to putting up trees.

Winship: Seems within a narrow question of diminished property values that a screen would do that – lessen diminishment of value.

Pierce asked Winship if he would be in favor of a screen.

Winship: Yes.

Martz: T-5 has a trailer on it, whether a variance is granted or not. Could the Planning Board (PB) do something? That trailer (Chet Mazza's) will still be visible. As far as diminished values, that would be a factor.

Hastings: There are several trees on that property already.

Martz: How many trees are needed? If the board does approve a variance, can decide on conditions and then have a final up or down vote on the conditions.

Pierce: Suggest the board come to agreement and then work with Atty. Bedard to create a draft document. We need to go through all five criteria first.

Martz: Granting a variance won't change (diminish) surrounding property values.

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Winship: I agree. After 30 years aesthetics don't bother me driving by.

Pierce: Asked the board for their consensus on meeting Criteria #4. If a variance is granted, surrounding property values would not diminish?

Martz: Agree.

Winship: Agree.

Houston: I think the properties are diminished because of the history of this, but can't say they would be further diminished by the granting of a variance with conditions. The conditions may improve the effect on the neighbors. I'm fine with this with the conditions we've discussed.

Hastings: Agree, but trees are not the only answer. Perhaps what Atty. Little had suggested could limit the impact on surroundings.

Pierce: Also agree.

Pierce: All five members agree, but with conditions.

Criteria #5 pertaining to "unnecessary hardship":

Pierce: Atty. Little makes an estoppel argument. Atty. Drescher suggests the applicant subdivide – cost could be a hardship. The ZBA cannot consider estoppel.

Martz: Would not be a simple subdivision due to acreage, road frontage, lot square, etc.

Houston: If subdivided, must move units to comply. If units were not expanded or replaced, or a condition placed of cannot turn into permanent dwellings, in the future would not want to see double dwellings as there are now.

Martz: Could remove trailer(s) and the need for the variance would go away.

Hastings: Variance allows two trailers – they could have just one.

Martz: Need to clarify language regarding deck or porch in #5.

Atty. Bedard: The problem is New Hampshire is a footprint state, and once (dwellings) are there you can do what you want. Once you establish a footprint, you could be entitled to make a deck, which could become a porch, which could become a bedroom, etc.

Martz: Could replace existing deck?

Atty. Bedard: They can replace what deck is there.

Martz: So they must live within the existing footprint.

Pierce: Asked the board for their consensus on meeting Criteria #5 pertaining to "unnecessary hardship".

Winship: Yes, in light of the history.

Martz: Agree.

Hastings: Agree.

Houston: Agree.

Pierce: Agree.

Pierce: The vote is all five in favor.

Hastings: Discussion of equitable factor = fairness. Decision not moral, but fair.

Houston: The BOS kept perpetuating this situation and did not look at it closely because it was believed to be compliant. It was reasonable for the Mazza family to believe everything was okay since the BOS signed off. But, the family did get income and use of the land. Was not a hardship but favorable all these years. Either course would be a substantial amount of money to go forward (subdivision vs. lawyer).

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Hastings: Issue of shared systems (well and septic).

Martz: Can have a shared septic on two properties with an easement. Could become a problem if Mazza owns one property and someone else owns the other in regard to shared costs of well and septic.

Hastings: Similar to a common driveway - legal but not practical.

Atty. Bedard: Can share a septic with design involved for each lot. They could ask for a waiver, and would have to go to the Planning Board.

Pierce: Asked Houston if she was equivocal on this point.

Houston: The family put in effort and money a certain way, and thought everything was okay. Now it would be a hardship - balance is on the hardship score.

Hastings: In regard to the trailers and changing decks, etc. - one septic system was approved. Discussion followed about current rules for septic systems.

Pierce: Read law on unnecessary hardship language and thinks Atty. Little makes a good argument regarding estoppel, but ZBA cannot consider estoppel. What are differences?

Hastings: Septic and wells approved over time.

Pierce: They have property and residents, but are not compliant.

Houston: If just "bare ground" there would be no way to get a variance today. If there, aren't they grandfathered in? They have been there a long time.

Pierce: Is it special? Different from other properties? Special situation?

Houston: Two units sharing one septic make it special.

Pierce reiterated that all members are affirmative on meeting unnecessary hardship.

Pierce: Going back now to points #1 and #2:

Criteria #2 pertaining to "the spirit of the ordinance":

Martz: Spirit of ordinance is met. There are two trailers on 40 acres.

Houston: If they should subdivide, would need to fix it.

Hastings: They are residential homes and the use is appropriate. Not a business, so use and density are within the spirit of the ordinance.

Houston: With 40 acres, agrees it meets spirit of the ordinance.

Martz: Agrees, with conditions.

Winship: Agrees, with conditions.

Hastings: Agrees, with conditions. The public interest is better off with a variance with conditions rather than a lawsuit with no conditions.

Pierce: Agreed. Atty. Drescher had mentioned argument of court – without conditions, could have more houses.

Pierce: Agrees.

Result of vote was all five in favor.

Criteria #1 pertaining to "not contrary to the public interest":

No further discussion.

All five members voted in favor.

Pierce: These voting results were for Lot 8-40.

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Martz: Conditions are:

- Cannot replace trailers
- Stay within footprint – no increase in living space
- If property is subdivided they must bring everything up to current zoning
- Trailer T-5 will be made whole with a lot line adjustment, or by moving it to meet zoning
- Trees (?)

Hastings: Atty. Little mentioned no addition garage or shed can be erected.

Martz: Can and should be encouraged to maintain the property? A unit may be removed due to age.

Houston: Maintain or must remove?

Atty. Bedard: That is a slippery slope. The owners would have to deal with life safety code, health code, etc. (Story about a previous case involving an unkempt house that backfired.)

Houston: Atty. Little said the family can repair the trailers but not replace them.

Atty. Bedard: When truly not useful any longer, it goes away.

Hastings: We could say if not meeting code, repair or remove.

Houston: Fair to address because of diminished property values to others.

Winship: These units are meant to be lived in.

Hastings: Give them a time period to meet.

Atty. Bedard: It goes to code. Talked about meeting requirements, updating or moving.

Martz: No trees?

Hastings: Can compromise when voting.

Board members then discussed factors for Lot 8-53.

Pierce: T-1 is gone, but T-2 is non-compliant. Is replacement of T-1 allowed? Atty. Little says two trailers on each property.

Martz and Winship: The second trailer is gone.

Houston: Regarding Lot 8-40 – disregard consideration of an Equitable Waiver?

Pierce: That is a moot point now.

Pierce: The original application says one mobile home on Lot 8-53. There were two, but one has been removed. Non-compliance is due to the houses and auto facility.

Hastings: Start with factor #1?

Pierce: Begin with material differences between the two applications? Comes down to multiple dwellings on each lot.

Martz: Do we know about wells and septic on this lot?

Pierce: Not much has been said about that.

Martz: May not need the 100 foot setback for the business.

Hastings: That would be grandfathered. There is the same argument about lot size – all jammed up together, but consider the size of the lot.

Houston: #1 and #2 are the same as for Lot 8-40, with caveat of a change in use – the owners would need to subdivide.

Pierce: What we need to make right is the trailer, not the other dwellings.

Atty. Bedard: Could compel with conditions.

Pierce: This is complicated due to a lack of knowledge of utilities, and got there the same way.

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Houston: It doesn't matter how – the existing condition is unique.

Martz: Any expansion would not be further non-conforming. This lot is less obvious.

Hastings: Regarding values on surrounding properties, there would be less effect. All surrounding property is owned by the family. There is visual effect on Lot 8-40 but not on Lot 8-53. Contrast is less of a problem.

Martz: No effect on surrounding properties.

Pierce: Hardship is equal?

Martz: We don't know enough

Hastings: We could get septic information but we have no time to spend looking at each one.

Houston: We don't need to worry about anything regarding the septic but where it is right now.

Atty. Bedard: Lot 8-53 is more unique because of other non-conformities on it. Lot 8-40 without the trailers on it is a fine lot. Lot 8-53 even without the trailer has other areas i.e. compound configuration and rentals that are physically more unique.

Martz: There are many unique situations with Lot 8-53.

Hastings: There are more unique situations than Lot 8-40.

Martz: The trailer could be subdivided off.

Pierce: Run down each variance criteria for Lot 8-53.

Criteria #1 pertaining to "not contrary to the public interest":

Winship: Agree, with conditions.

Martz: Agree, with conditions.

Houston: Agree, with conditions.

Pierce: Agree, with conditions.

Hastings: Agree with conditions.

Vote was unanimous.

Criteria #2 pertaining to "the spirit of the ordinance":

Winship: Agree, with conditions.

Martz: Agree, with conditions.

Houston: Agree, with conditions.

Pierce: Agree, with conditions.

Hastings: Agree with conditions.

Vote was unanimous.

Criteria #3 pertaining to "substantial justice":

Winship: Agree.

Martz: Agree.

Houston: Agree.

Pierce: Agree.

Hastings: Agree.

Vote was unanimous.

Criteria #4 pertaining to "values of surrounding properties would not be diminished":

Winship: Agree.

Martz: Agree.

Houston: Agree, with conditions.

Pierce: Agree.

Hastings: Agree, with conditions.

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Vote was unanimous.

Criteria #5 pertaining to “unnecessary hardship”:

Hastings: Agree.

Pierce: Agree.

Houston: Agree.

Martz: Agree, reluctantly.

Winship: Agree.

Vote was unanimous.

Hastings: Residential, rentals and business in compact area is unique.

Pierce: There is no need to discuss an Equitable Waiver.

Atty. Bedard: Same conditions as on Lot 8-40.

Pierce: Have a condition for trees on Lot 8-53, actually both properties?

Atty. Bedard: Could, but I would like to draft an order before board votes on this.

Houston: Recess until next meeting?

There was discussion about the date of the next meeting, with agreement to meet on Thursday, May 14, 2015.

There will be a non-public session with counsel at 5:30 p.m., followed by a public session at 6:00 p.m.

Hastings asked Bedard to confirm the board will be meeting with him and then hold a public meeting to vote.

Atty. Bedard: I will provide the document beforehand for review.

Pierce: The board will resume deliberation and voting then. Afterward we can review minutes from tonight’s meeting plus four other meetings.

Motion to adjourn by Hastings, seconded by Martz, and voted unanimously in favor.

Meeting was adjourned at 8:53 p.m.

Minutes submitted by Betsy Perry