



ZONING BOARD OF ADJUSTMENT

Approved 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 at home and alone)
Vice Chair Bruce Breton- present (at Community Development)
Pam Skinner, Secretary- present (via Zoom at home and alone)
Neelima Gogumalla- present (at Community Development)
Nick Shea- present (via Zoom at home and alone)
Betty Dunn, alternate- present (via Zoom at home and alone)
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 to be discontinued after the first 227.5 feet. Mr. Maynard stated that any of the research he
52 did 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 would have the 175 feet as required
58 in the ordinance. The second lot would end up with 29 feet of frontage on Range Road. The
59 applicant wished to show that they wanted to use the first 275 feet of the road for frontage. Mr.
60 Maynard went through this application with the Army Corps of Engineers who signed off for
61 review of the 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 Attorney Campbell's interpretation is not correct in terms of
69 the amount of the road; Spear Hill Road is not a Class VI road so it is now a non-conforming lot.
70 Mr. 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. Ms. Dunn asked how it would work where the applicant/residents could then now have
84 access. Mr. Maynard stated that they could not stop people from going across that portion of
85 road; if someone needed to get across Spear Hill Road, they could not deny them access.

86
87 There is also a DES permit for the plan. Mr. Maynard stated it took 8-9 months to get the permit
88 which involved Conservation. The new wetland rules are pretty stringent according to Mr.
89 Maynard. Fish and Game and the National Heritage Inventory are also involved in the DES
90 application process. For example, there are turtles that exist within 2 miles of this lot, so there is
91 a culvert to allow for critter passage in the culverts, Both of these areas signed off once the

92 culvert was approved and then the application was looked at by the Army Corps of Engineers.
93 The permit took about a year to secure according to Mr. Maynard.

94
95 Mr. Shea asked about the Planning Board. Mr. Shea stated that the Planning Board gave approval
96 and then Attorney Campbell found issues with the road. Mr. Maynard stated that his case is on
97 hold with the Planning Board and has not been approved and they were asked to apply for a
98 variance for this application. Mr. Maynard stated that the motion was to approve subject to an
99 approval of the variance. Chairman Scholz stated that the variance needed to be approved first.
100 There is a special permit across the WWPD as well. Chairman Scholz asked when the applicant
101 purchased the property; Mr. Maynard stated it was 2018. Ms. Dunn asked what was happening
102 on the property right now. Mr. Maynard stated that the lot has been timbered and the dredge and
103 fill is being done and there is work being done for the driveway. Mr. Maynard stated that they
104 cannot do the actual subdivision without approval and that work is not being done by the
105 applicant because it has not yet been approved. The Board reviewed the state permit that was
106 presented. The Board reviewed the notice of acceptance and decision from DES. The Board
107 discussed the various permit applications at the state level. There was a permit to approve the
108 subdivision which is separate from the permit from NHDES for the conditions of the potential
109 subdivision on the property.

110
111 Chairman Scholz asked about the wetlands and the marker on the property. Mr. Maynard stated
112 that the first 350 feet of the site is in the WWPD. Also, the site is not in the Cobbetts Pond water
113 shed; it goes to Porcupine Brook, not Cobbetts Pond. According to Mr. Maynard, on the map,
114 anything in the orange color is a wetland. Ms. Dunn asked about the maintenance of the road and
115 the maintenance of the easement. Mr. Maynard stated the goal is to have a mini condo
116 association of the 2 home owners and those conditions will be recorded in the deed. Chairman
117 Scholz asked about what was needed for the variance, Mr. Maynard stated that the only variance
118 he needed was for frontage in the area. The soils were sandy soils with deeper water tables. Ms.
119 Dunn asked about the access of the other neighbour on the other side of Spear Hill Road.

120
121 Mr. Peter Bronstein addressed the Board. Attorney Bronstein stated he was hopeful that the
122 neighbor was willing to enter into the agreement. Attorney Bronstein stated the neighbor does
123 not need to enter into a contract necessarily. The neighbor is currently maintaining the road.
124 Chairman Scholz stated that the second lot has 29 feet and asked where the 29 feet was being
125 measured from. Mr. Maynard stated there is 175 feet at the red line. There is a section labelled
126 driveway easement, if that were to be extended to where it meets 50 feet, that is 29 feet across.

127
128 Chairman Scholz read the letter from the Conservation Commission which stated that the
129 Commission accepts the plan as it is, no comments, and appreciates any improvements to the
130 trail easement and separation of the easement.

131
132 Eugene and Maria Sullivan, direct abutters on Bayberry Road, addressed the Board and were
133 present at Community Development. One of the proposed sites is being built in the backyard,
134 Mr. Sullivan stated he did not get a letter on this meeting until Friday afternoon, Mr. Sullivan
135 stated that Spear Hill Road has been a walking path for about 50 years. Mr. Sullivan stated that
136 the property was being logged. Mr. Sullivan stated that he has been told that the application has
137 been pulled and the lot was not being worked on by the town.

138
139 Ms. Maria Sullivan addressed the Board. Ms. Sullivan also stated that she has been informed that
140 the application has been pulled.
141
142 Mr. Sullivan then returned to the idea of the dredge and fill application and asked about this in
143 relation to wetlands. Mr. Sullivan asked why the stumping of the lot was being done if it was not
144 going to be built on. There has also been boulder removal and the two lots have already been cut
145 in on the lots. Mr. Sullivan stated that the size of the lots should be considered and he feels as if
146 the lot was created for 1 home. Mr. Sullivan reviewed the information he and his wife had been
147 given from staff. After discussion, it was decided that the application had been pulled from
148 Planning Board, not this Board.
149
150 Ms. Maria Sullivan addressed the Board. Mr. Sullivan also addressed the Board to show a map
151 of their property to show how close the construction was in relation to the applicant's property.
152 Mr. and Ms. Sullivan are very concerned about how close the property is to their property as well
153 as the wildlife in the area.
154
155 Mr. Bruce Willen address the Board via Zoom. Mr. Willen lives at 157 Range Road and is a
156 direct abutter. Mr. Willen stated he does not see any hardship. Mr. Willen stated that the
157 applicant bought a single lot and thought he might be able to subdivide it and put two houses
158 there. Mr. Willen is concerned about how the driveway is going to affect abutters. Mr. Willen is
159 worried about the shared driveway with multiple houses. Mr. Willen stated that this is being
160 done to maximize profits. Mr. Willen stated that there has been a pond being pumped out for 2
161 days with an industrial pump. Mr. Willen does not see that things like this are legal.
162
163 Mr. Heath Partington, 17 Galway road addressed the Board via Zoom. Mr. Partington sits on the
164 Planning Board. Mr. Partington stated that February 5th was the date of the reconsidered motion
165 of the original motion. The original motion was made on January 15th.
166
167 Ms. Gogumalla asked about the driveway that is used by now by Mr. Willen. Mr. Willen stated
168 he maintains the driveway and it is town owned.
169
170 Ms. Dunn asked about the obligation of the town to pave the section of the road that is a Class VI
171 road, has the applicant addressed this with the town in any way
172
173 Mr. Maynard addressed the Board for rebuttal. Mr. Maynard stated that the plan is 90 feet off the
174 lot line and it is at least 120 feet from the abutter's house. Mr. Maynard addressed the question of
175 the walking trail and the wildlife. Mr. Maynard stated there is no plan to change the walking
176 trail. Mr. Maynard has no plans to change the walking easement. Mr. Maynard then discussed
177 the dredge and fill permit. Mr. Maynard stated that the stumps need to be filled before the silt
178 fence is put up. Mr. Maynard stated that the boulders are also taken out before the fencing. All of
179 that must happen before the fencing before the culverts are installed. Mr. Maynard stated that the
180 pumping needs to happen in order to prepare the area to replace the culvert. Mr. Maynard stated
181 that the applicant was following all the best management practices.
182

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

190
191 Mr. Harvey, the applicant, stated that the homes would be between 3,000-3,500 square foot
192 homes. Section 76-41 C-1 was cited by Attorney Bronstein who stated that the section describes
193 the whole process. The concern Ms. Dunn has is that this will be for 3 homes on a section of road
194 that has not been clearly defined as a town road or otherwise.

195
196 Chairman Scholz opened discussion for limited rebuttal.

197
198 Mr. Sullivan stated that there is no wetland on site. Additionally, Mr. Sullivan is concerned about
199 the shared road aspect of the road and how that will be difficult to coordinate.

200
201 Ms. Dunn lost power at 9:10pm and left the meeting via Zoom.

202
203 Ms. Susan Willen, 157 Range Road, addressed the Board via Zoom. Ms. Willen asked who they
204 would go to when there is a dispute about the road.

205
206 Ms. Sullivan stated that years ago they were told that this is not a road anymore.

207
208 Ms. Dunn returned to the meeting by cell phone and stated that they may need to talk to town
209 counsel. Chairman Scholz asked her to clarify why they would talk to town counsel about the
210 accessibility to the town road. Mr. Maynard stated that if he could work with the neighbor, they
211 could stay on their side of the right of way and they would stay on the other side with some kind
212 of grass strip between them. Ms. Dunn asked about whether or not such a restriction can be
213 imposed over the person that already has access to this. Ms. Dunn stated that road issues are
214 thorny and she stated that they need to be spelled out and agreed to. Mr. Maynard stated that any
215 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 in to deliberative session. Seconded by**
223 **Mr. 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. Chairman Scholz does not believe it meets 1,2 4 or 5. Vice Chair Breton stated that he
235 would like to have looked at the complete plan from Mr. Maynard with a single use driveway but
236 he realizes the discussion is beyond that now. Mr. Shea stated that he does see a hardship for the
237 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 the town has done a lot to encourage business in the area. The
277 criteria seem like a non-starter. There may be a light added to Delahunty Road and they would
278 like to 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 Morgenstern vs. Rye, the land is the same
286 and the zoning is the same. Chairman Scholz stated that the Board does not have jurisdiction.
287 They are without jurisdiction to hear the case based on the Fisher v. Dover distinction.

288
289 Vice Chair Breton stated that times have changed due to COVID-19 and adjustments need to be
290 made; people are eating in parking lots intended for parking spaces. People do not want to use
291 this restaurant because they need to go in. People do not want to go in and use a restaurant. Vice
292 Chair Breton stated that a nearby property has a drive-thru. Vice Chair Breton stated that he
293 would rather use a drive thru and the public has not had the conditions in front of them as before.
294 Vice Chair Breton stated that he would like to think of the residents and things have really
295 changed. Vice Chair Breton stated that it is unclear how long this will last. Things are very
296 different and this cannot be looked at in the same way and it will need to be reviewed. Vice
297 Chair Breton stated that 5,000 people use the building next door and we need to consider how the
298 building is used right now.

299
300 Chairman Scholz stated that this is around the land and the zoning and they are not able to
301 change that criteria. Chairman Scholz stated that he does not believe they have jurisdiction.

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

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

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

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

315
316 The Board also discussed access for the public to both the room and the Zoom calls. Ms. Dunn
317 stated that she does believe they will be on Zoom for quite a while and she is happy to know that
318 the public will have access to be able to hear those who are speaking. It is going through too

319 many electronic conversions according to Ms. Dunn. Chairman Scholz asked if people could just
320 stand in front of the microphone to allow for better access.

321

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

325

326 Respectfully submitted by Anitra Lincicum

Approved