

**Town of Auburn  
Zoning Board of Adjustment  
March 25, 2014**

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

**Absent:** None

Mr. Wright called the meeting to order at 7:02 p.m. Mr. Wright informed every present tonight that there were two cases on the agenda for tonight's hearing and that he would like to take the cases out of order and would be taking the Desrosier case first. Mr. Wright also indicated that three (3) of the Board members were conflicted on sitting in on the second case which was the Zamoida case. Mr. Wright pointed out that the members of the Board that would not be sitting in on the Zamoida case would be Peggy Neveu, Kevin Stuart and himself. With that in mind, Mr. Wright informed everyone present that after the Desrosier case that he would be turning the hearing over to Mr. Lagana and that the Board members that were conflicted with the Zamoida case would be free to go after the first case was done.

Mr. Wright also pointed out that he would like to postpone the discussion of the Rules of Procedure until next month but that Ms. Royce would be passing out copies of the draft Rules of Procedures for Board members to review for discussion at the next hearing.

At this time Mr. Wright introduced the Board members to the applicants and everyone present. Mr. Wright asked Ms. Royce to read the Desrosier case for the record.

**Case #14-04  
Ron & Debra Desrosiers  
23 Depot Road – Map 10, Lot 9-3  
Zoned Residential One**

*Applicant is requesting a variance from Article 4, Section 4.06(6) to allow the construction of a 14 foot by 36 foot garage addition that will encroach within the side setback in a Residential One zone.*

Mr. Wright asked Mr. Desrosier to read his application. Mr. Desrosiers read his application into the minutes for the record.

Mr. Wright asked if there were any abutters present. None were present. Mr. Wright asked Mr. Desrosiers if he would be taking down any trees or changing the topography. Mr. Desrosiers said no. Mr. Wright asked Mr. Desrosiers what the number of feet he was looking for relief from the board. Mr. Desrosiers said it was less than three (3) feet. Mr. Lagana pointed out to Mr. Desrosiers that the rear of the garage would not be encroaching at all correct. Mr. Desrosiers said that was correct because of the way the property line went that it was only tight in the front. A brief discussion ensued with regard to the location of the well and the proposed garage. Mr. Lagana informed the Board members that he did take a ride by the property and it is a unique situation with steep slopes. Mrs. Robidoux also pointed out that Manchester Water Works was on that side of the property so that no structures on Manchester Water Works

property.

Mr. Wright asked the Board members if there were any further questions or comments. None were noted. At this time, Mr. Wright stated that he would entertain a motion to vote on the application.

***Mrs. Robidoux made a motion to vote on the application as presented to allow construction for a 14 foot by 36 foot garage addition that encroaches up to three (3) feet into the side setback for 23 Depot Road, Tax Map 10, Lot 9-3, seconded by Mrs. Neveu. Mrs. Robidoux voted to grant, Mrs. Neveu voted to grant, Mr. DiPietro voted to grant, Mr. Lagana voted to grant and Mr. Wright also voted to grant. The motion passed in the affirmative.***

Mr. Wright informed Mr. Desrosiers that there was a 30 day appeal period where an abutter or interested party may appeal the Zoning Board of Adjustment's decision so any construction started within the 30 day period would be at his own peril. Mr. Desrosiers understood and thanked the Board members for their time.

At this time, Mr. Wright turned the meeting over to Mr. Lagana and informed everyone that Mrs. Neveu, Mr. Stuart and himself would be recusing themselves from the following case.

At 7:15pm, Mr. Lagana began by elevating both Mr. Beaurivage and Mr. Benson to full voting members for the following case. Mr. Lagana asked Ms. Royce to read the case into the minutes for the record.

#### **Case #14-02**

**Rehearing for Craig & Kathy Zamoida**

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

**Zoned Residential Two**

**TABLED from February 25, 2014**

*A Rehearing of the Zoning Board of Adjustment decision granted on December 17, 2013 for a variance from Article 4, Section 4.06(6), to allow a one lot subdivision with frontage to be ten (10) inches less than the 200 feet required in a Residential Two zone.*

Mr. Lagana explained that when an appeal is granted that they basically start from ground zero as if the case was never heard. Mr. Lagana indicated that he would appreciate it if the applicants would restate their case. At this time, Attorney Brenda Keith began by saying that she was before the Board tonight on behalf of Kathy and Craig Zamoida. Attorney Keith wanted to also confirm that the record from the previous hearing would be part of any certified record should this matter come up on appeal. Mr. Lagana said yes.

Attorney Keith began by saying that, Cathy and Craig Zamoida appeared pro se at the last hearing and they did present the case as far as all of the points under RSA 674:33 as amended in 2009. However, Attorney Keith wanted to point out that the Board was not overly concerned about anything other than the fifth prong under the statute which was the unnecessary hardship factor. Attorney Keith went on to say that the Trusts Motion for Rehearing zeroed in on the unnecessary hardship and did not appear to be appealing any part of the decision. Attorney Keith went through the five factors of RSA 674:33 and started with "The Variance would not be contrary to the public interest" and with this de minimis request for zoning variance relative to

the frontage requirement, which is 10 inches or less. They do not see where there would be any contrary to public interest in granting the variance. Attorney Keith went on to talk about "The Spirit of the ordinance is observed" and did not think there was any issue with the minimal request on the frontage requirement. The next discussion was with "Substantial justice is done" and pointed out that the applicants purchased the lots and at that time they were lots of record according to the deed which showed the necessary requirement of 200 feet. Several years later the Zamoida's voluntarily merged the lots through the statute for some personal or taxation reasons and now would like to resubdivide the lots in the same fashion for when the lots were purchased. This is not a case where they created their own hardship as this was an apparent mistake on the part of the seller. A survey was conducted which they discovered the issue with the frontage. The parties tried to work this out with the abutter. Attorney Keith stated that the applicant would like to make it clear that they would like to make the lot that abuts the Trust that they would like to be the conforming lot and that their house lot would be the non-conforming lot. With the unique nature of this case, substantial justice would be done if the ZBA granted the variance for this case. Attorney Keith went on to talk about "The values of surrounding properties are not diminished" and they do not believe that this would affect any surrounding properties and the conforming lot would be the lot closest to the Trust property. "Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship" and given the facts of this case and the de minimis lack of frontage and the circumstances that led up to this that the Zamoida's meet the hardship requirement.

Attorney Keith talked about the Harborside Associates, LP v. Parade Residence Hotel, LLC, 162 N.H. 508 (2011) and with this in mind requested that the Board grant the variance in this case. Mr. Lagana asked the Board members if there were any questions or comments. None were noted.

Attorney W. John Deachman on behalf of EJS Trust began by saying that he had two (2) issues that he wanted to raise. The first issue was the hardship test where the Board had to find special conditions of the property that distinguish it from other properties in the area. Attorney Deachman did not believe there was anything distinguished about this property and from reading the minutes of the previous hearing could not find any evidence to suggest there were any special conditions of this property that distinguish it from any other. Attorney Deachman's second point was that, before a Zoning Board can act on a variance there has to be some sort of initial determination that the lot is substandard and does not comply with the ordinance. In this case, the Board is prepared to accept the fact that the Zamoida's don't have 400 feet of frontage. Certainly their deed shows 400 feet of frontage as well as the 1999 Gillis subdivision plan shows 400 feet of frontage and the Planning Board in 1999 most certainly would not have granted subdivision approval if there were not two lots with 200 feet of frontage. In Attorney Deachman's view, it did not make sense for the ZBA Board to disregard all of this and create a non-conforming lot. Attorney Deachman did not believe that the Board would be doing the Zamoida's or the town any favors by granting this variance where the Board would be creating a non-conforming lot. Attorney Deachman did not believe anything would match such as the tax map, deed or building records. The Zamoida's do have a challenge which sounds like a boundary dispute where a pin was placed in the wrong location and did not believe that the variance was an appropriate remedy. Attorney Deachman thanked the Board and ended his presentation.

Mr. Lagana asked the Board members if they had any questions or comments for Attorney Deachman or the appellant. Mr. DiPietro made a motion to go into deliberation.

***Mr. DiPietro made a motion to enter into deliberations. Mrs. Robidoux seconded the***

***motion and the Board entered into deliberations at 7:25pm.***

Mr. Socha asked if the public could speak and the Board came out of deliberations right away as they preferred to hear comments from abutters and interested parties before entering into deliberations.

***Mr. DiPietro made a motion to come out of deliberations. Mrs. Robidoux seconded the motion and the Board exited deliberations at 7:25pm.***

Mr. Socha of EJS Trust wanted to say that the proposed subdivision that the Zamoida's are seeking to obtain is not the same as the original subdivision and showed the Board that the property line was moved to give the house more property. Mr. Socha also stated that the easement was an exclusive easement for him which does not allow anyone to use that driveway without his permission which will not be given. Mr. Socha stated that if this lot is granted that they will be back before this Board because there is no usable frontage for that lot. At this time, the Board reviewed the proposed subdivision plan. Mrs. Zamoida explained that the easement was granted shortly after purchasing the property. Mr. DiPietro asked if the easement was granted before the lot was merged. Mrs. Zamoida said yes. Mr. DiPietro did not see any difference. Mr. Zamoida explained to the Board that when a few years ago when Mr. Socha went before the Board to subdivide the lot shown on the plan that the issue of the easement came up and the vote was in favor of them that it was not an exclusive easement that they were informed to use an alternate entrance to their lot by the Planning Board approval. Attorney Deachman indicated that the discussion was an interesting legal topic that he was looking forward to arguing at the Planning Board and does not have anything to do with the frontage. Mrs. Robidoux pointed out to the Board Members that they were just looking at the frontage issue and that the access rights is more of a deed issue and believed it was sidetracking the Board. Mr. Lagana agreed that it was not pertinent for tonight's case.

At this time, Mr. Lagana asked if anyone else had any questions or comments. None were noted. Mr. Lagana asked the Board if they would like to enter into deliberation.

***Mr. DiPietro made a motion to enter into deliberations. Mrs. Robidoux seconded the motion and the Board entered into deliberations at 7:35pm.***

Mrs. Robidoux reiterated what the attorneys were saying that the evidence of the property is that the Zamoida's thought they had 400 feet of frontage and for whatever reason the pin got put in the wrong place. The Zamoida's didn't put the pin there themselves and they did not create the hardship but it creates its own hardship for them. Mrs. Robidoux wanted to clarify a statement that she made at the last hearing where she commented on the topography and believes that there are special conditions for this property that would warrant this Board to grant them relief. Mrs. Robidoux further stated that it would not alter the character of the neighborhood, there would not be a gain to the general public and if they were to deny it, no one would gain anything from it and did not believe that 10 inches would affect anything and believed that it met the spirit and intent of the zoning ordinance. Mrs. Robidoux believed it was a very difficult situation for this specific lot.

Mr. Beaurivage stated that it was such a small amount of frontage and that it was unfortunate that the appellant could not work out an agreement and believed that it should be dealt with in the court system. Mrs. Robidoux did not disagree totally but if the Board were to grant the variance tonight, they would have to go through subdivision and once the subdivision is

approved and the plat is recorded and new deeds are drawn and tax maps are changed and the assessing records are changed everything would get washed out in the end.

Mr. DiPietro believed this was a classic case that the ZBA was intended for and believed that this was a very small variance request.

Mr. Benson believed there was a great enough hardship there based on some of the past and how it's laid out and agreed with Mr. DiPietro that the amount being asked is very minimal and believed it keeps within the spirit of the zoning ordinance.

Mr. Lagana commented that he disagreed with his fellow Board members and pointed out that a lot of his comments will reflect what he said in the original case. Mr. Lagana stated that very unfortunate sequence of events occurred to some very nice people but thought the dimension of 10 inches was irrelevant and believed it was a situation that was not appropriate for the Zoning Board and should not be handled by a variance. Mr. Lagana believed it failed the hardship and also believed it did not uphold the spirit of the ordinance and that the Board should not be creating a non-conforming lot and believed it would be best handled in court as a civil matter. Mr. Lagana agreed with Mr. Beaurivage and that it would be nice if abutters could work things out amongst themselves but unfortunately this is not the case. Mr. Lagana agreed that it was an unfortunate set of circumstances but did not believe this was the proper forum. Mr. DiPietro commented that he believed that this was the proper forum that the applicant has chosen and did not believe it was up to the Board to decide if it's right or wrong. Mr. Lagana agreed with Mr. DiPietro on that but believed that the Board had to act on the five criteria and believed it failed two of the criteria. Mr. DiPietro stated that 10 inches was minimal and pointed out that Mr. Lagana on several occasions reminded the Board that they were there to provide minimal relief and believed that this was about as minimal as it gets. Mr. Lagana acknowledged what Mr. DiPietro was saying and agreed that he has stated that the Board is here to provide minimal relief. Discussion ensued with regard to creating a non-conforming lot. Mrs. Robidoux pointed out that the Board does not create the subdivision but if the Planning Board so chooses to approve the subdivision they can approve a lot that has less than sufficient frontage because the ZBA said it was okay. Mr. Lagana asked what would happen if the Planning Board did not approve the subdivision. Mrs. Robidoux stated that it was done, meaning that the Zamoida's would not get the second lot. Mr. Benson asked Mr. Lagana what the two things that did not meet the variance criteria. Mr. Lagana stated that it was the hardship and the spirit of the ordinance. Discussion ensued with regard to if it was an equitable waiver instead of a variance. Mr. Lagana believed that if it were an equitable waiver and there were no concerns from abutters and the Code Enforcement Officer attended the hearing and said that she had no problem with it and thought it was a good way to resolve the issue he might have thought differently. Mr. DiPietro that this isn't a use the Board is talking about, it's residential and it was two (2) lots in a subdivision that was subdivided somehow with one of the lots having 180 feet. If you get past the five (5) factors and you look at what is reasonable, do you think it's reasonable for this person to have a lot 180 feet and this one can't have 10 inches less. Mr. DiPietro stated that it was not reasonable. Mr. DiPietro stated that they were talking about this lot and the surrounding and the special conditions and the hardship and these are special conditions. The right-of-way could be a special condition, the surveying could be a special condition and the topography could be a special condition because there was a mistake made. Further discussion ensued with regard to the non-conformity.

Mr. Lagana asked if there were any other questions or comments. Mrs. Robidoux just wanted to add that, when talking about the spirit and intent of the zoning ordinance that the Board puts

zoning requirements in place to preserve the character of the neighborhood, preserve your rights as a property owner and to not interfere with the efficient development of the land and with that in mind believed that it would not be contrary to the spirit of the ordinance.

***Mr. DiPietro made a motion to come out of deliberations. Mrs. Robidoux seconded the motion and the Board exited deliberations at 7:53pm.***

Mr. Lagana explained that the deliberations were a meeting within a meeting and everything was out in the open and if abutters or interested parties wanted to speak they could do so now. Attorney Deachman wanted to point out that it was unfortunate that the Board was glossing over that there was 400 feet of frontage here and that this Board was going to unilaterally shrink that and what problems that would cause down the road. It was a mistake of whoever set the pins and believed that it would be better to resolve this by court order if the parties cannot resolve it. Mr. Lagana wanted to remind Attorney Deachman that the Board has not voted on this yet. Mr. DiPietro asked if there was a survey done prior to September 16, 2013. Attorney Deachman stated that he had the original subdivision dated 1999 with regard to the Gillis subdivision. At this time, the Board reviewed the 1999 subdivision plan. Discussion ensued with Mr. Zamoida, Attorney Deachman and the Board members. Mr. Zamoida explained that the Trust survey and his survey did not match. Attorney Deachman believed they used the same point. Mr. Zamoida did not understand how the Trust subdivision was approved with a bad pin in place. Mrs. Robidoux indicated that the Planning Board does not look at the deed they only look at the plan in front of them.

Mr. Lagana asked if there were any other comments from the Board. None were noted. Mr. Lagana asked if there were any final comments from the audience tonight. None were noted. Mr. Lagana believed that the Board could take action on this case at this time. Mr. DiPietro made a motion and Mrs. Robidoux wanted to make a friendly amendment to include that the conforming lot would be the lot closest to the Trust.

***Mr. DiPietro made a motion to vote on the application as presented to include that the lot closest to the Trust will become the conforming lot with 200 feet of frontage for Tax Map 10, Lot 9-3, Case #14-04, seconded by Mrs. Robidoux. Mr. Benson voted to grant, Mr. Beaurivage voted to deny as he did not feel it was the decision of this Board, Mrs. Robidoux voted to grant as they met the five factors as stated earlier, Mr. DiPietro voted to grant as all the five factors have been met and Mr. Lagana also voted to deny as stated in deliberations that it does fail the hardship factor and the spirit of the ordinance. The motion passed by a vote of 3 to 2.***

Mr. Lagana explained that there is a 30 day appeal period and if anyone chooses to pursue this further it will have to be in Superior Court.

## **General Business**

Mr. Lagana asked if there was any new business. None was noted.

## **Minutes**

***Mrs. Robidoux made a motion to accept the minutes of February 25, 2014 with one change, seconded by Mr. DiPietro. The motion passed in the affirmative.***

## Adjourn

***Mrs. Robidoux made a motion to adjourn, seconded by Mr. DiPietro. All were in favor, the motion passed unanimously and the meeting stood adjourned at 8:05 p.m.***

*The next ZBA Hearing is scheduled for April 22, 2014 at 7:00 pm and will be held at the Town Hall, 47 Chester Road.*