

**GILFORD ZONING BOARD OF ADJUSTMENT
MINUTES
OCTOBER 6, 2008
CONFERENCE ROOM A
7:00 P.M.**

The Gilford Zoning Board of Adjustment met on Monday, October 6, 2008 at 7:00 p.m. in Conference Room A. This meeting was tabled from September 23, 2008.

Present were: Chairman- Andrew Howe, Vice-Chairman- Don Chesebrough, Regular Members- Charles Boucher, Robert Dion, Pat LaBonte and Alternate Scott Davis.

Absent: Regular member(s).

Also present was John Ayer, Director of Planning and Land Use and Stephanie Verdile Philibotte.

Chairman Howe led the Pledge of Allegiance and introduced Board members and staff. He explained the ZBA has the right to adjourn the public portion of the meeting at 10:00 p.m. and continue the deliberations for the first two applications from the September 23, 2008 agenda, Case #Z08-17 and #Z08-18, and if they can finish those deliberations by 10:30 p.m., they will begin deliberations on Case #Z08-19, #Z08-20, and #Z08-21. If deliberations on all applications cannot be completed by 10:30 p.m., the deliberations will be tabled until a specific date and time.

Motion made by R. Dion, seconded by D. Chesebrough, to take all applications off the table. Motion carried with all in favor.

A. Howe introduced the first case.

3. **Rita Sutton**

Appeal of an Administrative Decision of the issuance of a building permit for Barbara Aichinger on Tax Map & Lot #221-007-001. The property is located at 554 Edgewater Drive in the Single Family Residential Zone. File #Z08-19.
Tabled from the September 23, 2008 meeting.

A. Howe asked J. Ayer to provide the opinion of the Town Attorney regarding the timeliness of Sutton application and if the ZBA should accept and hear the application. J. Ayer spoke about the Sutton application and said the building permit was issued in October of 2007 and the Town Attorney's opinion is the 30-day appeal period would have been in November 2007. Since this is an appeal of the inspector's decision to approve the building permit. He said he agrees with the Town Attorney that the appeal period has passed. D. Andrade said the 30-day appeal period for the permit began in October 2007 when the permit was issued and there is a superior court finding that the building permit was valid.

Linda Connell, lawyer representing the Sutton appeal, explained why they submitted the appeal 30 days from the Superior Court's decision and not within 30 days of the issuance from the building permit. She explained that until the court ruled if there was 1 lot or 2 lots, the validity of the building permit of the second house was not known. Once the court ruled there was just 1 lot, the other house became impermissible Connell said. She said this has also been appealed to the Supreme Court. She is asking the Board to table the application in order to preserve their appeal rights until after the Supreme Court hears the case. She said the building permit that was issued is for the lot that does not exist based on the superior court's ruling.

A. Howe said they are only concerned with the regulations set forth in the zoning ordinance, which allows for a 30-day appeal period and that appeal period has expired.

D. Chesebrough said they are appealing the second building permit that was issued in October 2007 and that appeal period ended before the application was submitted on August 2008.

R. Dion asked why the building permit was issued when there was a decision forthcoming from the court regarding the status of the lots.

D. Andrade said the decision to issue the building permit for the second dwelling on the lot was based on the fact there was one lot. The applicant had another structure on the lot that was non-conforming. He referred to Section 9 of the ordinance relating to non-conforming structures for which the second permit was issued.

Linda Connelly, said she had not heard this before and went onto discuss Section 9.3.2.a of the ordinance regarding the size of rebuilt non-conforming structures.

A. Howe asked D. Andrade if he considered the entire building being entirely non-conforming and D. Andrade said yes but he does not agree with applying 9.3.2.a. to this situation.

Patrick Wood, representing Aichinger, said there were 2 houses on this property on 2 lots as shown on the original subdivision plan. The application for the building permit to replace the existing house on lot #10 was approved in the spring of 2007. He said because two (2) residential structures existed on the lot, both can be replaced. He said they forwarded all building permit information to the Suttons in December 2007 and the Suttons did not appeal the issuance of the building permit at that time. He referred to RSA 676:5 regarding the appeal process and said the ZBA Rules of Procedure establish a 30-day appeal period. He said the Superior Court ruled the building permit for the second structure was valid.

R. Dion referred to the drawing in the file which shows the house located in the setback. A. Howe said they are only going to decide if this application was filed in a timely manner, not the merits of the building permit issuance.

A. Howe called for a motion.

Motion made by D. Chesebrough, seconded by C. Boucher, to deny the application since the building permit in question was issued on October 29, 2007 and the appeal was not filed within

the 30-day allowable time frame.

A. Howe called for a voice vote.

P. LaBonte, C. Boucher, D. Chesebrough, A. Howe voted in favor of the motion, R. Dion voted against the motion. The motion passed by a 4-1 vote. Case # Z08-19 was denied and will not be heard.

A. Howe introduced the next case.

4. **Patricia and Jim Gray/ Joe Amrol**

Variance request pursuant to Article 5, Sections 5.1 and 5.1.3 and Table 2 of the Gilford Zoning Ordinance to allow an addition to be located within the required fifty(50) foot front setback as required by the Gilford Zoning Ordinance on Tax Map & Lot #213-070.000. The property is located at 93 Old Lake Shore Rd. in the Limited Residential Zone. File #Z08-20.

Tabled from the September 23, 2008 meeting.

Joe Amrol, representing the application, gave a brief presentation to the Board and explained how the applicant meets the criteria for an area variance as outlined in the application.

A. Howe asked about renovating the interior of the house to expand the kitchen and adding onto the exterior of the house in a conforming way instead of granting the variance. J. Amrol said they would have to move load-bearing walls.

A. Howe asked how the Grays are being denied the use of property since they have lived there for over 50 years. J. Amrol said they feel that other property owners in the area are allowed to have a porch and build in the front setback and they would like to have a porch and make use of their front setback.

D. Andrade explained the zone changes from Limited Residential to Commercial close to this property and the setback is less restrictive in the Commercial zone.

S. Davis spoke about the fact the house is already in the front setback and it is not correct to say the applicants cannot use their front setback because they are using it today.

A. Howe opened the hearing for public input. With no input from the public, A. Howe closed the public hearing for file #Z08-20.

A. Howe introduced the next case.

5. **Edward and Barbara Aichinger**

Variance request pursuant to Article 9, Section 9.1.1, Contiguous Nonconforming Lots, of the Gilford Zoning Ordinance to allow Tax Map and Lot #221-007.000 located at 554 and 558 Edgewater Drive, to be two (2) separate lots. The property is located in the Single Family Residential Zone. File #Z08-21.

Tabled from the September 23, 2008 meeting.

C. Boucher said his wife was Chairman of the Board of Selectmen when the agreement was signed between the Aichingers and the Town of Gilford and offered to recuse himself from the application.

Linda Connelly, attorney for the Suttons, stated they feel there would be a conflict if C. Boucher participated in discussion and deliberations on the application. C. Boucher stepped down from participating on Case #Z08-21. A. Howe appointed S. Davis as a regular member to replace C. Boucher. P. Wood stated his objection to C. Boucher recusing himself, stating there is no conflict of interest as the agreement is not an issue in this application.

Patrick Wood, representing the application, gave a brief presentation to the Board as outlined in the application materials and reviewed the information submitted. He is asking the Board recognize there are 2 lots.

A. Howe asked for clarification if the Superior Court has ruled the 2 lots are 1 lot and P. Wood said yes. A. Howe asked if there has been an appeal filed to the Supreme Court. P. Wood said yes. A. Howe asked why the applicant is in front of the ZBA. P. Wood explained the abutter argued the agreement entered into by the Town of Gilford and Mrs. Aichinger was not within their purview and appealed to the Court. He said the Court ruled the Board of Selectmen did not have the authority to enter into that agreement and the court also ruled the building permit for the second house was valid. He said they believe there should be two (2) lots and said the Court said Section 9.1.1 controls the situation. He said they are asking the ZBA to grant a variance in order to comply with the Court's decision that stated they should get the proper approvals through the town in order to subdivide the 2 lots.

A. Howe asked for J. Ayer's interpretation of Section 9.1.1 (.a) of the ordinance regarding an exception to when contiguous, non-conforming lots are required to be merged. J. Ayer said the recent court ruling stated the lots are merged and it is 1 lot. A variance from Section 9.1.1 (.a) would only help if they were not yet merged. J. Ayer said the current ordinance is still in existence requiring the lots to be merged. He referred to the zoning ordinances from 1984 and 1990-2002 as referring to merging of lots.

P. LaBonte referred to the "Niswander Rule" that was developed in the late 1960's early 1970's and discussed the merging at that time was to prevent lots from becoming non-conforming due to the changing of the ordinance relating to new lot sizes. These mergers were intended to reduce the number of non-conforming lots after the zoning requirements changed. J. Ayer said that is correct.

R. Dion asked when the cottage was taken down and P. Wood said it was taken down after the building permit was issued. He said he thought the house had to remain in the footprint. P. Wood said only if the house were to remain in that location, but they can relocate the house.

D. Chesebrough asked when it changed from a garage to a camp. P. Wood said it was like that for years and that previous owners had used the garage/camp as a residential structure. D.

Andrade presented assessing information to D. Chesebrough referring to the residential features of the garage/camp.

Barbara Aichinger, applicant, said she believed the garage/camp pre-dates the house based on features found in the garage/camp. She said she was going to try to answer A. Howe's question as to why they are in front of this Board. She said the Court did not like the agreement she signed with the Town of Gilford and referred her back to the Town of Gilford in order to resolve the lot issue and get the proper approvals if she wanted 2 lots. She also said she has put a lot of effort to work with her neighbor Rita Sutton, to reduce the impacts of construction to their house and planted extra landscaping and trees to screen the new house and also not to block Rita Sutton's view of the lake.

J. Ayer said he did not know there were 2 existing homes until he joined D. Andrade on an inspection of the garage for the first house. He said the Court ruled the lots are already merged and the applicant needs a subdivision to divide them. A proper process would be a variance from lot area and buildable lot area, not a variance from having to merge lots, they are already merged.

B. Aichinger said they are asking for a variance from Section 9.1.1 (.a) to prevent them from needing a subdivision.

A. Howe opened the hearing for public input.

Linda Connell, attorney representing Rita B. Sutton, stated her client's objection to this application and submitted in writing her client's objections. She submitted previous deeds that said there was a garage on the second lot. She noted the 1983 Governor's Island Club vs. Town of Gilford case in which the garage was an accessory use as well as the living quarters that were established to be the chauffeur's quarters. She said it was established that the garage was an accessory use to the primary single-family residence by the design and layout of the lot; including a driveway that went from the garage to the main single-family residence. She said a previous attempt to subdivide the lot in 1983 was denied. The case was argued in front of the Supreme Court and it was decided the lot could not be subdivided. She said Barbara Aichinger knew of the previous Supreme Court decision moved forward with her plans to construct the home anyway.

She argued this application should be a "Use Variance" not an "Area Variance" because it relates to the character of the neighborhood and she said there is no hardship with this property that would meet the criteria for a "Use Variance". She reviewed the information submitted in her objection to the variance as part of the record.

A. Howe asked D. Andrade and J. Ayer what they found when they went to the property and discovered there was a second house on the site. D. Andrade described the interior and exterior of the garage/camp that was used as living quarters by the previous owners. A. Howe asked for confirmation that D. Andrade went to determine that there was a small living unit in the garage as an accessory use then issued received a building permit to build another entire single-family residence. D. Andrade said yes.

Sue Green, Governor's Island resident, remembers this property and spoke about the garage being a 2 car garage that was probably 20' x 20' not 24' x 24'. She said it did not have a porch or a bathroom until recent times and there was no stove inside. She said it has not been known as a residence.

P. Wood spoke about the driveway that went from the cottage to the main house and he said the entrance was separate from the main house. He reviewed the previous court case from 1983 and explained that that application for a variance was to add property from across Edgewater Drive to the existing lots along the waterfront. He said the two waterfront lots were not proposed to be changed. He said the Supreme Court case from 1983 does not apply to this current situation.

Sue Green said the 1983 Supreme Court case was an appeal of the variance that was granted allowing the lot area to include the property across the road. She said it is her understanding the reason the variance from the 1983 Supreme Court Case never moved forward was because the Supreme Court decision said the roadway separated those 2 lots and you cannot put them together because the roadway separated them. P. Wood agreed and said that is exactly what the variance was about, which is why it was appealed by the Governor's Island Club and the Suttons saying the variance should not have been granted in the first place. He said the owner did not file the appeal at that time; the neighbors and Governor's Island Club filed it because the variance had been granted.

Discussion ensued about why the septic systems were not located across the street and B. Aichinger said because of the ledge it would be environmentally detrimental to the area.

With no other input from the public, A. Howe closed the public hearing for file #Z08-21 at 10:00 p.m.

A. Howe announced the Board would enter into the deliberative session and reserve the right to adjourn at 10:30 p.m.

Board Deliberations

Patricia Nix-Ford, Susan Belanger-Bright, Maureen D. Nix.

A. Howe clarified S. Davis will participate on the discussion and decision for Case #Z08-17. P. LaBonte will not participate in the deliberative session, as he was not present for the public hearing on September 23, 2008.

The Board discussed the application.

D. Chesebrough said the initial challenge to the Planning Board was to come up with an existing plan and there is no existing plan. He said all the Planning Board had in front of them was the 1988 plan and although that plan existed it was not approved. He referred to the July 7, 2008 Notice of Decision issued by the Planning Board and the decision into the record: "following uses have been legitimately conducted prior to the present land use regulations of the town and are therefore grandfathered:

1. The operation of an Inn and hotel/motel with access to Lake Winnepesaukee with attendant recreational and ancillary facilities for guests, their family and friends.
2. Public recreational boat and watercraft launch and short-term parking facilities (boats, trailers and cars).
3. Outdoor seasonal short-and long-term parking of boats and watercraft for residents of Lake Winnepesaukee islands, patrons of the Inn, their guests and families, year-round outdoor boat storage in specific areas, plus use of boat slips by and rental of slips to Island residents.

He said he does not agree with the term “legitimately conducted” the Planning Board because although the uses were conducted they were never approved they just grew. He said things that started as a courtesy to island residents (i.e. boat launching and rental slips) the Planning Board determined that establishes grandfathering a use. He said according to the records the use to allow boat launching and boat slip rentals was for a limited number of island residents only and not as a business use. He said the Ames have expanded the site from an Inn allowing their guests and some selected others to use the property into a marina. He said you cannot have a use expand as far as the Ames have expanded it and call it an accessory use to an Inn. He referred to the definition of a marina, which includes a launch ramp. He said when you start adding parking spaces for boats and trailers it is no longer accessory use to the Inn, it is a primary use. He said even the expansion of the parking areas should have been done with proper approvals and they were not. He said expanding the site to that extent is not warranted without a variance.

C. Boucher said there were no letters from abutters or others against the uses being used by the Ames Farm. He spoke in favor of the Planning Board’s approval of the site plan. He said the boat ramp is a natural expansion of a non-conforming use.

Motion made by C. Boucher, seconded by R. Dion, to deny the appeal of the Administrative Decision based on the grounds that the Planning Board made the correct decision in granting site plan to Ames Farm as stated in the July 16, 2008 letter from the Planning Board and uphold the Planning Board’s decision, interpretation, and determination of the uses.

Discussion on the motion.

S. Davis said he does not understand the logic the Planning Board used to approve the site plan, but acknowledges uses have expanded on the site.

A. Howe asked J. Ayer how the uses with the boat launching and expanded parking areas up into the fields above and behind the Inn happened.

J. Ayer said he could not speak to any extent about the plan because it may be considered public input and the hearing is closed. But he said as documented in the file, the Planning Board’s decision was based on months of testimony and information provided to them. He said the Planning Board made the best decision they could, based on the information provided to them.

A. Howe asked if there was any discussion by the Planning Board to limit the activities. J. Ayer said yes but nothing was stated to limit further future expansion of the current uses, other than what was stated in the motion.

Discussion ensued about grandfathering a property and acknowledging how uses naturally expand.

D. Chesebrough is concerned the staff report is considered only advisory and the Planning Board did not properly acknowledge J. Ayer's original concerns or the concerns of the neighbors. He said they expanded the whole site entirely with the expansion of an accessory use to a primary use and he said it is not an accessory use to the Inn anymore.

A. Howe called for a vote on the motion.

S. Verdile Philibotte polled the members.

R. Dion-Yes

S. Davis- No

C. Boucher- Yes

D. Chesebrough-No

A. Howe-No. Motion to deny the appeal failed by a vote of 2-3. The motion did not pass.

A. Howe called for another motion.

Motion made by D. Chesebrough, seconded by S. Davis, to grant the Appeal of an Administrative Decision and overturn the conditional Planning Board Approval of the existing conditions site plan for Ames Farm Inn on July 7, 2008, based on the following findings of fact:

- 1) The Planning Board put too much emphasis on previous uses that were established as a courtesy and as they expanded they claimed were legitimately conducted and allowed to expand.
- 2) The Planning Board was looking at a 1988 site plan that was not approved. The Ameses took a use that was accessory to the Inn and expanded it to the extent it became a primary use.
- 3) The Planning Board approved a significant increase of a use without proper variances.
- 4) The Planning Board allowed the creation of extensive parking areas and allowed an accessory use to become a primary use. The primary use of the Inn and cottages would not require that much parking.

A. Howe called for a vote.

S. Verdile Philibotte polled the members.

R. Dion-No

S. Davis- Yes

C. Boucher- No

D. Chesebrough-Yes

A. Howe-Yes

The appeal of an Administrative Decision **has been granted**, the conditional Planning Board Approval of the site plan for Ames Farm **has been overturned**.

Edward Mularz

The Board discussed the application.

Motion made by S. Davis, seconded by D. Chesebrough, to grant the area variance for a setback of 30' as described in the application and as having met all the criteria for an Area Variance as follows:

- I. *The variance will not be contrary to the public interest.*
- II. *Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.*

The application meets the following criteria for an area variance:

*An area variance **is** needed to enable the applicant's proposed use of the property given the special conditions of the property.*

*The benefit sought by the applicant **cannot be** achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance.*

- III. *The variance is consistent with the spirit of the ordinance.*
- IV. *Substantial justice is done.* Because it will be an unbuildable lot if the variance is not granted.
- V. *The value of surrounding properties will not be diminished.*

Discussion on the motion.

S. Davis spoke about a prior denial for this property and referred to the staff report written by J. Ayer explaining the previous variance was granted. He asked if J. Ayer could share what he found out regarding questions raised at the public hearing J. Ayer said the applicant at that time was granted a front setback variance but never took action therefore; the variance expired. He said he believes this variance request would be similar or even less impactful than the previous one.

Discussion ensued about the setback amount being requested. It was agreed the 30' setback as originally proposed is what is being allowed.

A. Howe called for a vote on the motion.

S. Verdile Philibotte polled the members.

S. Davis-Yes

R. Dion-Yes

C. Boucher- Yes

D. Chesebrough-Yes

A. Howe-abstained. Motion carried with all in favor, the variance **was granted.**

Motion made by S. Davis, seconded by C. Boucher, to table the deliberative sessions on the following cases: #Z08-19, #Z08-20, #Z0-21 to October 21, 2008 at 7:00 p.m.

MINUTES

Motion made by C. Boucher, seconded by D. Chesebrough, to table the minutes from August 26, July 1, 2008 and September 23, 2008 until October 21, 2008.

ADJOURNMENT

Motion made by R. Dion, seconded by C. Boucher, to adjourn the October 6, 2008 Zoning Board of Adjustment meeting at 10:50 p.m. Motion carried with all in favor.

Respectfully submitted,

Stephanie Verdile Philibotte
Administrative Assistant