

**Kennebunkport Zoning Board of Appeals  
32 North Street, Village Fire Station  
December 14, 2015 @ 7:00 P.M.**

A meeting of the Kennebunkport Zoning Board of Appeals was held on Monday, December 14, 2015. The meeting convened at 7:00 p.m. in the North Street Fire Station.

Members Present: Mr. Paul Cadigan (Vice Chair), James Fitzgerald, Karen Schlegel, Jean Conaty, Gordon Ayer, Wayne Fessenden

Others Present: Werner Gilliam, Town Planner

*1. Attendance*

Mr. Cadigan performed a roll call confirming all Board members were present.

*2. Approval of any minutes not previously approved.*

Eligible members to approve the minutes from the October 27, 2014 meeting are Mr. Cadigan, Mr. Fitzgerald and Mr. Fessenden. Mr. Fessenden noted the minutes stated the Board voted to include audio/visual recording but does not state whether the Board approved amending the by-laws to reflect a majority vote. The by-laws were updated for October 27, 2014 on the town website, Mr. Fessenden added.

The Board members had a brief discussion on the error in the language of the Zoning Board of Appeals By-Laws. Mr. Cadigan, Mr. Fitzgerald and Mr. Fessenden agreed to defer approval of the October 27, 2014 minutes.

Mr. Cadigan, Mr. Fitzgerald, Mr. Fessenden, Ms. Schlegel and Mr. Ayer are eligible to vote on approval of the minutes from the May 18, 2015 meeting. Ms. Schlegel made a motion to approve said minutes as written. Mr. Fessenden seconded the motion and the vote was unanimous.

Mr. Fessenden recused himself from the Board for the remainder of the meeting.

*3. **Wayne Fessenden / Keith Jacques, Esquire Authorized Agent** - The Applicant is seeking approval to split two previously merged lots with the purpose of constructing a single-family residence. The Application is available for review in the Code Enforcement Office at the Kennebunkport Town Hall. The property location is Wildwood Avenue/Broadway, Tax Map 35, Block 015, Lot 09 in the Goose Rocks Zone.*

Mr. Cadigan introduced the Agenda item.

Attorney Keith Jacques addressed the Board on behalf of the Applicant and introduced Mr. Fessenden to provide a brief history.

Mr. Fessenden addressed the Board citing pages 35 & 36 of the Zoning Board of Appeal's handbook which refers to lots that do not have common frontage and multiple lots under a single deed. Utilizing an enlarged site plan, Mr. Fessenden pointed out the property lines for the merged parcel of land acquired by his family in 1943 and 1953. In an extensive deed search, Mr. Fessenden stated his grandfather purchased the parcel on Proctor Avenue in 1943 and ten years later purchased the parcel on the corner of Broadway and Wildwood Avenue. Mr. Fessenden argued that these two parcels are separate lots and have been separate lots until the town decided to join them together. Mr. Fessenden concluded his presentation by stating this is not a situation where his family bought a large parcel of land and is trying to sell off sections of it in that these two parcels have always been separate properties.

Mr. Jacques addressed the Board stating the property is comprised of the Proctor Avenue lot where the residence is situated and the vacant lot that has frontage only on Wildwood Avenue and Broadway Avenue. These 2 lots were merged to meet the dimensional requirement of the Goose Rocks Zone, Mr. Jacques explained, and is asking for a variance against those dimensional standards.

Mr. Jacques also stated that due to the unique circumstances of the property this merged lot has minimal economic value for the Applicant.

Mr. Jacques then proceeded to outline the criteria for establishing practical difficulty in Article 9.3.C some of which are as follows:

*9.3.C. Practical Difficulty Variance*

*1. Notwithstanding Article 9.2.B, the Board of Appeals may grant a variance, but only from the dimensional standards of this Ordinance, when strict application of the provisions of the Ordinance would create a practical difficulty, as defined herein, and when all the following conditions are found to exist:*

- a. The need for a variance is due to the unique circumstances of the property, and not to the general conditions of the neighborhood;*

Mr. Jacques argued that due to the setback requirements of this property, nothing can be built at the apex of the entire parcel.

- b. The granting of the variance will not produce an undesirable change in the character of the neighborhood and will not have an unreasonably detrimental effect on either the use or fair market value of abutting properties;*

Mr. Jacques stated that not granting a variance would produce a much greater detrimental effect on the use or fair market value of abutting properties as this is one of the few undeveloped lots in the Goose Rocks Zone, is consistent with all of the other lots running along Grandview Avenue, and from its creation was intended to be a single-family lot.

Mr. Jacques referred to two letters submitted by Terry and Walter Dwyer and Barry Roberts in support of the Applicant stating a single-family home on this lot would enhance the neighborhood. Mr. Cadigan confirmed the Board has received copies of the referenced letters.

If the variance is granted, Mr. Jacques explained the lot lines originally described in the deeds have been maintained since the purchases in 1943 and 1953 and would result in a lot size of 10,700 sq. ft. on Proctor Avenue and 6,150 sq. ft. on Wildwood Avenue which are consistent with the lot sizes in the area.

- c. The practical difficulty is not the result of action taken by the applicant or a prior owner;*

Mr. Jacques stated these lots were not created by a larger parcel and have been identified independently with the notion that each lot would have its own single-family dwelling.

- d. No other feasible alternative is available to the applicant;*

Simply stated, Mr. Jacques said this lot would be limited to having an outbuilding or shed constructed on it rather than a single-family home if the variance is not granted.

- e. The granting of a variance will not have an unreasonably adverse effect on the natural environment;*

Mr. Jacques stated this is one of the sole remaining vacant lots in the Goose Rocks Zone and if built upon would be serviced with town water and sewer which is consistent with other homes in the area.

- f. The property is not located, in whole or in part, within a Shoreland area, as defined in Title 38 M.R.S.A. § 435, nor within a Shoreland Zone or flood hazard zone as defined by this Ordinance.*

This last criterion is not applicable as the property is not located in a Shoreland Zone.

Mr. Cadigan asked Mr. Werner Gilliam to provide the Code Enforcement Office's perspective on this Application.

Mr. Gilliam stated after discussions with the Applicant and Attorney Jacques regarding the language found in the Zoning Board of Appeals manual along with the legal opinion submitted consequently, Mr. Gilliam found the particular legal case cited in that opinion did not fit this particular situation. With that in mind, Mr. Gilliam added, he is forced to rely on the merger language of the vacant or partially built lot language in the town ordinance which states before a lot can be split they must contain at least 20,000 sq. ft. per lot. At that point, Mr. Gilliam said he informed Mr. Fessenden any decision to convey those lots separately is out of his jurisdiction.

Ms. Schlegel asked Mr. Gilliam that since the vacant lot has frontage on both Wildwood Ave. and Broadway Ave. would it need to meet the setbacks on both sides and would the driveway curb cut be on Wildwood? Mr. Gilliam responded it would be treated as a corner lot and the precedent has been set that it would have to meet the setbacks on both roads.

Mr. Fitzgerald commented that the combined lots still don't have the required 20,000 sq. ft. and asked if the lots were to become 2 separate lots would they both be non-conforming? Mr. Gilliam replied both lots would not conform to the dimensional requirement in the zone.

Mr. Cadigan asked if these lots were separately taxed and were merged prior to the requirement of the ordinance. Mr. Gilliam replied he assumes at some point in time the lots were taxed separately but he cannot comment on the tax history of the properties.

Citing Article 8.7.C of the Land Use Ordinance, Mr. Ayer read the following: "If two or more contiguous lots or parcels are in a single or joint ownership of record at the time of or since adoption or amendment of this Ordinance, if any of these lots do not individually meet the dimensional requirements of this Ordinance or subsequent amendments, and if one or more of the lots are vacant or contain no principal structure, the lots shall be combined to the extent necessary to meet the dimensional requirements." Mr. Ayer concluded the problem is these are two separate lots with single ownership.

Mr. Ayer asked Mr. Gilliam if he could explain any circumstances when someone would have a practical difficulty. Mr. Gilliam replied that practical difficulty is a matter of opinion and it is not in his position to tell the Board whether or not this circumstance qualifies as a practical difficulty or not. Mr. Gilliam did offer an example of a practical difficulty in the Goose Rocks Zone could be a reconstruction project that requires a significant relocation.

In reference to the Land Use Ordinance definition of Practical Difficulty which is: "A case where strict application of the dimensional standards of the Ordinance to the property for which a variance is sought would both preclude a use of the property which is permitted in the zone in which it is located would also result in significant economic injury to the applicant.", Mr. Cadigan asked if the piece of property that fronts Wildwood Avenue could be used for an accessory building? Mr. Gilliam answered that Yes, it could conceivably as long as it conforms with the dimensional requirements.

Mr. Ayer commented that with the two properties combined it reduces the non-conformity of the property.

Mr. Cadigan thanked Mr. Gilliam for his input and asked Mr. Jacques to come to the podium to answer questions from the Board.

Mr. Cadigan noted the Applicant wrote in their Application that the only structure that can be located on the Wildwood/Broadway portion would add no appreciable economic value to the property and asked if there was any empirical data to support that opinion. Mr. Jacques responded he has no appreciable value to supply the Board other than Mr. Fessenden's efforts to market the property to potential buyers. Mr. Cadigan offered that adding a nicely constructed 2 car garage would enhance the property. Mr. Jacques responded that could also have a detrimental impact on the neighbors.

Ms. Schlegel asked when Mr. Fessenden marketed the property did he market it as a 10,000-sq. ft. lot or a 16,000-sq. ft. lot? Mr. Fessenden replied he marketed it as 2 lots which were delayed pending the outcome of this hearing.

The Board members and Mr. Gilliam had a brief discussion on how the properties have been taxed in the past and how they are currently taxed on one tax bill.

Mr. Cadigan opened the public comment portion of the meeting. There were no comments or questions from the audience. Mr. Cadigan closed the public comment portion of the meeting.

The Board members had no further questions for the Applicant or Mr. Gilliam.

The Board members had a brief discussion on the necessity of addressing each item of the Practical Difficulty section in the Land Use Ordinance. It was agreed that since the Applicant failed to meet the requirements of the definition of Practical Difficulty, it was not necessary to outline each item of Article 9.3.C.

After much deliberation on language, Mr. Cadigan made a motion to deny the Variance Application due to the Applicant's failure to establish practical difficulty because there is an established use of the property and there are feasible alternatives to the Applicant for additional use of the property permitted under the Ordinance. Mr. Ayer seconded the motion and the vote was unanimous 5-0.

With the Application denied, Mr. Cadigan proceeded to review each of the items identified in Article 9.3.C. Mr. Ayer again stated it is not necessary to vote on all items identified as the Application does not meet the definition of Practical Difficulty.

Mr. Cadigan amended his motion to state "the Applicant has failed to meet the burden of establishing he has a practical difficulty as defined in the Land Use Ordinance and the need is not due to any unique circumstances of the property and there are feasible alternatives available." Ms. Schlegel seconded the amended motion and the vote was unanimous 5-0.

Mr. Cadigan will prepare the final Findings of Fact and send to the Town Office for each Board member to sign within 7 days of this meeting.

**Adjournment:** A motion was made to adjourn, it was seconded and the vote was unanimous.

**Submitted by:** Patricia Saunders, Recording Secretary