

Brentwood Board of Adjustment Minutes November 9, 2020

Members present: Chairman Ken Christiansen; Vice Chair Doug Cowie; Bruce Stevens, Andy Artimovich; Alternate Kathy St. Hilaire; Alternate Daphne Woss.

Christiansen opened the meeting at 7:00 pm. The Board introduced themselves. Motion made by Stevens, 2nd by Artimovich, to give St. Hilaire voting rights. All were in favor. Motion carried.

7:00 pm: Applicant/Owner: Michael Kirby & Teresa Forsyth/Kirby, request a variance from Article III, Section 300.002.006.005A-Lot Area Requirements; frontage of 50' on a lot of record where 200' is required, in order to construct a single-family home. Referenced by tax map 210.024.000; Scrabble Road, Brentwood, NH 03833 in the residential/agricultural zone.

Present: Sharon Somers from Donahue, Tucker and Ciandella, PLLC (DTC); Michael Kirby, Theresa Forsyth Kirby. Resident Steve Hamilton.

Somers handed out two letters of support from neighbors to be read into the record later (on file). Somers, representing the Kirby's, explained that they are seeking frontage relief. The property is located at 56 Scrabble Road with approximately 12 acres with 50' of frontage where 200' is required. They are seeking approval for a variance in order to build a single-family home. The intent is for Mike and Teresa to use it for their retirement and their existing house, lot 23 on the tax map, used for other family members or one of their children. The lot in question is a large 12+-acre parcel but has a small amount of frontage and it has wetlands. The proposal is to situate the home well back from the road and outside of the wetlands which would make it not very visible from the road. The Kirby's understand that if they get the variance, there are other permits that would be required; driveway permit and a NHDES wetlands crossing permit. This lot was created as part of a 1984 subdivision and is depicted on the plan (*recorded as Plan #D-12604*). There is a plan note which restricts further building on that lot. Somers spoke with Glenn Greenwood, (*Town Planner*) who in turn spoke with the Town Attorney about that note and the net result of the discussion with the Town Attorney was that while that note would technically be enforceable by the Planning Board and it would only become enforceable if the proposal should come before the Planning Board. It doesn't have any impact on the Zoning Board. The variance can be granted or not granted based on the ability to provide evidence and then if it did need to go before the Planning Board, the Planning Board could address it at that point but the two Boards can and should act independently. This is Somers understanding from what the Town Attorney has said.

Somers summarized the submitted variance criteria in the written materials.

1. **The variances will not be contrary to the public interest.** The general purpose of frontage is to prevent overcrowding. Will granting the variance impact the essential character of the locality. Putting in a single-family residence in an area populated by single-family homes so no change to the essential character of the locality. Secondly, the subject parcel is also larger than many other parcels so no overcrowding. The reasonable use of the property with less than the frontage is not a threat to public health, safety or welfare provided they obtain the necessary driveway permit and if the Board should grant the variance, a driveway permit could be a condition of approval.
2. **The spirit of the ordinance is observed.** The New Hampshire Supreme Court has virtually merged the variance "public interest" standard with the "spirit of the ordinance" standard. That has been satisfied as well.
3. **Substantial justice is done.** If the variance is granted, it would enable my client to have a reasonable use of their property by being able to construct a retirement home well back from the road, outside of the wetlands; a big benefit to them. In contrast, there is no detriment to the abutting properties that we have identified, and some have submitted letters. There's no detriment to any individual or the public to outweigh the benefit of my client to construct a home on this large lot.
4. **The values of surrounding properties are not diminished.** Granting the requested variance will not diminish the value of surrounding properties. Putting in a single-family home on the existing lot which conforms to all

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dimensional and use requirements aside from frontage, the use is consistent with other uses so there is no diminution of property.

5. Unnecessary Hardship.

A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because: The parcel is unique in that it is one of the larger parcels along this section of Scrabble Road and yet it has a substandard amount of frontage. Due to the existence of wetlands on site, it is questionable whether the property could be developed for anything but what the applicant proposes, namely a single-family dwelling. Due to the wetlands, a large lot, and disproportionately small frontage, does make this unique from other properties in the area.

B. 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 because: Since the purpose of the zoning ordinance is to prevent overcrowding, the literal application of the ordinance in this case would be applied to a lot that is well in excess of what is required, and will be set well back from Scrabble Road so little, if any, of the home will be visible to others thus preventing any possible perception of overcrowding.

C. The proposed use is a reasonable one. There are no practical alternatives, this is a proposed use. Somers had talked with the Kirby's to see if there was another way to do this however, lot 23 there's not enough frontage to reconfigure this to accommodate both lots. It's a reasonable use with help needed for the frontage.

Somers informed the Board that they are here to seek a variance first before getting an extensive engineered plan for the septic etc. but there are no level details to share. Christian asked how long the Kirby's have owned the property. Kirby replied since April of 1992. Somers clarified that the Kirby's own both lots; lot 23 with the existing house, a 2-acre lot to retain for family and then on lot 24, to build a home for them to retire too.

Stevens asked how is this taxed by the Town? What value is placed on it? It's not taxed as a building lot. Kirby commented it's in current use. Stevens said the actual value of it prior to its current use status would still be much lower than a building lot. Somers didn't know the value. Artimovich said it would be taxed as a non-buildable lot that the subdivision created. Stevens said from 1984 it would be taxed at a lower rate. Establish that it's never been taxed as a buildable lot as it doesn't meet the building dimensional requirements. Somers commented that the designation as this a non-building lot was done in conjunction with the idea that it was a 50' ROW set up as a reserve strip and they wanted to be sure it was built to Town standards to prevent a small subdivision.

Stevens read note 5 on the plan. *"Lot 1 may be used only as open space, woodlot, agricultural, and similar uses. No residence may be built on this lot until (a) all state and town requirements are met for a septic system. (b) A road is developed providing access to the lot which meets minimum lot frontage requirement under the Brentwood zoning ordinance."* Somers reiterated that the Town Attorney had advised that that condition would be enforceable if this matter was in front of the Planning Board, but it doesn't prevent this Board from taking action. Stevens commented that Mike Donohue had said back then that the Planning Board should not approve lots that didn't meet building specs, but the Sanborn family owned this, they were farmers. For agricultural purposes they wanted to retain it and today it wouldn't go through but in the 80's it did. But it's clear the lot is not for building purposes and the owner still has rights to use the land. If you could buy some land from the neighbors or put in a road to gain frontage, that's a right he has. But your client knew, it would be in the deed, he knew it was not buildable. T. Kirby offered that they purchased both parcels in foreclosure for 100K. Stevens said so you knew you weren't paying for a buildable lot. T. Kirby said they found plans in the house that they were going to build 4 or 5 houses out back. Stevens said and you have that right. It says as long as you bring everything to Town standards you can do that.

Somers commented the intent of this seems to try to prevent something other than a Town road going in to service 3 or 4 lots. Stevens disagreed, no. Brentwood is very property rights oriented and encourages people to have the best use of their land if they conform to the standards. Stevens agreed that the ZBA is separate from the Planning Board.

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St. Hilaire pointed out that they have reasonable use of the land with current zoning as senior housing only requires 10 acres. *The Board incorrectly said 20 acres were required. See p. 25 Zoning Regulations 300.002.008.003 D "the minimum lot area shall be ten (10 acres). (03/2017)* Stevens reiterated that the note states it could become buildable once it met the basic standards. It's a bad precedent for this Board to do; it would open up a number of parcels around Town.

Somers commented the test for this Board is to look at what is a reasonable use, not the old standard of whether there is no other reasonable use. It's a question of is what we're proposing a reasonable use and the purpose of the ordinance as applied is going to be unreasonable. It's a very large lot and the only non-conformity is frontage. The purpose of that frontage is solely to prevent over-crowding and it's one house on 12 acres of land. I don't think you can link a frontage requirement to this particular set of facts. There may be other circumstances where this Board might be troubled by an old plan that said no further building because maybe the configurations or facts would be different. But the facts here do indicate a reasonable use and the fact that there may be other reasonable uses for this property is not relevant.

Stevens said the townspeople spoke when they created the ordinance, and you have to have a fair standard supported by the Townspeople. St. Hilaire said if they built a road to Town standards, this could be subdivided, so there are other uses for this property. 12 acres with proper frontage you could get some house lots. Somers pointed out a fair amount of wetlands there. St. Hilaire commented yes and it's up to them to figure that out. The Sanborn's would have gotten every lot they could that was economically viable.

Somers replied her clients are not interested in building something to Town specifications and are only interested in building a simple home for themselves for their retirement. It might be an interest for someone else to take on the expense and planning to create a subdivision but that's not what they are interested in doing. St. Hilaire said any decisions made run with the land. Stevens said all land use approvals go with the property. Somers agreed and they could sell it to someone who wanted a single-family home on a large piece of property.

St. Hilaire said the note says they have to build the 50' ROW to Town standards. Somers replied that question hasn't been investigated but believed it could be dealt with, with a driveway permit. Stevens commented it's not that we're against it but the standards the Town has, have to be equitably applied across the board. St. Hilaire added, and they purchased this knowing this, it's on the deed, it's on the exhibits. Somers said the case law says even if you create your own hardship that's not dispositive. St. Hilaire questions the hardship and doesn't see a hardship. There is use of this land as it is right now. Somers said the test is identifying things that are unique, it's not whether or not there's reasonable use of the land. Stevens added if this was a lot of record that pre-dated zoning, no question but this was created in 1984 long after zoning was in place. St. Hilaire said there is a lot off of Shannon Way, that was developed in 84' or 85', Frank Olms property, exactly the same and his son used to come in asking can he build on it with the 50' ROW, similar to this, and you can't. His father subdivided that property and left about 17 acres with a 50' ROW. Stevens commented this is why it's not done this way anymore. Buyer beware, the deeds reflect it.

Hamilton asked if the ZBA can override this and say okay. They have 12 acres of land; use a driveway and go back in and put a house in. How are you tied to the previous zoning? St. Hilaire said the ZBA has to answer all five variance criteria. Stevens said the same dimensional requirements exist today as they did in 1984. Hamilton asked so this precludes them from doing anything on this but raise cows? Stevens replied no, they can build on it, but they have to find a way to make that lot through a boundary line adjustment maybe, there is a use there. It doesn't meet buildable standards as is but if there is upland soil, they can add an abutter's piece to get the frontage or build a road to get the frontage, then they can do it.

Somers said the notion to get additional space to get the frontage is not feasible. They are non-conforming on lot 23 themselves and the Schmalzer property doesn't have an abundance of frontage either. They looked at that and there's no ability to obtain additional frontage to meet this. These people will need to build to Town standards a road, far in excess of the quality of a driveway for a single family home. Stevens commented the Board members do have a responsibility to the Town and uphold the Town standards passed by the Townspeople.

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Cowie commented on a past case, Metzger V. Brentwood subject to gates and bars, Class VI road, with 50' of frontage. The court found the use reasonable as it met the needs for a fire truck. It's not unusual to accommodate people with a use that is a reasonable and was in favor of the proposal. Fifty feet onto a Town road is more than adequate for the needs of the property if it meets all the other considerations for a single-family home. Somers agreed and it does. Stevens suggested Cowie present a citizen's petition and present a zoning amendment to the Planning Board and clarified that Metzger v. Brentwood, the land that Metzger claimed was his access from a Class V Town road was actually access from a Class VI road and he subpoenaed the road agent. The road agent had put the sign in the wrong spot and the judge felt that it was not clear as the sign was 100' up the road not at the intersection of South Road and the Town could not prove that the Town had closed the road at South Road.

Artimovich commented that the surrounding property values were valued with that space never being built upon. I find it hard to believe that the property values would not be diminished going from open space to a house with activity. Somers didn't have evidence from an appraisal for Artimovich's point and said a residential use is not going to detrimentally impact the property values. Commercial or multiple homes, yes but a single-family home. Artimovich said its open space versus a single family home. Artmovich was also concerned that the relief was for 150' not 5' or 10'. Somers asked for a moment to speak with her clients. Bickum read the letters of support for the Kirby's proposal from Richard Singleton of 52 Scrabble Road and Donna Whitcomb of 59 Scrabble Road into the record (on file). Hamilton was also in full support of the Kirby's proposal.

Somers requested a continuance to consider the options. Christiansen would like to contact our Town Attorney for his written input. Somers said she spoke with Greenwood, who conferred with the Town Attorney. St. Hilaire asked if there was a bill for that. Bickum replied yes. Stevens said going forward the Board can ask for expert opinion and clarification. The opinion of the Town Planner is fine but written response from the Town Attorney as part of regulations is an expense to be borne by the applicant. Somers understood and was sure that would be acceptable to her client. Kirby asked if there was any negative feedback to the Town. Christiansen and Bickum confirmed no responses other than the two positive letters.

Motion made by Cowie, 2nd by Artimovich to continue the hearing for Michael and Teresa Forsyth/Kirby to Monday, December 14th at 7:00 pm. All were in favor. Motion carried.

7:00 pm: Applicant/Owner: Scott & Brenda Barthelemy, request a variance from Article IV, Section 400.005.002; re: siting septic in soil with a seasonal high-water table. Referenced by tax map 201.008.000; 470 Route 125, Brentwood, NH 03833 in the commercial/industrial zone.

Present: Bruce Scammon from Emanuel Engineering; Scott Barthelemy. No abutters were present.

Scammon, representing Scott Barthelemy, gave an overview. This is a 23-acre parcel at 470 Rte. 125, next to Starkey's Welding, with an existing house on the property. The Piscassic River borders. There used to be an antique store here at one time and there is a residence. The Planning Board approved moving the existing structure that was the antique store to become a farm stand. They applied for the septic permit with Mike Cuomo and 20 test pits were done on the site. There was 26" to the seasonal high-water table. The top 20" were gravel from when there was a parking lot for the antique store with 6" of natural storage below that and then the wet table. Technically, by the regulations, 400.005.002, 12" of natural soil are required before the water table. They're seeking approval to build a leach field here. There are other areas on the site, but the Piscassic River runs along the property and they're trying to keep it as far away from the river as possible. They also need separation from the residence and the commercial farm stand so they're asking for a variance on that height. Stevens commented the gravel has been in place for 20-25 years at least.

Scammon continued the Town of Brentwood requires 2' above seasonal high- water table. This will be 4' above seasonal high-water table; conforms to the state. A chambered system would require 24" but due to the fingers of wetlands on the site, it would be better to do stone and pipe system, that is higher and more protection for the environment. With 26"

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where only 12” is required, with no topsoil in that layer, they probably took off 8” – 12” when they put the gravel in. This area was the high area. Scammon reviewed the variance criteria (on file).

Facts in support of granting the variance:

1. Granting the variance would not be contrary to the public interest: Granting the variance would benefit the public interest. The public will benefit from the presence of a farm stand in this area, giving them easy access on Route 125 to shop for farm fresh products. Furthermore, the presence of another business would bring in revenue for the town.

2. If the variance were granted, the spirit of the ordinance would be observed because: The spirit of the ordinance is to provide sufficient distance between the bottom of the leach field and the estimated seasonal high water table (ESHWT). Per the design of the proposed septic system, > 4 feet is provided between the bottom of the leach field and the ESHWT, whereas only 2 feet is required per Section 400.005.003 within the Brentwood Zoning Ordinance. NHDES requires a 4 feet difference, therefore sufficient separation is provided.

*3. Granting the variance would do substantial justice because: Having a functional leach field is required for the operation of the farm stand. As mentioned in #1, the presence of a farm stand is beneficial to the town and surrounding communities. The ordinance requires 24 inches (**this is an error and should be 12 inches**) of natural soil above the ESHWT, 26 inches were found above the ESHWT of which 20 inches were gravel from the former antique shop parking area. The current owner should not be penalized for development by a previous owner.*

4. If the variance were granted, the values of the surrounding properties would not be diminished: The driveway of the nearest abutting residential lot is +/-325 feet from the nearest driveway of the farm stand, therefore the presence of a farm stand should not affect those abutters. There are some industrial abutters, which should be unaffected. The owner of the subject parcel also owns agricultural properties to the west, which provides the products within the farm stand, benefitting the property. There are also commercial properties ail along Route 125. These properties will only benefit by a functioning farm stand. There are no other farm stands in the immediate vicinity.

5. Unnecessary Hardship: A. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because: 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 because: The nearest passing test pit would require the removal of the driveway leading to the 2-story garage on the property. The other passing test pits are over 300 feet away from the proposed building, which would substantially increase the required disturbed area on site. Furthermore, the other passing test pits are closer to the Piscassic River than the one being used, therefore making the separation distance less, and possibly requiring an NHDES Shoreland Permit. And ii. The proposed use is a reasonable one because: The proposed components of the septic system are all in one area (minimizing site impact) with all requirements from NHDES being met.

Motion made by Stevens, 2nd by Hilaire to grant the variance for septic siting as presented. All were in favor. Motion carried.

Board Business: Approval of minutes – October 5, 2020

Motion made by St. Hilaire, 2nd by Stevens, to approve the minutes from October 5, 2020 as presented. All were in favor. Motion carried.

Motion made by Christiansen, 2nd by Artimovich, to adjourn at approximately 8:16 pm. All were in favor. Motion carried.

Respectfully submitted,
Andrea Bickum
Administrative Assistant,
Brentwood Zoning Board of Adjustment