



ZONING BOARD OF ADJUSTMENT

Draft Minutes

August 4, 2020 - 7:30 pm @ Community Development Department

Physical Location: 3 North Lowell Road (Community Development Department)
Live Broadcast: WCTV Channel 20 – Local Cable TV
Live Stream: <http://www.wctv21.com/>

Attendance:

Chairman Mike Scholz- present (via Zoom)
Vice Chair Bruce Breton- present (at Community Development)
Pam Skinner, Secretary- present (via Zoom)
Neelima Gogumalla- present (at Community Development)
Nick Shea- present (via Zoom)
Betty Dunn, alternate- present (via Zoom)
Kevin Hughes, alternate- excused
(attendance taken by roll call vote)

Staff:

Brian Arsenault- ZBA Administrator/ Code Enforcement (joined at 7:55pm)
Anitra Lincicum- minute taker

“As Chair of the ZBA, I find that due to the State of Emergency declared by the Governor as a result of the COVID-19 pandemic and in accordance with the Governor’s Emergency Order #12 pursuant to Executive Order 2020-04, the public body is authorized to meet electronically. Please note that all votes that are taken during the meeting shall be done by roll call vote only.”

Let’s start the meeting by taking a roll call attendance. When each member states their presence, please also state whether there is anyone in the room with you during the meeting, which is required under the Right-to-Know law.”

Public Hearing

Case #16-2020: Parcel 22-R-01 (Continued from July 14, 2020)
Applicant - Benchmark Engineering, Inc.
Owner – Mark E. Harvey
Location – 155 Range Road
Zoning District - Rural District

Variance relief is requested from **Section(s) 702 and Appendix A-1**; To allow a subdivision of Tax Map 22-R Lot 01 to create two buildable lots with one lot meeting all frontage and land area requirements and the other lot needing relief to create a new 3.38-acre lot with 29+/- feet of frontage on a Class V road and more than 1,200 feet of frontage on a Class VI road, where 175 feet of frontage is required on a public Class V road.

46 The case was read into the record previously along with the abutters' list.

47

48 Mr. Joseph Maynard of Benchmark Engineering is representing the applicant and addressed the
49 Board. The lot has been previously undeveloped. The lot has 1200 feet of frontage on an old
50 town road, Spear Hill Road. At the 1962 Windham town meeting, there was a vote for Spear Hill
51 Road not be continued for the first 227.5 feet. Mr. Maynard stated that any of the research he did
52 for this application all pointed to the fact that Spear Hill Road was only discontinued to this
53 point. In 1960, Spear Hill Road had an approved house plan with that road as the applicant's
54 frontage. Finally, in 1984, there was also a plan that had the use of Spear Hill Road as their
55 frontage and driveway. This property was purchased with all this information in mind; if the
56 town did not maintain the road for 5 years, the road would become a Class VI road, not a Class V
57 road. This left the applicant in a predicament. One of the lots maintains the 175 feet required in
58 the ordinance the second lot ends up with 29 feet of frontage on the Class V road. The applicant
59 wished to show that they wanted to use the first 275 feet of the road for frontage. Mr. Maynard
60 went through this application with the Army Corps of Engineers who signed off for review of the
61 application.

62

63 Mr. Maynard reviewed the 5 variance criteria contained in the public packet. Both lots meet all
64 other lot regulations and both will not be visible from Range Road; there is an existing driveway
65 that will be utilized. Mr. Maynard also indicated safe sight distance in the area Mr. Maynard also
66 mentioned the site plans and votes as far back as 1962 regarding the portion of discontinued road
67 and the variances granted over the years. The property owner did a substantial amount of
68 research. Mr. Maynard stated that the attorney's interpretation is not correct in terms of the
69 amount of the road; Spear Hill Road is not a Class VI road so it is now a non-conforming lot. Mr.
70 Maynard stated that substantial justice will be done in allowing the owner to separate the lots
71 into two building lots. There is a shared driveway that is proposed. This is a unique property
72 where there should have been enough frontage to divide the property into two. The interpretation
73 of the Class VI changes the frontage allowed. Both of the lots have a substantial building area
74 and will not be visible from Range Road, If the variance is granted, Mr. Maynard would then
75 bring the application forward to the Planning Board.

76

77 Mr. Maynard stated that the first lot will have 175 feet of frontage on Range Road which is the
78 legal road frontage. The variance is for the second lot that has 29 feet of frontage where more is
79 required.

80

81 Ms. Dunn asked if any maintenance has been done on Spear Hill Road. Mr. Maynard stated that
82 neither of the former road agents had ever done any road work in that area and were not aware of
83 the law on the books. Ms. Dunn asked how it would work where the applicant/residents could
84 then now have access. Mr. Maynard stated that they could not stop people from going across that
85 portion of road; if someone needed to get across Spear Hill Road, they could not deny them
86 access.

87

88 There is also a DES permit for the plan. Mr. Maynard stated it took 8-9 months to get the permit
89 which involved Conservation. The new wetland rules are pretty stringent according to Mr.
90 Maynard. Fish and Game and the National Heritage Inventory are also involved in the DES
91 application process. For example, there are turtles that exist within 2 miles of this lot, so there is

92 a culvert to allow for critter passage in the culverts, Both of these areas signed off once the
93 culvert was approved and then the application was looked at by the Army Corps of Engineers.
94 The permit took about a year to secure according to Mr. Maynard.

95
96 Mr. Shea asked about the Planning Board. Mr. Shea stated that the Planning Board gave approval
97 and then Attorney Campbell found issues with the road. Mr. Maynard stated that his case is on
98 hold with the Planning Board and has not been approved and they were asked to apply for a
99 variance for this application. Mr. Maynard stated that the motion was to approve subject to an
100 approval of the variance. Chairman Scholz stated that the variance needs to be approved before.
101 There is a special permit across the WWPD as well. Chairman Scholz asked when the applicant
102 purchased the property; Mr. Maynard stated it was 2018. Ms. Dunn asked what was happening
103 on the property right now. Mr. Maynard stated that the lot has been timbered and the dredge and
104 fill is being done and there is work being done for the driveway. Mr. Maynard stated that they
105 cannot do the actual subdivision without approval and that work is not being done by the
106 applicant because it has not yet been approved. The Board reviewed the permit of the
107 application. The Board reviewed the notice of acceptance and decision from DES. The Board
108 discussed the various permit applications at the state level. There was a permit to approve the
109 subdivision which is separate from the permit from NHDES for the conditions of the potential
110 subdivision on the property.

111
112 Chairman Scholz asked about the wetlands and the marker on the property. Mr. Maynard stated
113 that the first 350 feet of the site is in the WWPD. Also, the site is not in the Cobbetts Pond water
114 shed; it goes to Porcupine Brook, not Cobbetts Pond. According to Mr. Maynard, on the map,
115 anything in the orange color is a wetland. Ms. Dunn asked about the maintenance of the road and
116 the maintenance of the easement. Mr. Maynard stated the goal is to have a mini condo
117 association of the 2 home owners and those conditions will be recorded in the deed. Chairman
118 Scholz asked about what was needed for the variance, Mr. Maynard stated that the only variance
119 he needed was for frontage in the area. The soils were sandy soils with deeper water tables. Ms.
120 Dunn asked about the access of the other neighbour on the other side of Spear Hill Road.

121
122 Mr. Peter Bronstein addressed the Board. Attorney Bronstein stated he was hopeful that the
123 neighbor was willing to enter into the agreement. Attorney Bronstein stated the neighbor does
124 not need to enter into a contract necessarily. The neighbor is currently maintaining the road.
125 Chairman Scholz stated that the second lot has 29 feet and asked where the 29 feet was being
126 measured from. Mr. Maynard stated there is 175 feet at the red line. There is a section labelled
127 driveway easement, if that were to be extended to where it meets 50 feet, that is 29 feet across.

128
129 Chairman Scholz read the letter from the Conservation Commission which stated that the
130 Commission accepts the plan as it is, no comments, and appreciates any improvements to the
131 trail easement and separation of the easement.

132
133 Eugene and Maria Sullivan, direct abutters on Bayberry Road, addressed the Board and were
134 present at Community Development. One of the proposed sites is being built in the backyard,
135 Mr. Sullivan stated he did not get a letter on this meeting until Friday afternoon, Mr. Sullivan
136 stated that Spear Hill Road has been a walking path for about 50 years. Mr. Sullivan stated that

137 the property was being logged. Mr. Sullivan stated that he has been told that the application has
138 been pulled and the lot was not being worked on by the town.

139
140 Ms. Maria Sullivan addressed the Board. Ms. Sullivan also stated that she has been informed that
141 the application has been pulled.

142
143 Mr. Sullivan then returned to the idea of the dredge and fill application and asked about this in
144 relation to wetlands. Mr. Sullivan asked why the stumping of the lot was being done if it was not
145 going to be built on. There has also been boulder removal and the two lots have already been cut
146 in on the lots. Mr. Sullivan stated that the size of the lots would be considered and he feels as if
147 the lot was created for 1 home. Mr. Sullivan reviewed the information he and his wife had been
148 given from staff. After discussion, it was decided that the application had been pulled from
149 Planning Board, not this Board.

150
151 Ms. Maria Sullivan addressed the Board. Mr. Sullivan also addressed the Board to show a map
152 of their property to show how close the construction was in relation to the applicant's property.
153 Mr. and Ms. Sullivan are very concerned about how close the property is to their property as well
154 as the wildlife in the area.

155
156 Mr. Bruce Willen address the Board via Zoom. Mr. Willen lives at 157 Range Road and is a
157 direct abutter. Mr. Willen stated he does not see any hardship. Mr. Willen stated that the
158 applicant bought a single lot and thought he might be able to subdivide it and put two houses
159 there. Mr. Willen is concerned about how the driveway is going to affect abutter's. Mr. Willen is
160 worried about the shared driveway with multiple houses. Mr. Willen stated that this is being
161 done to maximize profits. Mr. Willen stated that there has been a pond being pumped out for 2
162 days with an industrial pump, he does not see that things like this are legal.

163
164 Mr. Heath Partington, 17 Galway road addressed the Board via Zoom. Mr. Partington sits on the
165 Planning Board. Mr. Partington stated that February 5th was the date of the reconsidered motion
166 of the original motion. The original motion was made on January 15th.

167
168 Ms. Gogumalla asked about the driveway that is used by now by Mr. Willen. Mr. Willen
169 maintains the driveway and it is town owned.

170
171 Ms. Dunn asked about the obligation of the town to pave the section of the road that is a Class VI
172 road, has the applicant addressed this with the town in any way

173
174 Mr. Maynard addressed the Board for rebuttal. Mr. Maynard stated that he is 90 feet off the lot
175 line and he is at least 120 feet from the abutter's house. Mr. Maynard addressed the question of
176 the walking trail and the wild life. Mr. Maynard stated there is no plan to change the walking
177 trail. Mr. Maynard has no plans to change the walking easement. Mr. Maynard then discussed
178 the dredge and fill permit. Mr. Maynard stated that the stumps need to be filled before the silt
179 fence is put up. Mr. Maynard stated that the boulders are also taken out before the fencing. All of
180 that must happen before the fencing before the culverts are installed. Mr. Maynard stated that the
181 pumping does need to happen in order to prepare the area to replace the culvert. Mr. Maynard
182 stated that the applicant was following all the best management practices.

183
184 Mr. Maynard stated that the right to get in and out of the property cannot be taken away from the
185 applicant. Ms. Dunn asked about the town property. There is some sort of release that will
186 happen with the town if they are willing to incur the expense to access the site; this in relation to
187 the liability waiver. Mr. Maynard stated that they must agree to do the improvement to the road
188 at their own expense and they are not going to hold the town liable for future homeowners. These
189 easements all get recorded into the deeds of the properties. Attorney Bronstein stated that this is
190 standard procedure when this is a Class VI road.

191
192 Mr. Harvey, the applicant, stated that the homes would be between 3,000-3,500 square foot
193 homes. Section 76-41 C-1 was cited by Attorney Bronstein who stated that the section describes
194 the whole process. The concern Ms. Dunn has is that this will be for 3 homes on a section of road
195 that has not been clearly defined as a town road or otherwise.

196
197 Chairman Scholz opened discussion for limited rebuttal.

198
199 Mr. Sullivan stated that there is no wetland on site. Additionally, Mr. Sullivan is concerned about
200 the shared road aspect of the road and how that will be difficult to coordinate.

201
202 Ms. Dunn lost power at 9:10pm and left the meeting via Zoom.

203
204 Ms. Susan Willen, 157 Range Road, addressed the Board via Zoom. Ms. Willen asked who they
205 would go to when there is a dispute about the road.

206
207 Ms. Sullivan stated that years ago they were told that this is not a road anymore.

208
209 Ms. Dunn stated that they may need to talk to town counsel. Chairman Scholz asked her to
210 clarify why they would talk to town counsel about the accessibility to the town road. Mr.
211 Maynard stated that if he could work with the neighbor, they could stay on their side of the right
212 of way and they would stay on the other side with some kind of grass strip between them. Ms.
213 Dunn asked about whether or not such a restriction can be imposed over the person that already
214 has access to this. Ms. Dunn stated that road issues are thorny and she stated that they need to be
215 spelled out and agreed to. Mr. Maynard stated that any curb cut is a state road.

216
217 Vice Chair Breton asked about a curb cut. Vice Chair Breton stated that they could probably
218 make their own curb cut and this would need to be finalized with Department Of Transportation
219 at some point. Mr. Maynard stated that he would need to meet a condition of the driveway if the
220 Board felt the need to do so.

221
222 **A motion was made by Vice Chair Breton to enter deliberative session. Seconded by Mr.**
223 **Shea. Roll call vote: Chairman Scholz, Vice Chair Breton, Mr. Shea, Ms. Skinner. Ms.**
224 **Gogumalla- yes. Vote 5-0. Motion passes.**

225
226 Ms. Gogumalla asked if the variance affects the subdivision of the lot. Chairman Scholz stated
227 that they were trying to subdivide this into two parcels. They would need a variance for the

228 second lot that is less than 175 feet. Chairman Scholz asked if there were any questions about the
229 criteria. Ms. Gogumalla stated that she does not see the hardship in this.

230
231 Ms. Shea stated that he has concerns around the impact of the property values.

232
233 Chairman Scholz stated that for the first prong, he does see that it might alter the essential
234 character. He also believes it might affect the essential character. Chairman Scholz does not
235 believe it meets 1,2 4 or 5. Vice Chair Breton stated that he would like to have looked at the
236 complete plan from Mr. Maynard with a single use driveway but he realizes the discussion is
237 beyond that now. Mr. Shea stated that he does see a hardship for the applicant.

238
239 **A motion was made by Ms. Gogumalla for Case #16-2020: Parcel 22-R-01 to deny relief as**
240 **requested to allow a subdivision of Tax Map 22-R Lot 01 to create two buildable lots with**
241 **one lot meeting all frontage and land area requirements and the other lot needing relief to**
242 **create a new 3.38 acre lot with 29+/- feet of frontage on a Class V road and more than 1,200**
243 **feet of frontage on a Class VI road, where 175 feet of frontage is required on a public Class**
244 **V road per plan submitted with a revision date of June 1, 2020. Seconded by Ms. Skinner.**
245 **Roll call vote: Vice Chair Breton- no. Ms. Skinner-yes, Mr. Shea- yes, Chairman Scholz-**
246 **yes, Ms. Gogumalla-yes.**

247
248 **Vote 4-1.**
249 **Motion passes.**
250 **The Chair advised of the 30-day appeal period.**

251
252 **Reasons:**
253 **Chairman Scholz- 1 (public interest), 2 (spirit of the ordinance), 4 (property values), and 5**
254 **(hardship)**
255 **Mr. Shea- 4 (property values)**
256 **Ms. Gogumalla- 1 (public interest), 2 (spirit of the ordinance), and 5 (hardship)**
257 **Ms. Skinner- 1 (public interest), 2 (spirit of the ordinance), 4 (property values), and 5**
258 **(hardship)**

259
260 **Case #18-2020: Parcel 18-L-450 (Continued from July 14, 2020)**
261 **Applicant – Edward N. Herbert Associates, Inc.**
262 **Owner – Cafua Realty Trust Liv, LLC**
263 **Location – 1 Delahunty Road**
264 **Zoning District - Professional Business and Technology District (PBT) and Cobbetts**
265 **Pond & Canobie Lake Watershed Protection Overlay District**
266 **(WPOD)**

267
268 Variance relief is requested from **Section(s) 614.4**; To allow a drive-thru service to the existing
269 business, where unless associated with banking operations, no drive-thru(s) are allowed.

270
271 The case has been read into the record previously.

272

273 Attorney John Cronin from Cronin, Zalinsky, and Bisson. addressed the Board and is
274 representing the applicant. Attorney Cronin stated that the applicant would like to maintain the
275 store at this location. Attorney Cronin stated that they looked at the ordinance in the PBT zone;
276 Attorney Cronin does not believe it has done a lot to encourage business in the area. The criteria
277 seem like a non-starter. There may be a light added to Delahunty Road and they would like to
278 look at the application favorably.
279

280 **A motion was made by Vice Chair Breton to go into deliberative session at 9:41pm to**
281 **determine if the Board have jurisdiction. Seconded by Ms. Gogumalla Roll call vote:**
282 **Chairman Scholz, Vice Chair Breton, Mr. Shea, Ms. Skinner. Ms. Gogumalla- yes. Vote 5-**
283 **0. Motion passes.**
284

285 Chairman Scholz stated that based on his review of Morgan and Stern vs. Rye, the land is the
286 same and the zoning is the same. Chairman Scholz stated that the Board does not have
287 jurisdiction. They are without jurisdiction to hear the case based on the Fisher v. Dover
288 distinction. Vice Chair Breton stated that times have changed and adjustments need to be made;
289 people are eating in parking lots intended for parking spaces. People do not want to use this
290 restaurant because they need to go in. People do not want to go in and use a restaurant. Vice
291 Chair Breton stated that abutting the property, there is another drive-thru. Vice Chair Breton
292 stated that he would rather use a drive thru and the public has not had the conditions in front of
293 them as before. Vice Chair Breton stated that he would like to think of the residents and things
294 have really changed. Vice Chair Breton stated that it is unclear how long this will last. Things are
295 very different and this cannot be looked at in the same way and it will need to be reviewed. Vice
296 Chair Breton stated that 5,000 people use the building next door and we need to consider how the
297 building is used right now. Chairman Scholz stated that this is around the land and the zoning
298 and they are not able to change that criteria. Chairman Scholz stated that they do not have
299 jurisdiction.
300

301 Mr. Shea does see the hardship on the part of the business owner. Chairman Scholz stated that he
302 is not disputing the merits but their job it to determine the Fisher v Dover test.
303

304 **A motion was made by Ms. Gogumalla for Case #18-2020: Parcel 18-L-450 that the Board**
305 **is without jurisdiction to hear the case based on the Fisher v. Dover standard. Seconded by**
306 **Ms. Skinner. Roll call vote- Vice Chair Breton- no, Ms. Skinner- yes. Ms. Gogumalla- yes,**
307 **Mr. Shea- yes. Chairman Scholz- yes**
308

309 **Vote 4-1.**
310 **Motion passes.**
311

312 **The Chair advised of the 30-day appeal period.**
313

314 The Board also discussed access for the public to both the room and the Zoom calls. Ms. Dunn
315 stated that she does believe they will be on Zoom for quite a while and she is happy to know that
316 the public will have access to be able to hear those who are speaking. It is going through too
317 many electronic conversions according to Ms. Dunn. Chairman Scholz asked if people could just
318 stand in front of the microphone to allow for better access.

319 **A motion was made by Ms. Gogumalla to adjourn at 10:07pm. Seconded by Mr. Shea. Roll**
320 **call vote: Chairman Scholz, Vice Chair Breton, Mr. Shea, Ms. Skinner. Ms. Gogumalla-**
321 **yes. Vote 5-0. Motion passes.**

322

323 Respectfully submitted by Anitra Lincicum

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