

**TOWN OF NORTHFIELD  
ZONING BOARD OF ADJUSTMENT  
September 24, 2012**

**MINUTES**

Members present: Phil Cain, Polly Fife, Brian Brown, Keith Murray, Kent Finemore, Dave Liberatore and Steve Bluhm. Also present: Gerald Coogan, LRPC.

**Minutes:** Keith Murray moved, seconded by Dave Liberatore to approve the minutes of August 27, 2012 as read. Motion passed.

**Daniel D. Durgin: Continuation of rehearing of an application for a variance from Article 7 Table 2 of the Northfield Zoning Ordinance to allow construction of a 32'x30' garage and single family home on a lot that does not have the required road frontage on Ledge Road (Tax Map R6 Lot 15B-1) in the R1 zone.** Steve Bluhm recused himself for this case. Chairman Finemore reviewed the status of this application to date. The original application was heard in April with a variance granted at the June, 2012 meeting. The Board of Selectmen requested a rehearing which was granted because additional information relative to the status of the road and this property became available. The rehearing was continued from the August 27 meeting in order to confer with the Town's Attorney. Chairman Finemore informed members of the board that Atty Maher replied that his opinion as stated in his May 7, 2012 letter remains the same but he did send a short letter with two court cases of interest. Polly Fife stated that the discussion about the status of the road has clarified that this is a discontinued road and should be treated as such. The decision before the board is really whether to allow building on a back lot with no frontage on a road. Dave Liberatore reminded the Board that the original decision to approve the variance was based upon the applicant stating that the property was purchased in 1938 before the road was discontinued, but deeds show it purchased in the 50's. Phil Cain asked why the Selectmen requested the rehearing. Glenn Smith responded that the Selectmen thought that once the status of the road was clarified, the ZBA would change its decision as the only access is over the land of an abutter and therefore this is a back lot that does not meet the requirements for allowing a building permit to be issued.

Keith Murray asked if it is the town's position that this was a complete discontinuance and if so, was there court permission for this to happen. Glenn Smith replied that the court's permission was not required because Ledge Road was laid out by the Selectmen in the 1700's. Keith Murray quoted from the book "Hard Road to Travel" that prior to 1945 the law required permission from the court. Glenn Smith replied that it is Atty Scott McGuffin's and Dave Krause's opinion that this law did not apply to roads that were laid out by the Selectmen. Keith Murray stated that he would like to see that law and added that the Board has struggled with fairness. Whether or not the town has made errors in the past by allowing the subdivision to occur in the 1970's, the passing of the Zoning Ordinance effectively landlocked Mr. Durgin's land. Polly Fife reminded the Board that the original land purchased by the Durgin family did have frontage on the

open portion of Ledge Road but was subdivided, leaving this portion without frontage. Dan Durgin clarified that this land was subdivided in the 50's and although he can't find the deed for when his grandfather purchased the land in 1938, the first deed to the Durgin family is in 1943.

Public hearing: Jason Durgin stated that the town allowed a subdivision in 1978 on the discontinued portion of the road and there is now a home right across the road from the Durgin property. He added that this lot should not be treated differently than the lot across the road. Public hearing closed.

Polly Fife expressed that her biggest concern is that the Selectboard is expecting a decision of the status of the road by the Board of Adjustment and it is not theirs to make. The road needs to be clarified as this has been a muddy issue for years. Keith Murray agreed that he is not comfortable making a decision on the status of the road. Kent Finemore summed up the situation to date saying that the Selectmen provided information the ZBA did not have at the first meeting. The ZBA had tried to deal with the road and whether this was a back lot. Atty Maher says that the road was discontinued and therefore this is a back lot. Whether the town was errant in approving the 1973 subdivision doesn't require that the town approve this application. Kent added that the Board is not being asked to determine the status of the road, but rather to reconsider its decision to grant a variance to allow a building permit to be issued on a back lot.

Polly Fife replied that the issue is whether there is legal access to this property and the Board has seen no evidence of legal access. The Board cannot be sure that it is legally accessed and it is clearly not a 50' right of way. She added that the ZBA is not the one to make the decision on access to the land and this is definitely a different situation from other back lots. Kent Finemore referred to Atty Maher's letter which indicated that the road became a private right of way for all abutters when it was discontinued. The Attorneys letter also indicates that all property owners would have access to their lots, therefore Mr. Durgin has access to the lot, but no frontage on a road. Polly Fife replied that the town is not convinced the Mr. Durgin has the right to cross Mr. Wilson's property. Glenn Smith responded that based upon the Attorneys letter, he believes Mr. Durgin has access over property of Mr. Wilson, but that does that allow him to build. Polly Fife commented that she would want to be sure the ZBA does not make a decision that will cause more problems down the road, but that the access issue seems to be clarified.

Public hearing: Dave Krause stated that he believes there is no question that Mr. Durgin has access of the Wilson property and that all property owners have the same access. Dan Durgin stated that his property is not different from the one across the road which has a home on it. He added that the deeds for properties on that road read "to the edge of the highway". Jason Durgin asked if it would be easier to consider this as a private road in order to grant a building permit. He added that he recently was granted a building permit on Cross Mill Extension which is a private road. Dave Liberatore responded that the difference is that Cross Mill Extension is a private road, but Ledge Road is a discontinued road where half of the road goes back to each abutter. Public hearing closed.

Kent Finemore commented that he had always understood that the land reverts to the abutters when a road is discontinued, but Atty Maher's letter says that it becomes a private road. Keith Murray stated that this is a case where substantial justice would be done. He understands the concerns about developing back land, but this is a unique case. Polly Fife asked who would ultimately settle the dispute over the width of the road, maintenance, etc. since Mr. Wilson objects to allowing Mr. Durgin access to his property. It was agreed that Mr. Wilson and Mr. Durgin would be responsible for any agreement. Polly Fife asked if the Board is prepared to declare that Mr. Durgin has the right to access his property, adding that it will be essential to distinguish this from other back lots, so that it is clear we are not intending to do the same for other back lots.

Dave Liberatore asked why this property is unique since it was purchased in 1943 after the road was discontinued. Keith Murray responded that no one in 1941 would expect that they couldn't build on that lot because of the discontinuance and in fact buildings have been allowed with the road being treated as Class VI for years.

The criteria for granting a variance were reviewed as follows:

(1) The variance will not be contrary to the public interest: Dave Liberatore stated that this application does not threaten the health and general welfare of the public and Polly Fife added "as long as there is safe access".

(2) The spirit of the Northfield Zoning Ordinance is observed: Dave Liberatore stated that the spirit of the ordinance is not to allow building on back lots and Keith Murray replied that this application will not cause overcrowding.

(3) Substantial justice is done: It was agreed that granting this variance would give substantial justice.

(4) The values of surrounding properties are not diminished: granting this variance would not diminish property values.

(5) Literal enforcement of the provisions of the Northfield Zoning Ordinance would result in an unnecessary hardship.

(A) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property: Keith Murray agreed that there is a hardship because Mr. Durgin would not be able to build on this lot. Kent Finemore replied that this is true of all back lots. Keith responded that this is a unique situation.

(ii) The proposed use is a reasonable one: It is a reasonable use.

Keith Murray moved, seconded by Phil Cain that based upon the unique circumstances of this application the Board grant a variance from Article 7 Table 2 of the Northfield Zoning Ordinance to allow construction of a 32'x30' garage and single family home on a lot that does not have the required road frontage on Ledge Road (Tax Map R6 Lot 15B-1) in the R1 zone with the condition that the applicant sign a waiver of liability releasing the town from any liability resulting from inability to access the property with emergency

vehicles. Polly Fife asked that the minutes reflect that the unique hardship of this property is the timing of zoning put into place that impacted the use of this land after it was purchased by the applicant and the nature of Ledge Road lot itself being a unique property with the other subdivided and developed property. Kent Finemore commented that while he is sensitive to this being a family property and all the above discussion he still thinks it is bad to approve building on a back lot. The motion passed 3-1.

**Kurt & Ruth Marvin: Rehearing of an application for a variance to replace an existing structure with a new residence on .15 acre at 34 Glines Park Road (R8 Lots 27 and 28) in the Conservation Zone.** Mr. & Mrs. Edward Mitchell presented the Board with a map showing a horse shoe shaped right of way on the Marvin's lot which gives access to the Mitchells and other properties. The Mitchells are concerned that the new residence as approved will impact that right of way.

Public hearing: Ruth Marvin presented maps, deeds and photos of the neighborhood and right of way. The Marvins do not dispute the 12' right of way on the side of their property as well as another 80' long right of way to the pond. There is no mention of the right of way in question in any of the deeds and the plan as recorded at Merrimack Co. Register of Deeds does not show the horseshoe shaped right of way. Dave Krause, representing the Marvins, confirmed that there is no deeded right of way for the Mitchells but the Marvins have been allowing them to use it. Mr. Mitchell added that there is a septic system at the location of the new home to which the Marvins responded that it will be removed and a new system installed. Maureen Parker, representing the Mitchells, explained that the horseshoe shaped right of way has been used for over 50 years and it is shown on the map. Kent Finemore replied that apparently that plan was not registered and the deeds do not reflect that horseshoe. Mrs. Mitchell stated that their leach field goes under the 12' right of way and that this is their only access. The Marvins plan to create a new driveway and the Mitchells and others can continue to use the 12' right of way. Maureen Parker asked that the Marvins be responsible for the Mitchell's leach field if something happens to it during construction of the residence. Public hearing closed.

Dave Liberatore reminded the Board that during the original meeting the 12' right of way was considered and no one was being cut off. There was no mention of the horseshoe and in fact it was not deeded. Keith Murray agreed that he has not heard anything to change the original decision and it is up to the neighbors to straighten out the access issues. Steve Bluhm asked Gerald Coogan if there is adverse possession in this situation. Mr. Coogan did not believe there would be because this right of way has been used by the public and not specifically for the Mitchells.

It was agreed that the criteria for a variance had already been reviewed at the July 23, 2012 meeting therefore Dave Liberatore moved, seconded by Phil Cain to grant a variance to replace an existing structure with a new residence on .15 acre at 34 Glines Park Road (R8 Lots 27 and 28) in the Conservation Zone. Motion passed.

**John A. MacLennon: Review request for a re-hearing of an application for a variance from Article 7 Table 1 of the Northfield Zoning Ordinance to allow a detached 30'x50' garage with living space on a 1.44 acre lot at 15 Susan Lane (Tax Map R16 Lot 21-7) in the R1 zone.** Kent Finemore reviewed the status of this application to date. The Attorney has reviewed this request and advised the Board to treat this as a request for a rehearing as an appeal must go to Superior Court. In Mr. MacLennon's request for an appeal he stated that the ZBA did not vote on each criteria, but the ZBA does not do that and been advised not to do so by the Attorney. Mr. MacLennon also claimed that the Chairman made comments about variances that influenced the Board's decision, but the record does not reflect that. Dave Liberatore moved, seconded by Phil Cain to deny a hearing of this application. Motion passed 3-1.

**Other:** Polly Fife commented that the recent training session attended by some members were very worthwhile and she encouraged members to take advantage of such training.

Meeting adjourned at 9:25 pm.

Respectfully submitted,

Eliza Conde, Secretary

*Minutes approved 10-22-2012*