

**TOWN OF HENNIKER
ZONING BOARD OF ADJUSTMENT**

December 16, 2009
Approved Minutes

Members Present: Doreen Connor, Chairwoman; Bob Stamps; Jeff Connor; Gigi Laberge; Bruce Trivellini, Alternate

Members Excused: Joan Oliveira; Roni Hardy

Others Present: Mark Fougere, Town Planner; Mike Colburn; Ron Taylor; Jennifer Astholz, Recording Secretary

Chairwoman Connor called the meeting to order at 7:00 pm.

Mark Fougere stated that there were no developments of Regional Impact to be considered (RSA 36:54-36:58).

Case 2009-109: Michael Colburn CDG, LLC, Applicant (Kristin Fusco—owner), is requesting an Area Variance from Zoning Article VII RR Rural Residential District, Section 133-26 D to permit the construction of a second story addition to an existing home that exists within the 30 foot front setback. The property is located at 108 Morse Road, Map 1 Lot 726.

Chairwoman Connor verified that abutters had been properly notified.

Mr. Colburn, applicant, stated that Ms. Fusco has contracted him to do some renovations to their house. He stated that the back section of the 150+-year old house was never on a full foundation. They are requesting permission to replace the structure, but center it on the back of the house and add a second story. Mr. Colburn distributed a photograph of a similar house to illustrate the design they would like to construct. He stated that a permit has been pulled for a 1-1/2 story structure, but they are requesting permission to add a second story. Mr. Colburn read the answers to the questions supplied on the Area Variance application. Mr. Colburn stated that they have moved the structure 11 feet away from the setback line, making it more compliant to the zoning regulations. He is also requesting permission to construct a 6-foot wrap-around porch, which will make the structure a total of five feet further away from the setback line than it currently stands.

Bruce Trivellini stated that the property cannot conform to the ordinance as the house existed before zoning was in place. He stated that the property owner suffers unequally in this circumstance because the house is 150+ years old.

Mr. Fougere stated that they have the building permit for the 1-1/2 story structure; they only need to come before the ZBA because they are requesting the 2nd story.

Chairwoman Connor stated that she interprets the zoning regulations differently. The regulations allow for the repair of non-conforming structures, but she stated that this constitutes replacing the structure and improving the property.

Jeff Connor stated that the closest house to the applicant is not within sight.

Chairwoman Connor stated that there are really two separate issues for the Board to consider: 1) allowing a 2-story structure; 2) approval of the wrap-around porch.

Mr. Colburn stated that the original house was closer to the setback than adding the six-foot open porch will be. He described the property and stated that adding the porch makes the house more aesthetically pleasing in this country setting.

Chairwoman Connor opened the public hearing at 7:20 pm. Hearing no public comment, she closed the public session and called for Board deliberations.

Bob Stamps stated that he thinks the design is an improvement to the existing condition of the property. The house was there long before the zoning regulations were put into place. He stated that he does not see how a bad precedent could be set by allowing this. He stated that the ZBA's job is to fairly assess what is best in these kinds of circumstances.

Chairwoman Connor stated that the property could be made a little more compliant without adding the porch. She stated that a decision had already been made regarding the allowance of the 1-1/2 story structure, and she understands the applicant's request to increase that to a full 2nd story. She stated that she has trouble introducing a new structure into the setback.

There was some discussion about property that the applicant owns across the street.

Mr. Trivellini questioned that the only issue that Ms. Connor has with the application is the inclusion of the new porch. She stated that was true. He stated that he feels the open porch makes the house look better, and without the porch, the house may look unfinished. He stated that he does not see an issue since they own 22 acres of property. Mr. Trivellini stated that the special condition of this case is that the house is 150 years old, and there is no way to bring the property further into compliance with the current zoning regulations.

Gigi Laberge stated that she would like to see if the addition could be done further away from the setback. She stated that in the future, the road may not have the same rural character that it currently has and the house would be very close to the road.

Mr. Colburn stated that the porch is five feet further away from the setback than the house currently sits. He also stated that the design looks best for the house, will help shed rain water away from the house and is more aesthetically pleasing for the roofline.

Jeff Connor stated that the porch addition is a separate issue from the request for a second story. If they had left the front structure and deck, they could have put an 11-foot deck there; however, they are improving the structure. If they would have thought of this design first, they may have been able to have designed it differently and possibly avoided the need to come to the ZBA.

Mr. Trivellini stated that it is important to have new buildings comply with zoning ordinances; however, he believes that the applicant is trying to show good faith in moving the structure five feet back from the setback.

Bob Stamps **MOVED** to approve the request for application for Case 2009-109 to allow a second story and a wrap-around porch. The extreme edge of the porch is to be no more than six feet off of the existing (new) foundation as of 12/16/09. Bruce Trivellini **SECONDED** the motion. Motion **PASSED, 3 in favor** (Mr. Connor, Mr. Stamps, Mr. Trivellini) to **2 against** (Ms. Connor, Ms. Laberge).

Case 2009-107: A motion for rehearing has been submitted by Gerald & Kathryn Eisen regarding the Area Variance granted to New Cingular Wireless, PCS, LLC by AT&T Mobility Corporation on October 21, 2009. An Area Variance was granted by the Zoning Board from Zoning Article XXV, Section 133-130(B)(2) to construct a 135 foot tall telecommunications tower where the Zoning Ordinance permits a maximum height of 77 feet (20 feet above the tree line). The subject property is located on Old Hillsboro Road (across from 1040 Old Hillsboro Road), Map 1 Lot 335 in the RR District.

Chairwoman Connor stated that this is not a public hearing; however, a motion for rehearing of the AT&T Wireless tower case has been filed. She stated that the motion was properly filed within the 30-day limit on 11/19/09. Ms. Connor stated that the Board is not to take new evidence at this time, but are only to review the motion for rehearing. Chairwoman Connor stated that she received a memo from Bruce Trivellini in support of the motion for rehearing. The memo was not circulated to the entire board as it was not received within 30 days of the hearing. She stated that she has some concerns since Mr. Trivellini is a member of the ZBA and has indicated that he has his mind is made up on this issue.

Mr. Trivellini stated that the piece he presented was intended for the Board members to review so that he could state his concerns clearly and give the Board members time to review his statements. He is not associated with the Eisen's motion for rehearing. He stated that it may have been an error to email his comments to Ms. Connor prior to the meeting.

Bob Stamps asked if the additional reasons submitted after the 30-day window are to be considered. Mark Fougere stated that Town Counsel advised that if the letter dated 12/4/09 offers information to support the complaints listed in the first letter, it may be allowed. However, if the second letter does not relate to the first letter, it may not be considered. Mr. Stamps stated that, in his opinion, the 12/4/09 letter raises issues not relative to the first complaint. Ms. Laberge stated that she agrees with this assessment. Mr. Trivellini read from a letter dated 11/18/09 that was given to the board members at the last meeting. Chairwoman Connor stated that the 11/19/09 letter is the official motion for rehearing that must be considered.

Chairwoman Connor stated that she believes that the hardship criteria were met. She stated that the applicant gave sufficient examples of case law dealing with hardship and cell towers.

Mr. Stamps stated that he is concerned about setting precedent if the board considers extra material added to the case. Ms. Connor stated that the court has indicated that the board did not make a mistake regarding hardship.

Mr. Trivellini stated that a reasonable alternative is that roaming charges have been upheld in Circuit Court in Pelham. Ms. Connor stated that she does not agree since the New Hampshire Supreme Court case covers use. She stated that she does not believe that there are other towers adequate to close the gap.

Ms. Connor stated that they are to only consider documentation submitted within 30 days. New Hampshire court has told the board how to address the hardship issue. She stated that even though the board does not have to consider the letter dated 12/4/09, she believes that a statement could be made that the board did not make a mistake regarding the hardship issue.

Mr. Stamps stated that he believes that there is a flaw in the ordinance since it appears that every tree in the area can be cut down so that a taller cell tower can be erected. Mr. Trivellini stated that they did not want to violate the spirit of the ordinance by doing that.

Chairwoman Connor stated that the reason that the ZBA exists is to grant relief when the five criteria are met.

Mr. Trivellini stated that a tower 77' tall was within the ordinance and provides improved coverage than currently exists. He stated that there was little difference between the 77' tower and the 135' tower.

Mr. Stamps stated that this was discussed at the board meeting and a vote was taken.

Mr. Trivellini stated that he believes the Board erred by allowing a tower more than 77' tall. Mr. Stamps stated that there is no new evidence to convince him that a mistake has been made.

Mr. Trivellini stated that a tower at 77' is a reasonable solution for AT&T; however, they require a taller tower to collocate.

Bob Stamps **MOVED** to not consider the reason given in the 12/4/09 letter. Jeff Connor **SECONDED** the motion. Motion **PASSED, 4 in favor** (Mr. Connor, Mr. Stamps, Ms. Connor, Ms. Laberge) – **1 against** (Mr. Trivellini).

The Board members considered the items listed in the 11/19/09 motion for rehearing. Concerning public notices, Mr. Stamps stated that regular notices are posted and publicized according to the right-to-know process. The individuals filing the motion were aware of the hearing but were unable to attend. Mr. Connor stated that he understands that the individuals have a nice house with a nice view and they do not want a cell tower there.

Mr. Trivellini stated that people buy property with zoning in place. They rely on this board to uphold the restrictions so that no one suffers unequally. The board is no longer upholding equality of the issue.

Chairwoman Connor quoted from New Hampshire Supreme Court rulings about property hardship and how it applies to this case.

Ms. Laberge stated that if you are at the bottom of the property looking up, the houses built there changed the views as well. She compared it to living within earshot of the rumble strips installed on Rte. 202. While she would prefer to live without the noise, she understands that the greater good is served for safety reasons. Likewise, she stated, that if you are broken down, you would be glad to have cell phone coverage along that stretch of road, and believes it is helpful for public safety.

Mr. Connor stated that he remembers when the cell tower was erected on Pat's Peak. People have gotten used to it being there. We must understand that views may change as growth occurs.

Mr. Stamps stated that he believes AT&T did a thorough job of helping the Town to understand how the addition of a tower would change the views. He also understands how frustrating it is to be driving and not be able to get a cell signal. Mr. Stamps stated that he understands that AT&T will be trying to make the tower look more natural if it is passed.

Ms. Laberge stated that after reading the court decisions she was even more convinced that the board did right. Mr. Connor believes that they should stand behind their decision.

Bruce Trivellini **MOVED** to approve the motion for rehearing. Jeff Connor **SECONDED** the motion. Motion **FAILED, 1** (Mr. Trivellini) **in favor to 4** (Ms. Connor, Mr. Stamps, Ms. Laberge, Mr. Connor) **opposed**.

Review and Approve minutes from November 18, 2009 meeting

Minutes of the 11/18/09 meeting were reviewed. Mr. Trivellini **MOVED** to approve the 11/18/09 meeting minutes as submitted. Ms. Laberge **SECONDED** the motion. Motion **PASSED, 3 in favor** (Mr. Trivellini, Ms. Laberge, Mr. Connor) – **0 opposed** – **2 abstained** (Ms. Connor, Mr. Stamps).

Adjournment

Mr. Trivellini **MOVED** to adjourn at 8:10 pm. Mr. Connor **SECONDED**. Motion **PASSED UNANIMOUSLY**.

Respectfully submitted,
Jennifer Astholz