

**KENSINGTON BOARD OF ADJUSTMENT
KENSINGTON, NEW HAMPSHIRE
PUBLIC HEARING
DECEMBER 5, 2017
KENSINGTON TOWN HALL
95 AMESBURY ROAD
AT 7:30PM
Meeting Minutes-Approved 3-6-18**

In Attendance: Janet Bunnell, John Andreasse, Mark Craig

Others in Attendance: Donna Carter, Michael Schwotzer, Mr. and Mrs. Hanson, Attorney William Scott, Jeffrey Toomey

John opened the meeting at 7:30pm and discussed the scope of what the board will be discussing tonight. John explained that the court has asked the town to get more information on the notation on the plan, and the board will be focusing on what the court has remanded them to do. The board reviewed the plan and the remand from the court.

Kathy stated that it was explained to her that the board would be doing the following with this evidentiary hearing:

1. Reaffirming decision
2. With testimony the board would change the vote

Attn. Scott will compile the boards information and return it to the court for the Town.

John opened the public hearing at 7:34pm, and read the below to all in attendance.

1. *Sherwood Forest Realty, INC., 75 Powell Street, Brookline, MA, 02446, owner of Map 16 Lot 4-4 in Kensington and located off of Powder Mill Road in Exeter, NH, who requested a variance from the frontage requirement of 200 feet of frontage on a public street or road in Article III, Section 3.2.2; B2 of the Kensington Zoning Ordinance and was denied. Upon remand from the Rockingham County Superior Court the Zoning Board has been requested to hold an evidentiary hearing on the conditions of a prior Planning Board approval.*

John explained that the instructions from the court are to address the plan notation on the map and make factual determinations as to what the notation means in the context of the Sherwood Forest variance request.

John opened the hearing to the public, and asked Attn. Scott to give a review of the application.

Attn. Scott stated that he is aware that letters went out to previous planning board members and thought that it would make sense for him to respond to any information based on what comes up from the public and the past board members. He stated it was up to the board, and John explained that this is a first and asked for a background of what they are here for tonight. Attn. Scott explained the following:

- The Britton's have owned the property for years in a corporation.
- Land was conveyed to two sons in another corporation.
- The lot consisted of 19 acres, and there have been a couple of applications in the past.

- The access way is in Exeter, but most of the land is in Kensington, with some in Exeter.
- He explained about the notation on the plan and if they were to use the land for any development then they would have to comply with the regulation in place at the time, and the court asked the question does that mean that they were to comply with the regulations in 1991, or the regulations today. He believes that means the regulations from 2016, and does not believe that anyone intended that whatever was in effect in 1991 would apply to later years.
- The notation on the plan states that the lot is not to be used for building purposes unless it complies with the current regulations. From his perspective that is no more than what would apply in any situation, that if you were going to use land for other than open space you would have to comply with current regulation at the time.
- Note A on the plan states that in accordance of the terms in section 5.29 of the Exeter Subdivision Regulations only one lot can be served by the approved driveway.
- He believes that there is some conflict that states that the lot has to comply with existing regulations, and he does not see where that means that the owner can't have a variance.
- He is unsure if the regulation 5.29 is even in the regulations of Exeter any longer.
- The Certified record that was submitted by the Town of Kensington in the Superior Court Appeal, Attn Scott pointed out a section of the Exeter Planning Board minutes from January 23, 1992 on page 3 of the record. He is referring to the highlighted section starting with Mr. Hamell. Mr. Scott read the following into the record:
 - “Mr. Hamell stated to Mr. Britton that he had indicated that he would prefer to keep the lot 4 as the parcel and not create a private way, he added that Mr. Britton would rather seek a variance from the board of adjustment for relief from the required minimum frontage requirement.” He was not there but seems clear that the notation on the plan was not prohibiting them from seeking a variance. There is a court case from 2013 which prohibits someone from violating the zoning ordinance and also the court prevented them by an order from seeking a variance. Within the past year the Superior Court stated that you can always go in and seek a variance, and what they are seeking is one building lot where a number are permitted.
- He has commented that the zoning ordinance in Kensington is to maintain the rural character of the town and allowing one building lot is more in keeping with the current zoning than allowing a number of building lots. The enabling statute basis is to avoid overcrowding and not to confiscate someone's property from language on a plan from 1990.
- He indicated that the judge was thoughtful in terms of her response in this case in the terms of wanting to give the board every opportunity to address the denial and the issue, but thinks she was clear in that there is little case law dealing with substantial justice being the basis on the denial of a variance. She quoted the Harborside Supreme Court Case, by stating “that perhaps the only guiding rule on this case is that any loss to the individual that is not outweighed by the need of the general public is an injustice. Here it is unclear from the record what benefit is

gained by the public in this instance, as there was no discussion by the board as to why enforcement of the plan notation benefited the public, further more other than a notion restriction it is unclear from the record what other evidence supported the denial of the variance request.”

- Basically, they are here to seek a variance to allow one building lot on 18 acres of land, this could be used to build multiple homes on the lot and they are not looking to do this, and is looking to put whatever restrictions the town’s counsel deems appropriate to keep that from occurring, and he understands the boards reluctance to deal with back lots.
- He understands that this is a difficult situation for this board and that there are very few developers that come in and ask for less then what is available by law. His client is willing to do this. He respectfully submits that the variance should be granted because there is no basis for substantial justice, and there is no benefit to the public for denying the application, but there is a hardship and a loss to his client if he cannot build one home on the lot.

Susan Hanson, 137 Linden Street, they have been attending meetings for the Britton property for about 35 years. She wanted to give the board some history and approached the board to point out a few things.

- Mr. Britton bought this property as well as a bunch of others
- She gave the board a map that she showed them information from that was old.
- She showed the board what he had originally owned and stated that he sold off a few acres. He used one property as access to a hay field.
- One of the two acre lots is owned by one of his sons, and two lots have been for sale for a number of years including this 18-acre lot.
- She believes that they backed themselves into a corner, which is now passed onto the town.
- She believes that if they allow building on this lot there will be issues with bussing, due to the fact that it dead ends; emergency services would take away from the rest of the town; trash pick up as well. She asked the board to consider those factors.
- She doesn’t know how the board can approve this, because it would be detrimental to the rest of the town.
- She believes that Exeter should be involved in this process.
- It is a very poor access area and numerous accidents. Not a desirable area to have an entrance to the property.
- She indicated that Paul Kimball had previously stating that there is an aquifer located at the back of the 18 acres, that the board should consider as well.
- She believes that this is the last chop and believes that he could have sold this one with a lower price.

Janet asked if she was at the meeting in 1991, she believes that she was, but is unsure, and not positive of the notation and why it was made.

Warran Hanson, 137 Linden Street, approached the board and discussed the following:

- first meeting was 1980 or so and bought the full 50 acres.
- He did the three lots.

Attn. Scott interrupted and stated that this was remanded from the court on a limited issue which was the substantial justice and he is concerned that they are getting pretty far away from that issue.

Mr. Hanson is concerned that the lot is being marketed as a house lot that they could build on, he continued that Tate and Foss has been showing this lot to people as a one-acre house lot.

John asked him to bring his comments back to what is being discussed tonight.

Mr. Hanson asked where the property is coming off of the road, they have a nice little loop at the end of the house lots. He believes that they are planning to do eight house lots.

Mr. Hanson explained that the Town of Exeter let the owners across the street from him put in the curb cut a year ago, which is opposite their barn. The curb cut is 45 feet and the drainage exit is through their field and into the Exeter River. That is his only access to his barn and with more building there it would affect his entrance to his barn. The Town of Exeter has told him that they are not allowed to have drainage go across the road. The board thanked him for his testimony.

The board discussed what Mr. Hanson just discussed, and looked at the map from 1950.

Jeff Toomey is a direct abutter, from Exeter, he lives at a lot abutting the lot in question. He is affected by whatever takes place.

- He believes that this will affect the rural character of the town.
- If the waiver is granted for not having the frontage then, if he wanted to be creative, he could seek a variance for frontage for a lot out back, which is no different then what is being talked about here.
- He is concerned with this setting a precedence for houses in back of each other.
- It is dangerous going in and out of that area, and he believes that the board should be cautious.
- Services as well as what was discussed earlier would be an issue.
- He believes that if the board grants this variance it will affect the value of the surrounding homes.
- He believes that the previous vote should be upheld.

Attn. Scott asked to address the abutter. He asked if he was aware that this area could be subdivided as it exists, and in his back yard there could be more than one house there. Mr. Toomey stated that is a whole other issue.

John pulled the conversation back to what the board is discussing and to the abutters point the board is addressing the 100 feet for a single house lot. And agreed that if not granted they can put in a subdivision, but tonight they are talking about the variance for a single lot. John is looking to give everyone a chance to speak.

Mark had a question. He addressed Mr. Scott, and asked if that lot could be developed as it is. It was explained that they would have to go before the Planning Board for a subdivision first, they could not just build the homes without Planning Board subdivision approval.

Attn. Scott explained that they could do that with proper permits, but they are looking to do just do one home, and would entertain whatever restrictions town counsel deemed necessary.

Michael Schwotzer- addressed the board as a citizen' of Kensington. He pointed out the January 3, 2017 meeting minutes of the Zoning Board of Adjustment for the rehearing. He continued that in the 3rd paragraph he talked about the history of the lot.

- He had reviewed the previous Planning Board Minutes both in Kensington and Exeter, and the first is:

Circle Trust - Dennis Hamel, Michael and Daniel Britton were present to represent Circle Trust in their request to subdivide 50+/- acres into two lots; one lot consisting of 19.6 acres to be and the second lot to contain the balance of the acreage. The 19.6 acre lot which is being created will have frontage of 80' in Exeter on Powder Mill Rd. The use of this land will remain the same; farm land and a notation is included on the mylar that this lot may not be built on unless it meets current zoning regulations.

- He explained that as a long-time planning board member you don't usually put those kinds of notations on a plan lightly. Non-buildable lots are a problem in the future.
- He read the Exeter minutes from 1-23-92 which they also deemed this a non-buildable lot. Exeter also stated that it was a non-buildable lot and would have to comply with the current regulations. Therefore, Exeter put the same restrictions as Kensington.
- The owner had a lot of acreage and wanted to cut out lots and ended up with strips of land, which abutted the farm land. He believes that this was a contract between the planning boards of two towns who stated that if you want to take the frontage away from this large piece of land then you can have it. But that piece was non-buildable.
- If the board denies this, then an owner could put a road in and do a subdivision. That is not the point. The point is that the towns of Exeter and Kensington said that you can have the subdivision and have the lots, but this land can't be built on. He does not believe that the regulations have changed a lot in the last 25 years.

The board thanked him for his input.

Alan DeFreitas approached the board as past member of the planning board in Kensington. He was on the planning board in 1990-1991 and he is not sure he understands about all the detail from Mr. Schwotzer, and will not contradict what he stated. He continued:

- At the time that this was done when the Britton's came forward there was no access to the back lot and there are a lot of those types of properties in town. The planning board was trying to be careful in indicating access to this type of property.
- They believed that the access would be through Exeter. So he believed that Exeter would have to decide as far as access to the property.
- He stated that they never judged whether the lot was buildable
- In the notes that was never asked of them so they did not judge that.
- He commented that there was a checklist that they went through.
- every time they were asked to provide a building permit, where the property was to be located and they waived that process.
- As far as what is being considered at this time, as a resident of Kensington he believes that there are some things that we can't restrict.

- If someone has a property that will perk and be permitted he believes that it is better to do one then four or five. He believes that should be considered.
- He stated he would answer any other comments.

Mr. Hanson stated that there was a false statement. John asked what that was.

Mr. Hanson continued that Mr. DeFreitas stated that in 1991 there was only one access to the lot. And in 1991 as his wife pointed out, Mr. Britton owned a large section and had several hundred feet of access. He has created the hardship by selling the parts of the property off.

Attn. Scott stated to confirm what Mr. DeFreitas stated, this is from the planning board minutes of 1991, it just asked that there was a notation for the lot to not be built on unless it confirms to current regulations, and part of that is what he is there for, a variance.

John asked if there was anyone here from Exeter Planning Board, and there was not anyone in attendance. He then asked the board if there were any questions they wanted to ask. Mark thought that the Exeter Planning Board should have been in attendance. John closed the public portion of the meeting.

John then explained that whatever the intent on the plan was the board can't seem to find out what it was, and they have tried by doing what the court has described by going back and trying to find out and believes that they have done their due diligence. Anything that comes in front of them they will use the regulations that they have, which they are afforded a variance if they the board feels that one should be granted based on the information that they have been given. Based on the information from the past, he remembers based on the minutes what was talked about. As a town they put in 200-foot frontage, and that is how the Town controls what type of development goes on. This is unique in that they have every right to go to the planning board and create lots with whatever they have. The questions were do they want to control it by allowing one, or possibly allowing 4 or 5. And speaking for himself he focused on not so much what this would do for this one lot, but the precedence that will be set throughout the town. That was his version of substantial justice and it held up the ordinance that the town has. He feels that the hardship was created by the original owners.

What is the gain of the general public, and to him it is the upholding of the ordinance that he has, 100 feet can be used for multiple lots, but that is why they have a planning vs a zoning board.

Janet read from the court remand and asked what they need to address tonight. She asked if the plan notation is the only thing that they need to address tonight.

John agreed that they need to focus on the plan notation and is not sure that its meaning really has any bearing on his decision.

Janet explained that:

- the board has to determine as to whether or not the notation means that the notation refers to 1991 zoning laws or 2016.
- The board will have to make the determination if they are going to stay with their previous determination.

- The Attn. representing the property owner stated that the notation would refer to 2016.
- Determine on whether the variance is allowed.

John explained that the relief from the restriction is coming to the board for a variance, on the frontage which was denied, based on not meeting criteria.

Janet continued that it is incumbent upon the board to make sure the findings, in order to clarify the record. She believes that the findings were clarified.

John asked Kathy to clarify what the court asked.

John asked if the motion would be to either uphold or rescind the original decision.

Kathy stated that going forward the applicant has the option to request another hearing.

Town Attn. stated to take into consideration what was in the court order remanded back to the town.

Janet clarified that the board was to have a public hearing, do further research, with mailings, and to possibly vote. She is still unclear what they need to vote on.

John stated that if it goes to court this discussion will be used and he wants to make sure that they are discussing the correct topics.

Janet explained that her thoughts were that there was no further evidence other than what was in the January minutes.

John stated that he would go through the criteria for a variance one by one.

Attn. Scott objected to that process due to the fact that this was a court order remanding a hearing on substantial justice, the remaining variance issues have been dealt with by the board previously and it is a very narrow issue as to whether there is substantial justice.

John agreed, but stated that if they were going to use the discussion points or factor of the variance as a deciding factor wouldn't he want the board to go through the criteria again.

They would not be voting on the criteria just going through the steps.

Attn. Scott does agree that it will take a vote by the board as to whether prior denial should be reversed. John agreed, but in his journey to that he wanted to go through the criteria again because one of the board members was not present for the first hearing.

Attn. Scott expressed that this process would become very problematic for him, and with respect he understands that this is a unique situation, but the applicant has gone through the hearing here, a rehearing and gone to superior court and the judge has ruled on a very specific issue that she wants addressed. The other issues are not in the current appeal, so be the board getting into a whole bunch of other things that are not in compliance with what the court is asking for. The court has asked the board to find some support for the substantial justice was not met by applicant, and he thought that was the intent of the meeting tonight. Not to go through the complete variance requirements. He would like to focus on what the court has asked.

Kathy explained that part of the decision was that the board was to:

- Make factual determinations on what the notation on the plan was and how the notation was considered.
- To find out whether the reference to the zoning was from 1991 or 2016.

John stated that the first part the judge mentioned more than one. Kathy stated that she believes that it was substantial justice as the cause of the denial in the motion.

Janet asked if the variance was denied solely based upon the substantial justice. The board read the denial. John commented that from the court order the judge stated: "Because the board denied the Sherwood Forest's application on the substantial justice and spirit of the ordinance factors alone" That is why he was looking to walk through the steps. The comment on substantial justice was that the board didn't support substantial justice. John asked for the boards thoughts on the discussion of substantial justice. Mark questioned what has changed in all the years going back.

John asked for a motion to vote to uphold or affirm the original board's decision.

Mark made the motion to uphold the decision of previous boards and cities. John asked based on what. Mark continued based on the frontage requirement and the fact that nothing has changed in all the years. Janet stated that the motion would have to include the spirit of the ordinance to address what the court ordered. Mark explained that he is not in the position to overturn what has already been done within the town. Kathy was asked to read back the full motion on the table. Mark motioned to uphold the decision of previous boards and cities based on the frontage requirements and that nothing has changed in the past years. Janet asked to amend the motion. The motion was not seconded, so no motion. The board reworked the motion.

Janet made a motion to uphold the Zoning Board decision to deny the variance based upon the public hearing discussion and factual determination, as well as testimony given. Mark seconded, all in favor.

Decision to uphold has passed.

Attn. Scott informed the board that as a procedural matter he has to submit a petition for rehearing, before going back to court again. He also requested a copy of the rough minutes.

Janet made a motion to close the meeting at 8:40pm, seconded by Mark, all in favor.

Respectfully submitted,

Kathleen T Felch