

**Town Of Hampton Falls
Public Hearing and Business Meeting**

Call to Order - 7:00 PM: Chairman McDermott called the meeting to order at 7:05 p.m.

Roll Call: R. McDermott, Chairman; C. Leto, Vice Chairman, P. Robart, J. Henebry, Members; A. Dittami, Alternate Member; L. Ruest, Secretary; T. Pare, Building Inspector/Code Enforcement Officer; Attorney Mark Beliveau/Pierce Atwood
NOT PRESENT: P. Young, Member; G. Fincke, Alternate Member

Review of the Minutes of the Previous Meeting (July):

MOTION: To approve the minutes of the July 28 meeting as written.

MOTION: C. LETO
SECOND: A. DITTAMI
4 IN FAVOR, 1 ABSTENTION, PASSES

Public Hearings:

- 1. Case #05-07:** Application from **Edward Bortolino, Andrew & Bette McKeon and Michael & Lyn Stan** Appealing an Administrative Decision of the Planning Board that an error in the decision, determination, or requirement on 5/24/05, to interpretation, in relation to Article III, Section 11.4.6, of the Zoning Ordinance and hereby appeals said decision, which we believe was made in error. (Ref: Planning Board Case 05-02-01)

The Board acknowledged receipt of a letter dated August 31, 2005 from Attorney Simmons requesting withdrawal of this application with prejudice. The parties have reached a settlement relating to Docket #05-E-331.

MOTION: To accept the applicants' request to withdraw this application.

MOTION: C. LETO
SECOND: P. ROBART
UNANIMOUS

- 2. Case #05-08:** Application from **Ernest and Carole Cherry** for 1) variance to Article III, Section 8.4.1 to permit roadways and structures within the buffer; 2) relief from Building Code Sections 7.1312 and 7.1313 to permit receiving areas of less than 20,000 square feet and depth of less than six (6) feet to bedrock and receiving area with depth to Seasonal High Water Table of less than two (2) feet; and 3) appeal from an administrative decision relating to Building Code Section 7.1312. (283 and 289 Exeter Road, Map 6, Lots 45 and 45-1)

E. Cherry, Attorney B. Pelech, J. Gove of Gove Environmental Services and Engineer K. Camm were present. Christine Cherry videotaped this hearing

Attorney Beliveau addressed procedural issues relating to the application at this time. He stated that the applicant seeks relief from Section 8.4.1 relating to roadways and structures within the 100' wetland buffer area. The ZBA interprets Zoning Ordinance 8.4 and 8.4.1 to prohibit structures,

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impermeable surfaces, et cetera, from the 100' buffer. If the applicant has structures, et cetera within the buffer, a variance is needed. However, Section 8.5, Special Use Permit, is for the construction of roadways within the District. Relief to this requirement and jurisdiction is sought from the Planning Board. B. Pelech stated the plan includes issues other than the roadway (identified in pink on the displayed plan). Therefore, the areas marked in pink where the primary loop road crosses buffer or wetland will not be discussed at this time.

Secondly, the applicant seeks relief from the Building Code 20,000 square foot reserve requirement. M. Beliveau explained that these provisions are set forth in the subdivision regulations as well. The ZBA thinks that the proper way to apply these identical provisions is to seek relief from the Building Code for one lot, thus appealing to the ZBA. When the proposal arises out of subdivision, then proper relief is through the subdivision regulations waiver provisions and handled by the Planning Board. B. Pelech agreed with this concept as long as the Planning Board adopts the same thinking. E. Cherry and K. Camm commented that this is not how the matter was dealt with in a previous application to the Planning Board for the same plan. E. Cherry added that this application is a result of a mediated settlement with the court and that he feels it is unreasonable to ask him to spend additional money on an application package to the Planning Board when he feels relief is needed from the ZBA. M. Beliveau noted that the applicant needs to apply to the Planning Board anyway for subdivision approval. E. Cherry stated that the court agreement is that if he feels he is not getting anywhere with the town, he can stop the process and return to court. Without the relief requested, he feels the process is fruitless as he was told in the past what he can't do. E. Cherry requested iron clad proof that the requested relief will be addressed. B. Pelech suggested Attorney Beliveau could meet with the Planning Board before an application is called. B. Pelech and E. Cherry took time to discuss this matter and returned indicating agreement to proceed as Attorney Beliveau outlined allowing the Planning Board to make a determination on the roadway.

The third item on the application, appeal from administrative decision, also has been identified to not be properly before the Board. The appeal makes reference to a position taken by the Planning Board in prior proceedings relating to interpretation of the Building Code, specifically, the 20,000 square foot reserve area. Discussion of the applicant's interpretation versus the Board's interpretation versus the Building Inspector's interpretation took place at this time. M. Beliveau suggested that the Boards and Building Inspector review this matter and try to determine how to interpret the provision. It is agreed that there is a need for a variance to this requirement. It is not properly noticed as submitted, however. The relief to the Building Code as applied for is similar to this issue and is to be addressed by the Planning Board as part of a subdivision application. M. Beliveau encouraged the ZBA to look at this issue in order to understand how the provisions interact and how they are to be interpreted. M. Beliveau will meet with the Planning Board to discuss the interpretation of the ZBA and its impact to what the Planning Board does.

B. Pelech referred the Board to the plan for a 25-lot subdivision. He identified the color highlighted sections on the displayed copy (wetlands=green, 100' buffer=blue, proposed residences=dark red). The relief sought relates to allowing structures within the wetland buffer. At no point, does the encroachment exceed 50 feet. B. Pelech began his presentation applying the dimensional area (Boccia) test relating to hardship. M. Beliveau noted that the Board was expecting the applicant to refer to this request as a use variance (Simplex). He reviewed recent case results with Attorney

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Pelech at this time. The use, rather than area, relates to prohibitions of certain activities within the district. The 100' buffer is not a setback but rather an area where one cannot do certain things.

Attorney Pelech stated he would demonstrate where the application of the ordinance interferes with reasonable use of the property because of special conditions. He stated that the project does not interfere with the public or private rights of others as a great amount of the project is not visible to the general public. He reviewed individual lots at this time and identified where they met or did not meet requirements. Most lots have the structure footprint within the buffer area and some lots have driveways that cross the 20,000 square foot reserve area. Lot #18 is the existing home on the property which is located in the buffer. This lot is grandfathered and no relief is needed.

B. Pelech reviewed the five criteria for granting a variance at this time. He stated that there is no diminution in value as homes are being constructed on viable upland and will not affect abutting properties in any way. He stated that the proposal is not contrary to the spirit of the ordinance and indicated that Wetland Scientist J. Gove would speak to this specifically with regard to structures in the buffer not impacting wetlands more than a home placed outside the buffer. He added that the purpose of the wetland ordinance is to protect these areas as set forth in the ordinance. Additionally, this proposal is of benefit to the public in that it provides housing that will not require any extensive amount of municipal services, and the tax base will increase by assessed value of 25 residences.

B. Pelech stated he feels the proposal meets the hardship test of Simplex in that structures and driveways have been moved to just within the buffer zone and that there are no reasonable alternatives. Substantial justice has been met in that there is no public benefit in denying the request. This concludes the applicants' presentation.

J. Gove explained how the wetlands were delineated and the types of soils identified. A Department of Environmental Services permit has been approved. Direct wetland areas have been placed in the areas of least impact. He reported that 40% of the parcel is wetland, 23% wetland buffer and 37% upland area outside the buffer. He noted that the area at the back corner of the lot has been placed in permanent protection by the Wetlands Bureau. A lengthy presentation, to include questions of the Board, of the types of soils in different areas on the parcel took place at this time in conjunction with a review of Article III, Section 8, Wetlands Conservation District. Provisions to retain trees in certain areas, in order to maintain forested conditions, was strongly encouraged to be part of the subdivision plan and individual deeds for lots created. A five minute break was taken at the conclusion of this presentation.

Discussion was opened to questions and comments of the Board. J. Henebry inquired as to the size of the road and was told it is a 50' right of way, 4,900' long of which 24' is paved. A. Dittami inquired whether the shifting of lot lines would bring more lots into compliance. B. Pelech stated he didn't believe so. A. Dittami asked if the plan was redrawn to meet regulations, how many lots would result and was told between 19 and 25. A. Dittami then asked how many lots are needed to make the project economically viable.

E. Cherry responded that that is not an issue and that the applicant is before the Board as a result of a court mediation of August 2, 2005. The agreement is that if the town approved a 25 lot subdivision,

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he would remove the 108 condo project from consideration. He stated that if the Board is talking of anything less than 25 lots, the talks are not that of the mediation agreement.

In looking at the hardship criteria, A. Dittami stated he is not aware of current costs to support a project such as this and felt this issue is something to take into consideration. B. Pelech indicated that it is a fair question and suggested that E. Cherry answer it to his best ability. E. Cherry stated that no analysis has been done. He has proceeded on the 19 lots, with the expectation to come back to make 25. E. Cherry feels 25 is necessary for a reasonable project.

A. Dittami referred to the discussion about the affect on wetland areas. He questioned whether the structures built in this area would be subject to problems. J. Gove stated that these areas are not areas of flooding and feels there are uniform soil conditions in the wetlands. P. Robart asked J. Gove how he would characterize this parcel, relative to Hampton Falls, with respect to wetlands. J. Gove stated this parcel is typical and noted that work he has done in Rockingham County finds most communities to have 20% of aerial surface covered by wetlands. Although some are higher and some are lower, he feels the Cherry parcel is an average lot.

C. Leto figured that 60% of the lots require variance. B. Pelech indicated 14-15 lots of the 25. C. Leto suggested the applicant look at pulling in the end of the road to allow additional area for those lots. E. Cherry stated this is not an option without eliminating lots. In response to C. Leto, B. Pelech stated that 50-60% of the total acreage requires variance. A review of the impacts took place at this time. In response to A. Dittami, J. Gove stated that the amount of wetlands is not uncommon to Rockingham County but that the uncommon part is that the wetland are small areas scattered throughout the parcel. The percentage of upland to wetland is typical; it's the layout that is unique. A. Dittami asked whether the glacial event referred to earlier that caused this layout to occur is uncommon to this area. J. Gove stated no. A. Dittami asked if the direct abutting properties are any different from this parcel. J. Gove stated that he has not looked at this matter with any level of intensity, however, feels you would see similar types of soil conditions. Wetlands are unknown. In response to P. Robart, E. Cherry stated he has owned this property for 23 years.

Discussion was opened to abutters and members of the public. Abutters Young and Glover indicated that they had no comments. No comment was heard from member of the public C. Merrill. R. McDermott closed the public hearing.

The Chairman asked for any additional questions. J. Gove responded to a question regarding the potential affect to neighbors of this property by stating that this plan has gone through site specific review as well as wetlands review and received approval. This means that pre/post run-off conditions have no detrimental down stream flooding issues with abutting properties. C. Leto noted that there is one access/egress and requested information on traffic flow. He was provided with information resulting in approximately 250 trips per day.

Review of the five requirements for granting a variance took place at this time. Members provided input on each as bulleted below:

- 1. No diminution in value of surrounding properties will be suffered.**

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- Did not feel impact of development would diminish surrounding properties.
- Did not think enough evidence was presented one way or the other regarding the use of the property and value. Unable to answer with the evidence presented.
- Given the abutters had no comments, no indication of the value of properties was brought up.
- Abutters did not express concern.

2. Granting the permit will not be contrary to the public interest.

- Hampton Falls believes the 100' buffer is proper for Hampton Falls. Support of the articles as passed by voters is proper. There is a broad stroke of buffers being violated.
- 60% of the properties are located within the 100' wetland buffer. In reading the district ordinances, there could be a lesser degree of intrusion thus making this proposal contrary to the public interest.
- The wetland ordinances are clear as stated. It is felt that the sheer magnitude of the amount of relief needed is glaring in number. This needs to be taken into account.
- 15 lots out of 25 needing relief is an inordinate amount of intrusion to buffer by driveway crossings and structures. Concur with the above comments.

3. Special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship.

(A)-Simplex case – applicants for a 'use' variance may establish unnecessary hardship by proof that:

(1) A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;

- Disagree - When looking at a restriction and reasonable use of property, one is to consider size and magnitude; what it is and what it could be. Regarding unique setting of the property, this property in general is typical of Hampton Falls in land mass and not considered unique in its environment.
- The number of lots the applicant could get if the lines were adjusted, given 15 lots affected, initially was a problem, but then the applicant said they could get 19 to 25 without need for a variance without further information regarding economics, uniqueness. Not enough justification to say is unique. The applicant says they can get lots that meet requirements. Feel would be against the public interest.
- The applicant can get 19 or more conforming lots and is asking for variance to 60% of the project. Cutting back does not interfere with reasonable use of the property.
- In Hampton Falls, all property owners have to go through the exercises to identify what is available to work with. One may or may not agree with the laws on wetlands or other issues, however, all who own property have to go through the same process. This is not necessarily a hardship.
- Property values have increased substantially in Hampton Falls. If the applicant were to adjust lots, therefore, reducing the number of lots, may find it ends up square. Agree with other members' concern regarding the number of lots needing variance. Understand the applicant is attempting to get reasonable use; property is not unique, however.

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(2) No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and

- It is felt that there is a relationship.
- The applicant is in a position to do something with the property; can get 19 or more conforming lots.
- No case has been made to sway otherwise.
- Disagree.

(3) The variance would not injure the public or private rights of others.

- Believe it would injure public and private rights. The ordinance is clear on wetland standards and protection of such. The magnitude of the variances requested, in fact, affect it.
- Have to defend the wetland ordinance. See no injury. Would be against the private rights of others.
- Wetland rules are imposed by the townspeople/voters.
- Although not being injured personally, there may be injury to people in the future.

4. Granting the permit would do substantial justice.

- Based on discussion of #3 above, this proposal would do substantial justice.
- Feel would be a good project, however, 60% of lots require variance.
- Disagree given magnitude of relief needed.
- There is reasonable use of the property as 19 lots are available without need for variance. No injustice. Proposal does not qualify under this section.

5. The use would not be contrary to the spirit of the ordinance.

- The use would be contrary if the applicant can make reasonable use without variances. Granting would be explicitly contrary to all ordinances.
- As you look at the project, the ordinance is clear as to what is allowed. Given the overall expectations, it is felt to be contrary.
- The applicant can meet the spirit and intent without being much smaller.
- As member of the ZBA, am empowered to implement the spirit of the ordinance.

MOTION: To deny the applicants' request for variance to Article III, Section 8.4.1 to permit structures within the buffer for the following reasons:

- Do not believe sufficient evidence to support diminution in value was presented.
- Believe granting of permit is contrary to the public interest because the fact appears that there is reasonable use of the property without granting a variance.
- Do not believe any unnecessary hardship to owner; no economic hardship. Do not believe zoning interferes with use of property. There is nothing clearly unique of the property that would justify granting a variance.
- Because there are reasonable uses of the property, no injustice to make the owner comply with current rules and regulations of the ordinances. Justice is effectively moot.

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- The use appears to be contrary to the spirit of the ordinance. There is reasonable use of the property; 19 lots versus 25. There is no evidence to say this is an unreasonable use.
- There was a lot of discussion in the areas of wetland buffer zones, however, nothing was heard that the ordinances are unnecessary, unwarranted or inappropriate.
- Granting something so large is contrary to the spirit of the ordinance.

**MOTION: A. DITTAMI
SECOND: P. ROBART
5 IN FAVOR, PASSES UNANIMOUSLY**

Other Business:

Office of Energy and Planning: Paperwork on upcoming training sessions was provided to the Board. Those who wish to attend should provide completed registration forms to L. Ruest as soon as possible.

Municipal Law Lecture Series: Information on these lectures will be mailed to Board members. Those who wish to attend should provide completed registration forms to L. Ruest as soon as possible.

Comments or Questions from the Floor: No comments or questions were heard at this time.

Adjournment:

MOTION: To adjourn the meeting at 9:55 p.m.

**MOTION: C. LETO
SECOND: P. ROBART
UNANIMOUS**