

**Town of Auburn  
Zoning Board of Adjustment  
January 28, 2014**

**Present:** Mark Wright, Chairman, Jim Lagana, Vice Chairman, Mike DiPietro, Peggy Neveu and Elizabeth Robidoux, Members. Jeffrey Benson, Robert Beaurivage (7:08pm) and Kevin Stuart, Alternate Members. Minutes recorded by Denise Royce.

**Also Present:** Carrie Rouleau-Cote, Building Inspector; Attorney Mitchell; William Herman, Town Administrator; Russell Sullivan and Paul Raiche, Selectmen; Chuck Joy, Jeff Porter and Allan Villeneuve, Conservation Commission.

**Absent:** None

Mr. Wright called the meeting to order at 7:00 p.m. Mr. Wright introduced the Board members and explained the procedure for tonight's hearing to everyone present.

**Motion for Rehearing**

**Requested by EJS Trust**

**Case #13-29**

**Craig & Kathy Zamoida**

**563 Londonderry Turnpike, Tax Map 4, Lot 11-2-3**

**Zoned Residential Two**

*Applicant was granted a Variance on December 17, 2013 to allow a one lot subdivision with frontage to be ten (10) inches less than the 200 feet required in a Residential Two zone by a vote of 3 to 2. Article 4, Section 4.06(6) On January 14, 2014, Attorney Deachman on behalf of EJS Trust submitted a request for Motion for Rehearing in accordance with RSA 677:2.*

Mr. Wright informed the Board members and everyone present that there were two matters on the agenda for tonight's hearing and that the first matter was a request for a Motion for Rehearing regarding the Zamoida case that was before the Board last month. Mr. Wright informed the Board members that they have received a letter from Attorney Deachman on behalf of EJS Trust. Mr. Wright asked the Board members if they had any questions, comments or thoughts that would require the Board to go into deliberations or were they prepared to move on the motion.

At this time, Mr. Stuart recused himself from this case. Mr. Wright pointed out that Mr. Stuart did not vote on that case as he had recused himself during that hearing as well. With that in mind, Mr. Wright elevated Mr. Benson to a full voting member.

Mr. Wright asked if the Board had any questions or comments. Mr. Wright believed it was pretty straight forward.

***Mr. Lagana made a motion that they move to rehear the case involving Craig & Kathy Zamoida, 563 Londonderry Turnpike, Tax Map 4, Lot 11-2-3, Case #13-29, seconded by Mrs. Robidoux. Mrs. Robidoux voted to grant, Mr. DiPietro voted to grant, Mr. Lagana voted to grant, Mr. Benson voted to grant and Mr. Wright also voted to grant. The motion passed in the affirmative.***

The case will be reheard at the next ZBA Hearing scheduled for February 25, 2014. Mr. Socha asked the Board members if they would be sending out notices regarding the hearing scheduled in February. Mr. Wright said yes. Mrs. Zamoida asked Mr. Wright if they could obtain a copy of what Attorney Deachman had sent the Board with regard to the request for rehearing. Mr. Wright said yes and Ms. Royce informed Mrs. Zamoida that she would e-mail it to her in the morning.

Mr. Wright explained that, for the sake of consistency that he was going to turn this case over to Jim Lagana, the Vice Chairman who chaired that meeting as he was not here for the first hearing and did not review the matter and believed that all of the members that voted on that case that evening are here tonight. With that said, Mr. Wright turned the meeting over to Mr. Lagana and exited the meeting.

Mrs. Robidoux stated that she was not here at the original meeting but did review the minutes of the meeting and asked Mr. Lagana if he would like her to sit in on the case and believed it was a do over and assumed that it would be a new case. Mr. Lagana indicated that he had consulted with town counsel and that he was informed to maintain consistency that only the members that were at the original hearing should sit on the case. Mrs. Robidoux wanted it noted that she was not happy with that decision but would step down and sit in the audience.

**Case #14-01**  
**Rehearing for**  
**Town of Auburn Board of Selectmen**  
**Appeal Regarding: Richard and Sharyn Ramos**  
**530 Bunker Hill Road – Map 5, Lot 82**  
**Zoned Residential Two**

*Applicant requested an Appeal of the Zoning Board of Adjustment decision granted on November 19, 2013 for a variance from Article 3, Section 3.01 a use not defined to allow a second dwelling unit on a single lot in a Residential One zone and later amended by the applicant to request a variance regarding Article 2, Section 28 to allow a detached accessory dwelling unit in a Residential Two zone, which has been granted by a vote of 4 to 1 with the condition (s) listed below, by vote of the Board of Adjustment.*

**CONDITIONS:**

- 1) ZBA request to meet wetlands setbacks,**
- 2) Proposed Accessory Dwelling Unit to be a one bedroom dwelling with a total area of less than 950 square feet,**
- 3) Upon approval, all applicable state permits will be obtained, and,**
- 4) Restrictive Deed to be recorded stating that the dwelling is to be used for family only (in-law use) and shall never be rented.**

Mr. Lagana began the rehearing on this case and introduced himself to the audience and indicated that he had originally chaired this case in November. Mr. Lagana explained that the BOS appealed the case and that the Board granted a rehearing on December 17, 2013 and now they were here tonight to rehear it. Mr. Lagana elevated both Mr. Benson and Mr. Stuart to full voting members for this case. To remain consistent Peggy Neveu and Mike DiPietro will be sitting in on this case as was done back in November. Mr. Lagana explained that Mrs. Robidoux voiced displeasure at not being able to sit on the case and after speaking with town

counsel that town counsel suggested that Mrs. Robidoux excuse herself from the case. Mrs. Robidoux stated that she respected Mr. Lagana's decision.

Mr. Lagana began the rehearing by saying that they are here tonight to listen to the appeal. The appeal will be to determine whether or not the Zoning Board acted improperly in terms of applying the ordinance or overlooked important documentation or evidence and with that in mind, Mr. Lagana turned to discussion over to the Board of Selectmen's attorney.

Attorney Mitchell began by saying that he filed a Motion for Rehearing on behalf of the Board of Selectmen. Attorney Mitchell asked Mr. Lagana how Mr. Lagana wished Attorney Mitchell should proceed because the Motion for Rehearing was granted. Mr. Lagana said yes. Attorney Mitchell believed that they would be starting over and noted the fact that Mr. Lagana was trying to keep the same Board members to try to avoid the length that would entail by going through all the facts again. Attorney Mitchell indicated that the applicant has the burden of proof of showing that the variance standards have been met. Mr. Lagana pointed out that he would like to proceed by having Attorney Mitchell present his case this evening and of course will ask the applicant to either agree or refute your findings as he does not want to put the applicant through their case again. Attorney Mitchell wanted it noted that it was clear that as far as making a decision that they were before the Board tonight with the application is unacted upon. Mr. Dingman believed that this was a hearing for the appeal itself and was for the Board to decide whether or not to grant the full appeal. Attorney Mitchell stated that it was an appeal before the variance which is how the statute reads.

Mr. Stuart asked Mr. Lagana that he received advice from town counsel and Mr. Lagana said yes and explained that this was a rehearing of the case. Mr. Lagana further explained that he did inform the applicant that there was a 30 day appeal period and that the Board of Selectmen appealed the ZBA decision.

Mr. Lagana stated that he preferred to have Attorney Mitchell to go first. Mr. Stuart indicated that he did not know what advice that Mr. Lagana was given but that his experience with a rehearing is that the Board is going back and doing it all over again as if the first one did not happen. Discussion ensued with regard to the definition of rehearing. Mr. Lagana stated that his plan tonight was to hear the appeal and if Attorney Mitchell's question was whether or not they would start at ground zero, I guess we are as he did inform the applicant that the decision may be overturned.

At this time, Attorney Mitchell began by saying that the real question is, is should the Board vote to grant the variance or not. Attorney Mitchell explained that they need to look closely at the ordinance.

Mr. Lagana pointed out that Mr. Beaurivage arrived late and that he would not be sitting in on this case but is sitting in on the Board.

Attorney Mitchell explained that they requested a variance for a provision in the ordinance that was really just guidance of the ordinance on how to read it. Then the Board members at that time correctly recognized that the variance should not be considered in that frame work but to Article 2, Section 28 which is the definition of Accessory Dwelling Unit. Looking at the definition there are no explanatory notes in this ordinance. Common sense of this interpretation is that generally in this zone we don't allow a second dwelling unit on one lot. We're going to allow it in very restrictive situations and the wording of the ordinance adopted by the voters is that the structure has to be secondary and subordinate and customarily incidental to the single family

home. The ordinance puts in some protections with regard to requirements such as it must be attached or we don't allow this and it must not only be attached but must also be accessible from the inside of the single family home or we don't allow this. It must have interconnected smoke and fire alarms or we don't allow this and we don't allow this if it does not meet all zoning setbacks. This application came before the Board to build a separate dwelling unit not attached and not interconnected in any way but quite a bit removed from the single family structure. Although the applicant in effect has done has asked the Board to throw out all of the protective requirements that the voters put into the ordinance. The only way it will be built would be to get rid of those things.

Attorney Mitchell noted the five (5) criteria of granting a variance and wanted to point out two (2) in particular. One of importance is the spirit of the ordinance which he does not believe that it is a very weighty argument to say that it is consistent with the spirit of the ordinance and the concerns that the voters show in adopting this provision which has all these protective components to just sweep them away. The main concern is that, in town, we do not want a second dwelling unit on a lot. We will allow it in certain circumstances to serve family members but are concerned about the enforcement of these situations. With this in mind, this is why we put provisions like they must be attached and interconnected with each other. Attorney Mitchell stated that he did not believe that it was consistent with the spirit of the ordinance to throw those things out. The second thing relates to the hardship test and in order to find that a hardship exists in any variance case, the Board has to make a specific finding that a special condition exists about this property that distinguish it from others in the area that are related to the next part of the hardship test and the next part of the hardship test is that there has to be a showing that no fair and substantial relationship exists between the general purposes of this zoning ordinance and its protective provisions and the specific property that we are talking about. Attorney Mitchell respectfully does not believe that a credible argument can be made that these circumstances meet that test. This application does not satisfy the spirit of the ordinance provision and clearly does not satisfy the hardship provision.

Attorney Mitchell read a section for the Board members that were quotes from earlier ZBA cases in Auburn with similar issues which many of the same Board members were sitting on the Board and voted on. The quotes are as follows:

- 1) "There are in-law apartments attached to homes that become exposed to the rental risk, but it is less likely that one would be used by someone who was not a family member. Detaching the unit increases the likelihood that the building would become a rental unit, especially with a separate garage." This comment was made by Mr. Wright (who has stepped down tonight) was concerned with creating two houses on one lot and was concerned that the Board would be setting a precedent it may not be able to defend.
- 2) "Mr. DiPietro commented that he felt the Board needed to consider what would happen if everyone wanted a detached unit like this."
- 3) "Mr. Wright stated that, it is hard to sit on this Board when you hear the reasons why people want to do things, but the members need to be aware of someone who will pull this case out a year or more from now and use it as a precedent as to why he should not be denied."

Attorney Mitchell pointed out that they are replicating now the concerns that these Board members expressed in the Dube case back in March 2006. At this Attorney Mitchell handed the Vice Chairman a copy of the minutes quoted above. Attorney Mitchell stated that he believed he said what he had to say and believed that the application fails to meet at least two

(2) of the five (5) conditions necessary for granting the variance and therefore requested that the Board deny the variance.

Mr. Lagana thanked Attorney Mitchell for his presentation and pointed out that the Board had set some very stringent conditions upon this case during the granting of the variance and asked Attorney Mitchell if any or all mitigate any of his concerns. Attorney Mitchell said no that the conditions all came directly from the ordinance like recording the restriction. Discussion ensued with regard to the presentation above. Attorney Mitchell pointed out that nobody wants the Code Enforcement Officer to peer over fences.

Mr. DiPietro asked Attorney Mitchell about the protective measures that are built into the ordinance and wanted to know if Attorney Mitchell thought that some carry more weight than others and gave an example of the square footage of the accessory dwelling unit. Attorney Mitchell said yes and believed the larger the unit, the more attractive it would make to market it. Attorney Mitchell explained that they were all adopted by the voters and they all are equally important. Attorney Mitchell believed it would be the effect of what happens. Mrs. Rouleau-Cote commented that the ZBA has received requests to exceed the 950 square foot requirement for an accessory dwelling unit in the past and acted upon that based on the hardship that was shown which included a handicap person that needed additional space or the primary dwelling unit was large enough to support a larger square footage without the accessory dwelling unit overpowering the primary structure so in the past the Zoning Board has entertained those request and has granted a variance to exceed the 950 square feet through the variance process. They still keep it to a one bedroom but allow an increase in the square footage.

Mr. Lagana asked if there were any other questions or input from the Board. Mr. Benson asked Attorney Mitchell if the hardship five (5) factors are shown then he believed it would be rezoning. Attorney Mitchell did not agree and explained why we need a variance process is to avoid having restrictions being so tight that they take away the reasonable use of the land. That's where the variance came from. Mr. Benson thanked Attorney Mitchell.

Mr. Stuart asked Attorney Mitchell that in his motion, he indicated that "Although the actual plan for this project was not provided to the appropriate town officials prior to the ZBA hearing, it has now been reviewed and the proposed new separate structure as shown on the plan significantly impinges into the rear setback of this lot." Mr. DiPietro wanted it noted that they did not give a variance for setbacks. Attorney Mitchell explained that the representation that was made was that there was no problem of where they wanted to put it. Attorney Mitchell showed the plan that shows that the proposed building is in the rear setback. Mr. Lagana wanted the record to show that the applicant testified that the structure would meet all setbacks so they need to take testimony as gospel. Mr. Lagana indicated that Attorney Mitchell had stated that the Board let them put it wherever they wanted and that was simply not the case. Attorney Mitchell did not believe he had said that. Mr. Lagana reiterated that the applicant had stated that they would meet all setbacks. Mr. Stuart asked Mrs. Rouleau-Cote to explain the plan. Mrs. Rouleau-Cote explained that this plan was presented by the applicant which shows the proposed building with a setback but that the setback was only a 30 foot setback of which in fact has a 50 foot setback which would put the structure within the 50 foot setback.

Mr. Dingman commented that in November they discussed the issues that counsel had brought up as far as the 950 square feet. The only two (2) items that they would not be adhering to was the fact that it was not going to be attached and there would be no entry from the primary

dwelling but it would have all the other criteria as far as fire and safety. They would only be excluding two (2) of those items. Mr. Dingman pointed out that there was the issue with all the wetland setbacks that were depicted and voted by the town's people to protect other portions of interest of the town. In discussing the hardship tonight which points out the uniqueness of this property is where the primary dwelling is so close to the pond and some wetlands that are on the other portion of the property basically overlaps so that no type of addition to the existing structure would be conforming to the wetlands ordinance so basically they believed the Board did justice in the way of weighing whether they excuse two (2) items to enforce all the wetlands ordinances or vice versa. With this the Board voted to be with them. As far as the 50 foot setback, Mr. Dingman stated that it was relayed to them that it was actually a side line by the surveyor. In any event, the Building Inspector indicated that it would have to be shifted right and he brought plans tonight showing both the 30 foot line and the 50 foot line and the location where the structure could be conforming. Mr. Dingman reiterated that the property is unique because of the pond and wetlands and the location of the existing structure and believed that the Board looked at everything in its entirety and made the proper decision that night. Discussion ensued with regard to shifting the structure forward and maintaining the 50 foot setback in the rear. Mr. Stuart asked to see the plans. At this time, Mr. Dingman showed the new plan to the Board members. Mr. Lagana thanked Mr. Dingman for his time.

Mr. Lagana asked the Board members if they had any further questions or comments. None were noted.

Mr. Lagana explained that if everyone had a chance to review the minutes of this case that the Board based their decision on the fact that the existing home sits entirely within the wetland setback and after listening to testimony that the Board felt that any further construction on the property would be less detrimental to the wetlands if instead of increasing the intensity and adding on to the existing structure that the new structure be placed out of the reach and further from the wetlands. Mr. Lagana asked the Conservation Commission members that were present for their comments and if this sounded reasonable or would it have been better to annex the proposed accessory dwelling unit. Mr. Joy commented by saying that usually they get a chance to look at it but that was not the case here. They are here tonight to ask the Board that if in the future they have any issues pertaining to wetland setback that they seek Conservation Commission for comments. Mr. DiPietro asked Mr. Joy if they had seen the plan. Mr. Joy said no. Mr. DiPietro stated that the Board has spent a lot of time over the years treading lightly around wetlands and they made an assumption to stay away from the wetlands and what they really need to do is to seek advice from the Conservation Commission who has expert opinions to give them. Mr. DiPietro pointed out that they jumped to conclusions. Mr. Lagana stated that they try very hard to prepare for every case and during Mark's absences and sitting in for him over the years that they made an assumption and expected that Conservation Commission had a chance to view all the cases and was surprised to hear that they had not. Mr. Joy indicated that they only find out when they read the minutes and the agenda. Mr. Porter indicated that they will be meeting next Tuesday and will put this on their agenda. Mr. Lagana stated that there were two (2) abutters present that evening and that they were both in favor of this plan. Mr. Lagana asked the Conservation Commission if they had anything else to add. Mr. Joy and Mr. Porter both said no.

Mr. Dingman asked what the Board's stance and would they prefer to see the wetlands ordinance enforced 100% or not. Mr. DiPietro explained that making a variance so that they would not affect a Level One wetlands was the right thing to do and they made that assumption. Mr. DiPietro asked the Conservation Commission to weigh in on it. Mr. Joy

indicated that without looking at the plan and the overall impact of the area it's difficult to say which one is better or worst. Mr. Stuart asked what the Conservation Commission needed to do. Mr. Joy explained that they would discuss it at a meeting and respond and conduct a site walk. Mr. Lagana pointed out that the minutes do reflect that the decision was based on the fact that the existing structure is within the wetland setback and although the accessory dwelling unit did not meet the town's definition of that, all new construction was going to be out of the wetland setback. Mr. Lagana asked the Conservation Commission if this would be a more preferable and more protective situation. Mr. Joy indicated that there are a lot of homes and buildings in town that are within our current wetland setbacks ordinance and it just depends on the year they are built and how it was delineated. He would say as a rule they would be more apt to look at the wetlands setback as a way to contain new development. There is a 125 foot wetland setback from a Level One wetland and if someone puts a house 10 feet from it and then the homeowner is back looking to put a deck on the house and he has to come before the Board to request a variance.

Attorney Mitchell pointed out that the Board has tried to avoid granting this type of variance in the past where it has granted wetland setbacks in the past in the appropriate circumstances. In the analysis of which is the lesser of two evils, building within the wetland setback or building it further away. Attorney Mitchell reiterated the two provisions mentioned earlier.

Mickey Rolfe asked if they would be both on the same well and septic. Mr. Dingman indicated that they would be using the same well but that the new home would have a new septic.

Mr. Lagana asked if there were any further questions from abutters or interested parties. Mrs. Marzloff wanted to point out that part reason of this Board is a relief valve for an over burdensome regulation that prevents people from having reasonable use of their property. Mrs. Marzloff believed that this applicant has reasonable use of his property and is looking to add to that use and does not necessarily believe that it was the function of the Zoning Board.

Mr. Lagana asked if anyone else wanted to speak. None were noted. Mr. Lagana asked the Board members if they had any questions or comments. Mr. DiPietro stated that he did not hear anything that was earth shattering or new and believes that they need to hear from the Conservation Commission and moved to table the hearing until they obtain some feedback from the Conservation Commission with regard to the wetland issue. They need to know if attaching the accessory dwelling unit would add significant impact to the wetlands, then they can make a real easy decision. Mr. Stuart stated that he was going to make the same motion and also believed that they should have slowed down from the beginning and need to get input from everyone including the Conservation Commission who stated that they have not reviewed plan but would take a look at it.

***Mr. DiPietro made a motion to TABLE the hearing until February 25, 2014 for 530 Bunker Hill Road, Tax Map 5, Lot 82, seconded by Mr. Stuart.***

Mr. Lagana mentioned that Attorney Mitchell mentioned two (2) concerns about the five (5) factors and one being the spirit of the ordinance and asked the Board if they felt that by having the Conservation Commission review the plan that it would satisfy the spirit of the ordinance concern one way or the other. Mr. Stuart said that he agreed that it was part of the issue of the hardship so for that purpose he would be interested in hearing what the Conservation Commission had to say.

Mr. Lagana pointed out that a motion has been made and seconded and would move to a vote on whether or not to table the hearing until February and the responses will be to either grant or deny.

***Mr. DiPietro made a motion to TABLE the hearing until February 25, 2014 for 530 Bunker Hill Road, Tax Map 5, Lot 82, seconded by Mr. Stuart. Mrs. Neveu voted to grant, Mr. DiPietro voted to grant, Mr. Stuart voted to grant, Mr. Benson voted to grant and Mr. Lagana voted to deny. The motion passed with a vote of 4 to 1 in favor of tabling the hearing.***

Mr. Lagana informed everyone present tonight that the hearing has been Tabled until February 25, 2014. Mr. Porter was given three (3) copies of the plan for their review and comment for the next hearing and the Conservation Commission meeting which is scheduled for Tuesday, February 4, 2014.

### **General Business**

Mr. Lagana spoke with Mrs. Robidoux that she was not excused from the hearing and that she could have sat in on the hearing but not voted. Discussion ensued with regard to Mrs. Robidoux stepping down from tonight's hearing on the Ramos rehearing matter.

Mrs. Neveu asked Ms. Royce that when she prepares the packet for the ZBA members to forward a packet to the Conservation Commission. Ms. Royce said she could do that but that the Conservation Commission would not have known it was regarding wetlands because the Board members as well as herself and the Building Inspector never received a plan until the night of the hearing. The Board members agreed with Ms. Royce. Mr. Stuart added that from looking at the original application that no one would have known what was going on with that case.

Mrs. Neveu asked if we had to have everything in place prior to the hearing. Ms. Royce said we did for Planning Board but not for Zoning Board. The Board believed we should have something that requires the applicant to have everything submitted with the application in order for the Zoning Board of Adjustment to review and hear the matter. The Board agreed.

Discussion ensued with regard to the requirements of submission to the Zoning Board. The Board also discussed preparing a checklist prior to submission of an application to the Zoning Board of Adjustment.

### **Minutes**

***Mr. DiPietro made a motion to accept the minutes of December 17, 2013 as written, seconded by Mr. Stuart. The motion passed in the affirmative.***

### **Adjourn**

***Mrs. Robidoux made a motion to adjourn, seconded by Mr. Stuart. All were in favor, the motion passed unanimously and the meeting stood adjourned at 8:20 p.m.***