TOWN OF CHESTERFIELD, NH
ZONING BOARD OF ADJUSTMENT

MINUTES
February 11, 2014

Present: Chairman Burt Riendeau, Andy Cay, Harriet Davenport, Renee Fales, Alternates Lucky Evans and Kristin McKeon

Absent: John Perkowski

The Zoning Board of Adjustment met at the Chesterfield Town Office on February 11, 2014. Riendeau opened the meeting at 7:33 p.m. and explained the process of the meeting.

1. Jeff & Karen Rodden requested a variance from Article II Section 203.4C Coverage 20% impermeable coverage to permit a pervious paving system and a variance from Article V Section 503.1 for expansion of a non-conforming part of the building to add a second story to the breezeway and a covered walkway. The property is located at 158 North Shore Road, Spofford, NH 03462 (Continued from January 14, 2014)

Voting on this application will be Riendeau, Cay, Davenport, Fales and Evans.

Landscape Architect Don Scott and Attorney Michael Bentley presented the building plans and pervious paving proposed changes for the Rodden application. Scott stated that the reason for the expansion is that the applicant wants to remove the front door, front porch and walkway and replace it with a window. The vertical expansion will create a new entryway and move the stairwell to the center portion of the house and to provide more open space in the living and kitchen area in the front of the house. This will also allow the applicant to take their laundry from the breezeway to the second story.

The covered walkway has become necessary because there is a door on the side of the garage with ice and snow coming off the roofline falling onto the walkway. Scott is asking for a variance to expand the building from existing building coverage of 10.7% to 11.7%. Scott requested that the applicant be allowed to reduce impervious cover by using a pervious paving system to in front of the garage, decreasing the pervious coverage from 30.5% to 20.5%, to nearly comply with the conformity of 20%. He stated that infiltration trenches, along the drip edges of the house, which will be added to infiltrate water into the ground and the water will be released under the deck in front of the house. Scott stated that a perk test was done at the house and a reading was received of 8.5 inch of infiltration on the 12 square inch hole. The pervious system being proposed can handle as low as 8.5 inches per hour. Scott stated that there is access to the garage from the breezeway and there will be a doorway in the proposed upstairs laundry area into the storage area above the garage. Fales inquired as to the amount of square footage of the living space. She read the tax card indicated the basement in the first floor was 1,208 sq. ft, first floor of the garage is 676 sq. ft., upper story finished 10,080 sq. ft., unfinished attic 676 sq. ft., basement unfinished 1,208 sq. ft and wooden deck 312 sq. ft with a total gross area is 5,160

sq. ft. with the living area of 2,288 sq. ft. Jeff Rodden stated that the basement was not finished. Scott added that the proposed.

Bentley stated that the overhang is 6 feet wide, with 2 feet conforming and 4 feet nonconforming. Bentley stated that the driveway will be reduced, with an area in front of the garage having the tar area being replaced with a pervious paving system.

Cathy Cook, abutter, stated that the applicant's property is already stressed with too much square footage as it is. She presented photographs of the property, before the Rodden house was built prior to 1991. The 158 North Shore property file indicates that there was only one variance granted, that being a driveway change requested by the previous owner. Cook added that water drainage has been a problem in her basement, caused from a drainpipe at the Rodden property releasing water onto her property. Bentley responded that the proposed new drainage system should make the drainage system better than it is now.

Jon McKeon stated that the town has nothing in place for inspection of pervious paving installations and there are no permits for them. He added that it is necessary that the materials being used should comply with the materials that are supposed to be used, as the analysis goes and that the installation is done correctly. McKeon added that the state does not have inspections on pervious paving for being in the Shoreline Protection area.

Scott stated that maintenance is required for pervious pavers, whereby salt and sand should not be applied to those areas. He added that the pavers should be vacuumed every 3 to 4 years and the 2 inches top layer of stone needs to be replaced every 10 years.

Fales moved to close the public portion of the meeting, seconded by Davenport. Motion passed unanimously.

Riendeau stated that the town hasn't addressed pervious systems, with no way of inspections being done and relying on the installing being done properly. He added that, until the town takes the stand on the ordinance on that specifically, the board should be looking at the ordinances on how it reads on impermeable coverage. The definition on impermeable coverage is all that horizontal area of a lot, parcel or tract, which, because of man-made alterations to the natural surface of the land, including building, parking lot, driveway areas for other development cannot be penetrated by rain water substantially the same as the natural surface. He added that some reports state that impermeable pavers can dispense of more water than the natural surface could. Riendeau added that this has not been addressed in the town ordinances specifically and is open to any discussion. He also stated that there are installation and inspection issues and with maintenance issues, as to whether they are going to be pervious.

Fales noted that the applicant is not changing the impervious surface and whether or not they put the pavers in, it is the expansion. She also had the concern of access from the addition into the storage space and the possibility of that area being turned into a guest room or family room and they currently have 2,200 sq. ft. of living space.

Cay stated that it seemed a reasonable change to the dwelling to make it more useful. They're limited to what they can do there and can't expand much. Riendeau questioned whether they can expand at all; they're already maxed out on less than ½ acre. Is that the intent? The expansion is in the middle of two existing buildings.

Cay stated that he feels that the pavers are a good thing and they do have valid engineering and the construction and inspection issues are valid. If the town feels that it needs to be inspected, then inspect it.

Davenport felt that the run off issues are a concern for the property owner and one of the abutters, but the issues are being addressed in the proposed project, whether it be the drainage under the eave area where the water runs off and the impermeable pavers may be an issue but seem to be the latest thing coming to address these kinds of issues. Proper installation needs to be addressed. There is no policing or testing in place to insure that that is happening and hopes that the contractor is doing that kind of work and engineer properly.

Evans stated that the drainage is being addressed in the proposal by keeping the water on the property instead of runoff.

Cay added that he doesn't feel that it's not unreasonable or excessive to add a 227 sq. ft. connector between the house and the garage at the second floor level to solve their laundry problem. He added that the board has given walkways relief and access reasons and it's not changing the character or use of that space.

Riendeau stated that if you look at the intent of 503.1, it was to eliminate expansion of non-conforming parts of the building, horizontally or vertically and the reason why is because of these are completely a second story. If there wasn't a breezeway in the enclosed area between the garage and the house right now, it may be a different conversation. Part of it is conforming and part of it is nonconforming.

Cay made a motion to approve the application as applied for.

Criteria for approval:

- *The variance is not contrary to the public interest.* ***Yes, the variance is not contrary to public interest.***
- *The variance will not be contrary to the spirit and intent of the intent of the ordinance will be observed.* ***Yes, the variance will not be contrary to the spirit and intent of the intent of the ordinance will be observed.***
- *Substantial justice is done.* ***Yes, substantial justice is being done by providing relief in this instance of the applicant.***
- *The variance will not diminish the values of surrounding properties.* ***Yes, this will be an enhancement of the value of surrounding properties.***
- *Literal enforcement of the ordinance would result in unnecessary hardship.*
  (A) Because of the special conditions of the property that distinguish it from other properties in the area:

(a) *There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property.* ***Yes, finding of hardship that there is no fair and substantial relationship between the general purposes of the ordinance provision and the specific application of that provision to the property.***
(b) *The proposed use is a reasonable one.* ***Yes, this is a reasonable use to add 227 sq. ft. at a covered walkway. It provides for a freeze protected laundry and provides safe and adequate access to the home. It's on a lot that doesn't have other buildable area where it can provide for these wants and needs.***

Fales seconded the motion.

Cay moved to amend the motion to reference the changes in coverage for the building from10.7% to 11.7%, being 1% increase in coverage, due to their changes. They are offsetting that with reduction in impermeable coverage by implementing permeable pavers into the driveway and by reducing a small portion of the driveway area. As presented by their representation, the coverage is reduced by from 30.5% to 20.5%, a 10% reduction.

Fales seconded the amendment.

Cay further amends the motion to include that we've heard testimony regarding the need for property installation, choice of proper construction materials, and proper maintenance of the pervious paving system. We recognize that the town is not presently requiring or set up to do inspections or otherwise oversee the installation or inspection of permeable pavers but we ask the applicant see that the design is installed, according to engineer specs, that it is properly maintained in time so that it maintains its permeable characteristics.

Fales seconded the amendment.

Riendeau added that his consideration would be permeable pavers in the man-made statement that is in the zoning ordinance. It is still being overlaid on an impermeable space already. It's not a new green space that's being torn up and done, being different in another application before us that wants to make grandiose patio area in the lot that is already over on their coverage.

The vote was called.
The motion was seconded and carried unanimously.

2. Charles and Antje Hornbeck request a variance from Article 203.5 of the zoning ordinance to permit a front setback of less than 50 feet. This property is located at 376 Old Chesterfield Road, Chesterfield, N.H. 03443 (Map 12A Lot 3.2) Residential district
(Continued from January 14, 2014)

Voting on this application will be Riendeau, Cay, Davenport, Fales and McKeon.

Antje Hornbeck presented her application and plan showing their intent of connecting their existing cape to their garage with a mud room and laundry area. They also want to add a fourth

bedroom to the south of the property, which extends to their existing driveway. Hornbeck measured 66 feet distance from the road to the garage. Riendeau stated that the property line is inside the road right of way, not the pavement. Tom Forest prepared the site plan for the Hornbecks. Their septic is designed for three bedrooms and the Hornbecks are requesting to build a 13x13 ft. fourth bedroom, which will have a lower roof line than the existing house on a lot size of 2.8 acres. Fales stated that the septic will need to be upgraded. The existing house is 1,200 sq. ft. and would be adding another 600 sq. ft. The house was built in 1945. There will be no basement under the addition.

Riendeau suggested that a site visit be scheduled to determine the layout of the property. He asked if this was a reasonable request to grant relief.

There were no abutters present.

Davenport made a motion to close the public portion and it was seconded by Fales.
Vote: Davenport – yes, Fales – yes, Cay – yes, Riendeau – yes; McKeon – no
The motion carries.

McKeon made a motion to view the property, seconded by Davenport. Motion passed unanimously.

The meeting will continue at the site visit on Saturday, February 15, 2014 at 9:00 a.m.

3. Nine A LLC Notice of Appeal from Selectboard

Riendeau announced that there has been a request for a rehearing from the Selectboard to consider a rehearing. The five voting members were Cay, Fales, Riendeau, Evans and Davenport. All the members are still present to consider rehearing.

Riendeau stated that when the board looks at a Consideration for Rehearing (NH RSA 677.2) as amended within 30 days after any order or decision of the board, any party of the action or proceeding or any person directly affected may apply for a rehearing. The board shall either grant or deny a rehearing within 30 days of receiving their request or may suspend the order of decision complained of pending further consideration. Appeals to the New Hampshire Superior Court may be taken pursuant to RSA 677.4 as amended within 30 days after the action complained as of the record. When we take into consideration for rehearing, we look at what's being considered for a rehearing.

Riendeau stated that in order for the granting of a rehearing, it has to be based on whether there is new information and things that come up since the decision or was not discussed during the decision that is a major deciding factor that the board did not consider. The other reason for consideration would be give the board a chance to go back and make any adjustments on the decision and the fact finding and review what was done and make any corrections that was made in the decision made.

Cay read the framework of the rehearing from the New Hampshire Practice.

Riendeau read aloud the Zoning Board Appeal for Nine A LLC, received from the Chesterfield Board of Selectmen, dated February 5, 2014.

Cay stated that the Selectboard has a right to appeal any decision of the Zoning Board. Fales stated the she felt that the Zoning Board took all the information presented for consideration on the decision that was made and she doesn't feel that there is anything new. Davenport stated that she feels that this is an extremely valuable resource to the town and want to be sure that the valuable resource is protected.

Cay stated that the document is a request for a rehearing and not an appeal to the decision, so as a result, if a rehearing was granted and the decisions to it, then the Selectboard could initiate an appeal to Superior Court and the document is the basis for a rehearing. If new evidence or new information is germane to the case, is could be cause for having a rehearing. He added, if the board feels that the minutes or the motion doesn't accurately reflect everything the way we like it to reflect, that could be a cause for rehearing. Riendeau added that if you want to go more into details and the findings of that decision for the record. Some of the thought process that might have gotten to the decision, might not have been reflected exactly in the findings. We look at all the facts, how it came to the conclusion, if it comes in front of a judge, did the board make a legal decision and that's what is being challenged. Riendeau feels that the biggest item is the spirit and intent of the ordinance. Did the board consider that strongly enough in our findings, or a thought process that didn't get verbalized to get into a decision of finding. Riendeau stated that if the ZBA grants the rehearing, it starts the whole process all over again. The Selectboard doesn't come in front of us, it will Chakalas. Cay added that the case will need to be represented. The town can be a participant, the Selectboard can participate in the process for their input. The burden is on the applicant to start over to make those arguments. This will be scheduled and noticed and go through the normal process for a hearing.

Riendeau stated that the request for a rehearing is not taken lightly. If there is no new information that is going to come before the board that is going to affect a thought process or a decision, the rehearing is not granted. Another option is, if you want to clean up the record, then the rehearing is granted.

Davenport asked, in #2 for the rehearing referencing "nothing has changed from that date to change the spirit of the Zoning Ordinance" in the Supreme Court hearing of 2008 and feels that there was a huge change in what was presented back then, that was denied. It went from seven lots with several duplexes. Cay responded that #2 was intended to say is that, in the courts findings, they found that a cluster development wasn't appropriate in that case. What that doesn't say, in the next sentence, which recognizes that the board acknowledged that there was hardship here and that the applicant most likely, and the court said that in their order, most likely is entitled to some relief from that. Cay added that nothing has changed since the 2008 Supreme Court hearing.

Evans stated that he can't remember the board going through the deliberation of the Supreme Court decision, in terms of this decision that the ZBA made. Nine A LLC came before the board,

speaking of the septic outside of the Lake District with zero capacity mentioned in every one of the tests. The Spofford Lake District was not discussed at any length and the Supreme Court decision was not gone through. Riendeau replied that all the ZBA members were sent copies of the Supreme Court decision and, at the time, all the board members asked specifically to take a look at the Supreme Court case to refresh your memory. We didn't put the burden upon the applicant to walk us through that again. This was a totally new application but if you wanted to see what the decision was made through the Supreme Court in 2008, we encouraged everyone to read it. Riendeau added that the board didn't go into discussion of that Supreme Court decision only because we didn't know how it was going to play into the new application. It was a totally different application. Things that were discussed, this time around, didn't get discussed in the first application of 2008.

Riendeau stated that if the Selectboard feels that the ZBA needs to reevaluate, then that could be a cause for a rehearing.

Cay stated that if there is a court appeal on this, it's going to hang its hat on cluster subdivision. The question is whether the Zoning Board has the authority to put a cluster subdivision in a non-cluster subdivision is what it's going to come down to. The court is going to apply their test of reasonableness here. When this property was zoned in1976 for an institutional building, that wasn't in the zoning then. It was a hotel prior to that. Cay added that there are many precedence to that. Riendeau stated that it is a residential zone. He doesn't feel that the court is going to say that you can't put a residential development there.

Evans said that the board didn't spend a lot of time on the spirit and intent. The criteria for approval was a little untidy and the justice being done was not discussed at great length. The reasonable return on the land and their investment, we didn't discuss certain aspects of it. Did they have a reasonable return while they were in business there? Was it sufficient to remove the building? We don't know. Five houses versus three houses: we didn't have sufficient numbers for alternatives for number of houses. With less than five houses, the applicant said he couldn't do it. That's the hardship justice that we must serve at a half million dollars is necessary for justice here, versus four, versus three and there's no consideration of what that building made in terms of money.

Fales agreed that the motion made is untidy and that we could have more meat into it. Fales admitted that she was "sick as a dog while doing this". Cay agreed that her motion reflected it and that the minutes were extensive with a lot of record.

Cay stated that the applicant complied with the boards wishes.

Riendeau stated that we should decide whether there is enough information that we didn't feel that we didn't cover or we want to or do we want to clean up the record. In previous issues, counsel suggested that it may be a good idea to consider a rehearing to make sure that everything is on the table and it is documented properly, with the findings are laid out in a systematic and legal language. Cay added that it assists the court so if the record gets cleaned up and further information can be provided to the court for their benefit, then it makes their job easier. That's one of the purposes for granting a rehearing. Riendeau asked if the board feels that the applicant

would have more information or different information already presented or is it just going through the record.
Evans made a motion for a rehearing. Riendeau hears no second for the motion for a rehearing.

Fales made a motion to deny a rehearing by the Chesterfield Board of Selectmen for the variance granted to Nine A LLC for a cluster subdivision. Cay seconded the motion.

Discussion: Evans stated that he doesn't feel that the motion, previously made, is strong enough to prevail if we go to court. There's a mistake in math as well and the fact that it does not dwell very much on the spirit and intent in the Spofford Lake District. So many of the aspects in the Supreme Court decision are not address or satisfied in terms of going against them of what has become prevailing law for case law *Chesterfield v. Nine A LLC* in terms of making decisions, especially in lake districts. We did not spend a great deal of time on it. If we deny the rehearing, it will not prevail and we stand on this current decision and the reasons for it as discussed.

Riendeau explained that if a rehearing was to happen, it would give the board an opportunity to analyze it. It ends up on some sort of technicality. They're not going to look at whether a three subdivision of better than a five. They are going to look at the facts of the findings of how we came to the decision. Riendeau explained that however the decision will be that the board is very comfortable with it. Cay asked that is the cleanup process worth the burden that you're going to put onto the applicant. And the alternative, if it goes to Superior Court and gets reprimanded by to the board, we're going to have a hearing and there's going to be testimony and it's not going to be a hearing from the start.

Vote called: Cay – yes; Fales – yes; Davenport – no; Evans – no; Riendeau – no.
The motion failed to deny a rehearing.

Evans made a motion to have a rehearing. The motion was seconded by Davenport.

Discussion: Evans stated that the board should discuss the decision and how the decision was made. With their approach to us with exactly what they asked for. Whether the board agrees with them or not we agree with them on each issue, needs to be our decision. It would be good if we are consistent with the Superior Court and Supreme Court coming on our behalf in a previous decision, to which we are not consistent. If there's one thing that Riendeau has asked for over the years, is that this board should really try to be consistent. Evans stated that people in the town are upset.

Riendeau stated that he would like to have the board take the time and go back to clean up the record.

Vote called: Yes – 3 votes; No – 2 vote

The motion passed to have a rehearing.

4. Review January 14, 2014 Meeting Minutes

Fales made a motion to approve the January 14 meeting minutes, as amended. The amendments are to add the words "cluster housing" and to change the square footage to change the square footage from 60,000 to 40,000. Davenport seconded the motion. Motion passed unanimously.

5. Other

- **Rules of Procedure**

Riendeau stated that in the past, all alternates can ask questions but once the board goes into the decision mode, it's always up to the five voting members for the discussion, to void the confusion between the public or the applicant, if an alternate is going down the trail that the five voting members doesn't feel necessary and the discussion is limited to the five voting members during the deliberation.

The board agreed that they are following the procedures currently written in the Zoning Ordinance and agreed to discuss the participation of alternates in the Rules of Procedure at the March 11th meeting.

- **Gary Cota Decision of March 2012**

The board agreed that Cota's request for a variance was denied at the March 2012 meeting.

Adjourn: The meeting adjourned at 11:37 p.m.

Respectfully submitted,
Patricia Grace
Secretary

Approved

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Burt Riendeau
Chairman, Zoning Board of Adjustment

Date_____