

BOARD OF ADJUSTMENT
DEERFIELD, NEW HAMPSHIRE
APRIL 27, 2021

MINUTES OF MEETING

PRESENT: Board members Joshua Freed, Jonathan Leer, George Thompson, Alternate members Amy Lockwood, George Kelley IV. Also present Jane Boucher, secretary. All were present via zoom.

Chair Joshua Freed called the meeting to order at 7:15PM and appointed Amy Lockwood a voting member in the absence of Anthony DiMauro.

APPROVAL OF MINUTES

Jonathan Leer moved to approve the minutes of February 23, 2021. Stephen Stephenson seconded. Voted in favor with Amy Lockwood abstaining.

ELECTION

Joshua Freed said that he did not wish to serve as Chair of the ZBA.

George Thompson noted that he will continue to serve as Vice Chair and Jonathan Leer said he will continue to serve as Clerk.

Jonathan Leer moved that the Board wait until Anthony DiMauro is present to appoint a Chairman. George Thompson seconded. Voted in favor.

Jonathan Leer moved to appoint George Thompson to serve as Vice Chair of the ZBA. Stephen Stephenson seconded. Voted in favor.

Joshua Freed moved to appoint Jonathan Leer to serve as Clerk of the ZBA. George Thompson seconded. Voted in favor.

7:25PM The meeting was recessed for ten minutes.

7:30PM Chair Freed called the meeting back to order.

APPLICATION FOR REHEARING/ CASE # 21-01 BCM ENVIRONMENTAL AND LAND LAW AND OWNER ANNE MOSCHELLA, Kelsey Peterson, BCM Environmental and Anne Moschella were present via zoom.

Clerk Jonathan Leer read the Notice of Public Hearing by which BCM Environmental and Land Law and owner Anne Moschella, 115 Nottingham Road, Deerfield, NH for property at same address (Map 416 Lot 69) are requesting a rehearing of the Zoning Board of Appeals' February 23, 2021 decision (Case 21-01) to deny a

variance from Article 210.8 and 207.3 for wetland and boundary setbacks for the purpose of constructing a barn.

Joshua Freed noted that he did not feel the Board erred in it's decision to deny the variance and asked if there was a motion to hear the appeal. There was no motion made.

Kelsey Peterson asked the Board to make a motion for the record.

Anne Moschella felt there was more information in the letter submitted by Attorney Peterson , BCM, and hoped the Board would reconsider. A copy of the letter is attached to these minutes.

Jonathan Leer moved to DENY accepting Case 21-04. Joshua Freed seconded. Voted in favor. It was unanimous.

Jonathan Leer felt that no additional information had been submitted.

Joshua Freed indicated that there was no new testimony and the Board did not err in it's decision.

The meeting was adjourned at 7:45PM.

Transcribed by Jane Boucher
Pending Approval by the Board of Adjustment

REC'D.
3/23/21

Via Overnight Mail

March 19, 2021

Mr. Josh Freed, Chair
Deerfield Zoning Board of Adjustment
Town of Deerfield
8 Raymond Road
Deerfield, NH 03037

**RE: Motion for Rehearing;
Anne Moschella, 115 Nottingham Road, Deerfield, N.H.
Case 21-01**

Dear Chair Freed and Members of the Board:

I represent Anne Moschella and respectfully submit this Motion for Rehearing of the Town of Deerfield Zoning Board of Adjustment's denial of the variances from Article II, Section 207.3 and Article II Section 210.7 of the Town of Deerfield Zoning Ordinance (the "Zoning Ordinance"). This Motion is brought pursuant to RSA 677:4.

Ms. Moschella mistakenly omitted several facts and details of the arguments when she first applied for the variances. Ms. Moschella respectfully request that the Board carefully consider this Motion and recognize it as Ms. Moschella's opportunity to construct a sufficiently-sized dry barn in the only available and appropriate location on the property that satisfies all of the variance criteria and has not been the subject of concern by any neighbor.

Factual Background

Anne Moschella owns the approximately 9.48-acre property at 115 Nottingham Road (the "Property"). On the Property, Ms. Moschella and her husband, Simon Cantu, maintain their family home and a small horse farm. Currently, they use the existing barn attached to their home to house their horses and to store their tractor and lawn equipment. Much of the remaining dry acreage is dedicated to horse pasture, critical for the health and wellbeing of their horses, and the yard immediately surrounding the home. The Property also contains a pond, surrounding wet area, and the inlet and outlet for that pond.

They have now outgrown the existing barn on the Property and wish to construct a small auxiliary barn for the storage and maintenance of their farm equipment, so Mr.



Cantu can work on the equipment on a dry surface. This equipment would include, but may not be limited to, a manure spreader, sickle cutter, bush hog, york rake, lime spreader, and aerator, along with other small tools. They have given careful consideration of the size, layout, and location of the proposed barn to make best use of the small amount of dry land on their property and make the barn functional for storage and transportation of large farm equipment to and from the dry barn.

Anne Moschella applied for a variance from Section 207.3 and Section 210.7 of the Zoning Ordinance to construct the barn in a location 35 feet from the side boundary of the property where 37.5 feet of setback is required and 51 feet from a delineated wetland where 75 feet is required.

On February 23, 2021, the Town of Deerfield Zoning Board of Adjustment ("ZBA") denied the Moschella application for variance from these sections of the Zoning Ordinance. Anne Moschella respectfully and timely submits this Motion for Rehearing respectfully requesting the ZBA rehear the application and grant the variance. Without this variance, they will not be able to build their barn on the most logical location on their property for it.

Proposed Use Satisfies Variance Criteria

To grant the requested variances, the ZBA must find that the Applicant has satisfied the five standards of RSA 674:33, I(b)(1)–(5), each of which is addressed below. The Applicant bears the burden of proving all five of the variance standards. Bartlett v. City of Manchester, 164 N.H. 634, 637 (2013).

Granting the variances is not contrary to the public interest and observes the spirit of the ordinance

These first two variance standards, from RSA 674:33, I(a)(2)(A) and (B), are related and can be considered together. See Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011). "The first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the applicable zoning ordinance." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005). For a variance to be sufficiently contrary to public interest, it "must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." Nine A LLC v. Town of Chesterfield, 157 N.H. 361, 366 (2008). While judging whether "granting a variance violates an ordinance's basic zoning objectives, [the court considers], among other things, whether it would alter the essential character of the locality or threaten public health, safety, or welfare" but "such examples are not exclusive." *Id.* This includes determining if a variance violates basic zoning objectives is to examine whether granting the variance would "alter the essential character of the neighborhood." Harborside Assocs., 162 N.H. at 514.

Here, Anne Moschella proposes to place the barn in a location that does not unduly or in a marked degree conflict with the Zoning Ordinance. The Property is currently used as a residential property with the agricultural horse farm. The majority of the property is fully utilized for residential and agricultural uses. The horses require significant amounts of well-developed pasture that Ms. Moschella and Mr. Cantu have supported and developed over time. The pasture has significant value to them and their horses. They chose to site their new barn structure in a location that interfered as little as possible with the dimensional requirements of the Zoning Ordinance while also not disturbing existing pasture and being functionally sized and oriented for farm equipment. The purpose of the wetlands setback is to protect wetlands from disturbance. The Moschella property also contains a pond, surrounding wet area, with an inlet and outlet for that pond, which makes this location close to the road the simplest option that does not disturb actual wetland areas. This protects the public interest by concentrating development along the road and disturbing little of the wetland buffer area.

Further, their proposed use is an agricultural one, as defined in the Town of Deerfield Zoning Ordinance. Zoning Ordinance, Section 602. As such, under RSA 674:17, I(i), the Zoning Ordinance "shall be designed: (i) To encourage the preservation of agricultural lands and buildings and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings;" Further, the New Hampshire Legislature has stated a purpose of protecting agricultural activities through zoning.

Agriculture makes vital and significant contributions to the food supply, the economy, the environment and the aesthetic features of the state of New Hampshire, and the tradition of using the land resource for agricultural production is an essential factor in providing for the favorable quality of life in the state. Natural features, terrain and the pattern of geography of the state frequently place agricultural land in close proximity to other forms of development and commonly in small parcels. Agricultural activities are a beneficial and worthwhile feature of the New Hampshire landscape. Agritourism, as defined in RSA 21:34-a, is undertaken by farmers to contribute to both the economic viability and the long-term sustainability of the primary agricultural activities of New Hampshire farms. Agricultural activities and agritourism shall not be unreasonably limited by use of municipal planning and zoning powers or by the unreasonable interpretation of such powers; . . .

RSA 672:1, III-b. Under this state standard, the ZBA must not unreasonably limit the agricultural use of the Moschella property and not unreasonably interpret its power and role in granting variances for agricultural uses like this one. When determining if their requested variance is not contrary to the public interest and observes the spirit of the

ordinance, the ZBA must consider these statements on zoning's general purposes in state statutes.

Granting the variances does substantial justice

"Perhaps the only guiding rule [on this standard] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007) (citing 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000)). In analyzing this standard from RSA 674:33, I(a)(2)(C), courts have also considered whether the proposed development was consistent with the area's present uses. See Labrecque v. Town of Salem, 128 N.H. 455, 459 (1986).

Here, the loss to them if the variances are not granted would be high and there would be no corresponding benefit to the public. Without the variances, they will not be able to improve their agricultural use of the property, or will have to construct a smaller, less functional, and less aesthetically pleasing structure to house their farm equipment. As for the public, the public will not gain anything from this variance being denied. They do not propose to disturb any delineated wetland and allowing them to build the barn in this location prevents aesthetic disturbance of the pastures and other areas of the Property that are aesthetically pleasing to them and the public. The public interest in a very small amount of wetland *buffer* disturbance is far outweighed by the loss to them and the aesthetic loss to the Property as a whole.

Granting the variances does not diminish the values of surrounding properties

Notably, no immediate neighbors spoke in opposition to the variance applications, including the neighbor whose protective side boundary setback would be slightly infringed on. The addition of an aesthetically pleasing structure will allow them to stop storing their farm equipment outside under unsightly tarps and will add to the value of their property and any properties that can see the Moschella farm. Their intention is to increase the historic, rural-agricultural appearance of their neighborhood with their scenic horse farm. The variance will actually benefit surrounding properties.

Literal enforcement of the provisions will result in an unnecessary hardship

The "unnecessary hardship" element is satisfied when "owing to special conditions of the property that distinguish it from other properties in the area: (i) 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; and (ii) The proposed use is a reasonable one." RSA 674:33, I(b)(5)(A). Alternatively, if those requirements are not met, "an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance,

and a variance is therefore necessary to enable a reasonable use of it.” RSA 674:33, I(b)(5)(B).

The special conditions of this property that distinguish it from other properties in the area are that it is an existing horse farm with extensive wet areas. Pasture for livestock, especially horses, is incredibly valuable and should not be considered as available open space for placement of new buildings. They considered all practical locations on the Property for the barn before applying for this variance.

At the hearing on this application, the ZBA expressed concern that they had not proven there was no other location on the Property for the barn that did not require a variance. The proposed location is not simply one of preference over suitable buildable areas of the Property that can be developed without a variance. The proposed location is the only place on the Property that can accommodate their agricultural needs while preserving important pastureland. Even if there was another location for the footprint of the barn, it would likely be impractically far from the existing farm structures and/or it would likely require construction of an additional farm road through wet areas and/or pasture which would likely have a greater impact on wetlands than the proposed barn. The unique circumstances of the Property make it prohibitively expensive to confirm what is already known – that this location is the only viable location for the barn.

Therefore, finding an unnecessary hardship is supported under either standard. Under the first standard, the general public purposes of the wetlands setback is protection of environmental resources and the general public purposes of the side boundary setback is preservation of property values and spacing between properties. Preventing them from building a structure completely consistent with the current use and appearance of the Property that has raised no opposition from abutters is inconsistent and has no fair and substantial relationship with these public purposes. Further, the construction of a small corner of a minimally impactful structure like an equipment barn in an already protective buffer does not have a fair and substantial relationship with the public purposes of the wetlands setback. In addition, the use of this corner of the Property is completely reasonable as an extension of the current agricultural use that does not overburden the Property and concentrates impact and development along the existing public road. Considering the unique conditions of the Property, strict application of the setbacks does not make sense because the setbacks would not be serving their intended purposes.

If the ZBA does not agree with this analysis of the first standard, the second standard is also satisfied. The Property is large, but due to special conditions of its existing use as a horse farm with extensive pastures and existing wet areas, the reasonable use of the Property is as a horse farm. Continued use of the horse farm requires the development of additional storage areas for farm equipment. As noted above, the farm equipment is currently stored outside, even in winter, under tarps, which are unsightly, unacceptably fragile, and do not prevent degradation of the equipment.



This variance is required for them to make reasonable use of the Property as an efficient and smooth-running horse farm.

Conclusion

For the above reasons, the Applicant has provided sufficient, credible information to meet its burden of proof on all criteria. Therefore, on behalf of Anne Moschella, I respectfully request that the ZBA grant the requested variances.

Sincerely,

A handwritten signature in black ink, appearing to read "Kelsey Peterson".

Kelsey Peterson

Cc: Client