

Newfields Zoning Board of Adjustment
January 31, 2024

Attendance: Chairman Kent Lawrence, Betsy Coes, Steve Yevich, Bob Elliott, Jack Steiner, and alternate Catherine Tarnowski. Alternate Scott Sakowski was absent from the meeting.

Guests: Tom and Eileen Conner, attorney R. Timothy Phoenix

Chairman Lawrence called the meeting to order at 7pm, introduced the Board Members above, and explained that Catherine would participate but not vote tonight. He introduced tonight's case:

1. Case #23-11-29-01- Thomas H Conner Variance—Thomas H Conner, Trustee of the Thomas H Conner Revocable Trust of 2012
Variance Request for relief from Article III, section 3.4.2, Schedule II, requirement for 200 ft. of frontage for each lot. The proposal is to subdivide an existing parcel referenced as Assessors Map 203, Lot 17 (28.96 acres) into two new lots, one having 2.5 acres of land and 200 ft. of frontage, and the second lot will be 26.46 acres and will have 98.67 ft. of frontage. The variance request is to allow a lot to have less than 200 ft. of frontage.

Attorney Tim Phoenix of Hoefle, Phoenix, Gormley & Roberts in Portsmouth presented Tom and Eileen Conner's case. The entire lot is around 29 acres. The proposal is to subdivide the lot so their home and the bottling plant are on one lot of 2.5 acres, and the second lot would be roughly 26 acres on which they want to put a single-family home. They've got 98 ft. of frontage, which would be enough for a road if they wanted to subdivide this and provide frontage for homes, but they don't want to do that. They will access it up the existing driveway instead of building new access. The packet contains a recommendation from the Planning Board from several years ago particularly because of an included deed restriction. There would be 200 ft. of frontage for the existing front lot and 98 ft. of frontage for the back lot. The cause of it is that over the years, for whatever reason, land was subdivided off, and instead of leaving 400 ft. of frontage for this whole lot, they only left 300 ft. of frontage. So, if you want to do anything with this, there's a need for a frontage variance or you need to build a road and enough houses to justify building a road. He referenced Exhibit C in the packet: the yellow highlighted lot is the Conner lot, and many lots nearby do not have 200 ft. of frontage. Some of them come close, but most are at 150 ft., 120 ft, etc. Bob asked if those lots were preexisting lots and pre-zoning, and the general consensus was yes. Attorney Phoenix cited case law that says it can be a hardship if you are providing a circumstance that is like other circumstances in the area, and less than 200 ft. of frontage is consistent with many of the lots in the area.

VARIANCE REQUIREMENTS

1. The variances will not be contrary to the public interest.
2. The spirit of the ordinance is observed.

Attorney Phoenix always combines the first two requirements due to the 2007 Supreme Court case *Malachy Glen Associates, Inc. v. Town of Chichester*, which says the overarching test for these two requirements is whether granting the variance "would unduly and to a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." "Mere conflict with the zoning ordinance is not enough." The purpose of the Newfields Zoning Ordinances is to regulate "the use of

land and buildings, the size of yards and courts and other open spaces, and the density of the population” to:

- Secure safety from fire, panic, and other dangers—Creation of a second lot with more frontage than would be required for a full-width road to create a subdivision will not diminish safety for Conner or other residents. The house will be built to current building codes and will have easy access via the existing drive.
- Promote health and general welfare—The proposal makes appropriate use of the land, especially since the Conners are committed to not further subdivide the lot. There will only be one house on the new lot.
- Promote adequate light and air—The project will maintain existing access to light and air.

Bob asked about the Conner’s commitment to not further subdivide the 26 acres. Kent also noted there’s a suggestion that there will be a deed restriction on the land. Attorney Phoenix did not have a sample worked up yet, but the letter from the Planning Board is in the packet which suggests that’s the plan. Chairman Lawrence said he believes because of the road frontage the lot would be suitable for conservation subdivision, but that again requires in putting in roads. He found the shared driveway weird. Attorney Phoenix said it’s much less impactful to not put in a driveway. He anticipates that if the Conners sell their home and the bottling works to someone else, there would need to be an easement to access it separately. They don’t need an easement or an access easement because they own both. Today, all 29 acres are owned by the Conner Trust. There was some confusion due to the notes from a 2020 Newfields Planning Board meeting which referenced selling a different lot of land owned by the Conners.

- Promotion of good civic design and arrangement which includes the provision for public utilities and other services—Conner’s parcel includes public utilities and other services for the existing home and business, and the proposal includes a Proposed Access Easement for the second lot which could be used if needed in the future to separate the utilities.
- Conservation of the value of land and buildings—Conner’s proposal creates one additional lot for a single-family residence and with the deed restriction preserves a lot of the land. It probably doesn’t preserve the value of the land as compared to development, but in overall life we know that wetlands and conservation are important, so they are trying to do the right thing.
- Preservation of the rural charm now attached to the town—The commitment to not further develop the land is preserving the rural charm, and the house and will not be visible behind the current house.

The Malachy Glen case and other Supreme Court cases that followed said that whether the variance in a “marked degree conflicts with the ordinance such that it violates the ordinance’s basic zoning objectives” is based on if they alter the essential character of the locality and do they threaten the public health, safety, and welfare. The essential character of the locality is rural and many of the surrounding smaller lots have less than 200 ft. of frontage. There will be one house surrounded by a lot of open land, which is the definition of rural, so the essential character of the locality will not be harmed. If they were going to develop this and go with a conservation subdivision, there would have to be a road here, which is considerably more disruptive. The second test is whether it threatens the public health, safety, or welfare. Clearly, a 98 ft. frontage does not do harm where they could put a road in, so the public’s health, safety, and welfare is actually protected by this option for the land.

3. Granting the variance will not diminish the surrounding property values. The project does not diminish surrounding property values as it is consistent with the character of the surrounding area. We think preserving all this open space and putting one house will not diminish property values.
4. Denial of the variance results in an unnecessary hardship. This is a 3-pronged test:
 - a. Special conditions exist that distinguish the property/project from others in the area. This is a property with a significant amount of overall frontage, but not enough to get two lots. The option for any economic use is a full subdivision or get a variance.
 - b. No fair and substantial relationship exists between the general public purposes of the ordinance and its specific application in this instance. There's enough frontage for a full road that they don't want to create. Frontage requirements exist to prevent overcrowding and ensure adequate access property, provide separation from neighbors, and provide sightlines. Granting this variance doesn't create a problem, thus there is no substantial relationship between requiring this lot to have 200 ft. of frontage when it's impossible to do.
 - c. The proposed use is reasonable. This is a residential use in a residential zone. Creating one more home and continuing, at least for now, to utilize the existing driveway. The case *Vigeant v. Hudson* said if the use is permitted, it is deemed reasonable. This is a dimensional variance, not a use variance, but that's the way the case reads.
5. Substantial justice will be done by granting the variances. The test from the Harborside Associates case and the Malachy Glen case is that if there is no benefit to the public that would outweigh the hardship to the applicant, this factor is satisfied. "Any loss to the applicant that is not outweighed by a gain to the general public is an injustice." It's a balancing test. The harm to the Conners is they will have 26 acres that they can't do anything with unless they decide to put it in conservation or create a larger subdivision. You balance that harm against the harm to the public if the variance is granted, which is negligible because the 98 ft. frontage is relatively consistent with surrounding lots. The *Walker V. Manchester* case says that if you're proposing a physical condition that's consistent with other conditions in the area, that's a factor for hardship and therefore balancing the case for substantial justice.

We think it's a good project and a straightforward case, and we have the support of the Planning Board.

PUBLIC COMMENT

Jesse Kells, with the Newfields Youth Athletic Association, said the Conner's generously donated the land they use for the sports fields, so he supports the proposal. Dick McKenzie, an abutter to the property, was present.

ZBA DISCUSSION

Chairman Lawrence mentioned a prior case that involved a conservation subdivision coming out of a bigger parcel and noted that it's the road frontage that dictates that route. He acknowledged that 98 ft. is big enough to put a road in. He believes this would qualify for a conservation subdivision, so we may be trading the process of going through that for a deed restriction which would limit the division and development of this property to one residence. What's been presented has gone through the Planning Board process in a preliminary discussion, and that's what Glenn supported.

Attorney Phoenix said they do have to go back to the Planning Board for the formal subdivision application but had to come to the ZBA first. Mr. Conner said that they looked at the conversation

subdivision, and according to the zoning ordinances, there had to be a 75 ft. buffer around the whole thing and there wasn't enough room at 98 ft. to make that happen. They said we wouldn't be able to do a conservation subdivision because of that. Chairman Lawrence said that may be, he wasn't sure, but thanked him for bringing forward.

Chairman Lawrence noted that it could be odd to have different owners with one driveway, but that's not in the Board's purview at this time. Bob referred to Glen's letter and that the Planning Board's support was based on the unusual shape of the lot, which creates a hardship, and that the property owner has already thought about conditions and is willing to go along with a condition to create a deed restriction that would prohibit any further subdivision. Chairman Lawrence said we would have to do an approval based on a condition that there's a registered deed restriction and sign off after he has seen it. So, we would be conceptually approving this but waiting for that detail to be finished up, like we've done in similar cases. Attorney Phoenix proposed that by the time they go to the Planning Board, he will have drafted a proposed restriction that he could give to Chairmen Lawrence and the Planning Board. Chairman Lawrence said he would like the deed to be registered before he approves and signs it. Bob said the other thing that the attorney very elegantly presented was that these are all about balance. It's balancing the intent of the zoning with the hardship, or the potential hardship, and the Constitution and the right to that land and use that land in a way that is not overly restrictive.

Betsy moved to vote on the case, and Jack seconded the motion.

VOTE

Variance requirements:

1. The variance will not be contrary to the public interest: proposed use must not be in conflict with the explicit or implicit purpose of the ordinance. It must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure public rights. VOTE Yes-5, No-0
2. The spirit and intent of the ordinance is observed. These two are closely related because it's in the public's interest to uphold the spirit of the ordinance. VOTE Yes-5, No-0
3. Substantial justice will be done by granting the variance: the benefit to the applicant shall not be outweighed by the harm to the general public. VOTE Yes-5, No-0
4. Granting the variance will not diminish surrounding property values. VOTE Yes-5, No-0
5. Literal enforcement of provisions of the ordinance will result in unnecessary hardship. VOTE Yes-5, No-0

Chairman Lawrence motioned to pass this request for a variance with the condition that there must be a deed restriction that gets registered with Rockingham County. The deed will say that this property is approved for one residential dwelling unit. The condition is that there is one residential dwelling unit and it's registered with the county that there is no further subdivision, and final approval of the variance will be signed after the deed is registered. All Board members agreed to the condition.

Attorney Phoenix said his goal would be that the Planning Board would see the ZBA approval before the meeting. Chairman Lawrence said they could go forward with it, but he's not sure if he can sign it before the Planning Board approves it. He's not exactly sure how it will play out. Attorney Phoenix said you can approve this all you want, but if the Planning Board doesn't agree to the subdivision it doesn't matter.

Chairman Lawrence made a motion to approve the condition with a residential unit, registered with the county, no further subdivision, and final approval signed by the Chair as it's shown to be registered with the county. Bob seconded. VOTE Yes-5, No-0

Chairman Lawrence made a motion to close the meeting, and Betsy seconded at 7:41 pm.

Kent Lawrence, Chairman