

**FRANKLIN ZONING BOARD
REGULAR MEETING AND PUBLIC HEARING**

Wednesday, October 2, 2019 at 6:30 p.m.; City Council Chambers

Minutes

Call to Order

☐ **Salute to the Flag**

☐ **Roll Call: Present – Chairman Glen Feener, Vice Chairman Kathlene Fleckenstein, Jeffrey Dickinson, Cecile Cormier, Roy Hubble, & David Testerman. Also present: Planning Director Richard Lewis.**

❖ **Seat Alternates: Cecile Cormier seated for Debbie Davis who was absent.**

☐ **Approval of Minutes of the September 4, 2019 Public Meetings of the Board.** A motion to approve the minutes was made by Member Cormier and seconded by Vice Chair Fleckenstein. Member Cormier suggested several amendments to the minutes. By a vote of 5-0-0 the September 4th minutes were approved with the amendments.

☐ **Old Business:** None

☐ **New Business:**

Z19-12: Beverly Anderson, owner, Appeals an Administrative Decision of the Planning Director finding that the Zoning Ordinance does not allow in the Table of Permitted Uses [Section 305-13], and the Purpose Section of the Ordinance [Section 305-1], and the Travel Trailers & Recreational Vehicles Section [305-29.6] & does not support, the granting of permission to camp on the property located on Riverview Drive, tax map 115-101-00 in the R-1 Zone (Low Density Residential District).

Attorney Chris Seufert, representing the owner, presented the board with a handout of materials relevant to Ms. Anderson's appeal. Included was a page listing various NH Supreme Court cases that have dealt with grandfathered use and State Statutes. Attorney Seufert stated that it is a constitutional right to continue a grandfathered use and changes of ownership do not eliminate that right. Ms. Anderson bought the property in 2018 from Leslie Schuster. The materials also included a letter from Mr. Schuster stating that he utilized a 12-foot camper on the property until he sold the property to Ms. Anderson. The City sold the property to Mr. Schuster by quitclaim January 22, 1996. Mr. Schuster owned the property over twenty years. A photograph on the 2016 tax card shows the camper. The City's tax records over different years show that the 12-foot camper was located on the property. The last photo is of Ms. Anderson's 12-foot camper that is on the property now. Ms. Anderson's position is that she is continuing the non-conforming use that had been on this property for over twenty years. Att. Seufert stated that the new ordinance took effect in 2005, and he believes that you can't evaporate pre-existing uses by passing an ordinance, that's why we have the grandfather clause law in the State of New Hampshire. As long as the property has been used as a non-conforming use, that right continues in perpetuity. That's what we have here; Ms. Anderson using the property as Mr. Schuster used it for over twenty years, long before this ordinance was passed; this is an allowed and grandfathered use of the property. Attorney Seufert claimed that Mr. Lewis became involved when Ms. Anderson brought in a bigger camper and requested an electrical connection. The previous camper had been damaged by a falling tree. Mr. Lewis denied the permit for electricity and he noted when visiting the property that a newer, bigger camper had been brought in. Attorney Seufert said that he told his client that she couldn't install a bigger camper, that she had to conform to the prior footprint of the non-conforming use. Ms. Anderson replaced the bigger camper with a 12-foot pop-up camper. Attorney Seufert summed up by saying, "So for that reason, I think she is well within her constitutional rights to use this

property as it has been used for over twenty years and I don't think Mr. Lewis has the authority to violate the constitution and take those rights away from her."

Member Cormier asked for the trailer location. Mr. Seufert described the location. He added that there are many pre-2005 travel trailers down there that are grandfathered as well.

Planner Lewis responded that if the Board steps back and takes a look at it from a broader perspective they'll understand that "we're not talking about a building that is short a setback, or a commercial use or activity that is located in a residential district. We're talking about a mobile vehicle." The old camper was removed from the site; it wasn't a permanent structure. Can Ms. Anderson guarantee that it is in the exact same place? The picture provided by Attorney Seufert shows the clearing of trees. Planner Lewis said he wasn't aware of any permits from DES, allowing the cutting of trees and the clearing of vegetation within the 250 feet of the shore. In the Isabelle v. Newbury case provided by Attorney Seufert, it is a matter of a change of occupancy from tenant to owner. He continued, saying that if you apply grandfathering rights to mobile vehicles, you'd be running into some real problems. This is a matter already decided by this board on Aug. 3, 2016. One of the primary foundations of any zoning ordinances is public health safety and welfare. The City of Franklin has not adopted a camping ordinance or camping ordinance language which means that people who establish camping are doing it on an unregulated basis. The Fire and Police departments have some obligation to serve the public and provide public health safety and welfare. Not knowing who and/or when someone is down there undercuts the ability of the City to provide good public safety. The Fire Chief and the Code Officer have recently been down to that location and question the ability of getting emergency vehicles down there. The road is unstable. Planner Lewis felt that Attorney Seufert's arguments do not apply to movable vehicles and he hoped that the Zoning Board would uphold his decision.

Member Cormier asked if the camper was just in use in the summer and Attorney Seufert answered that it was for seasonal use only. Member Cormier asked if the location of the camper is in the same location of the previous camper and if it met the setbacks in that zone. Attorney Seufert answered that it is in the same location. He also stated that the previous owner didn't have a septic system. Member Cormier asked if it was haul in and haul out and the attorney said it was. Member Cormier then asked Planner Lewis about any issues with the Fire or Police Departments regarding camping. Planner Lewis spoke about a structural fire on Dottie's Lane where the Fire Department was unable to get the truck down there and had to fight the fire from the top of the hill. In fact, former Fire Chief LaChapelle tried to drive a 4-wheel vehicle down there and rolled it due to the condition of the road. The structure was a total loss. The most recent letter from Fire Chief Michael Foss and the Code Officer states that they are not convinced that ambulances or fire trucks can access properties in the area. Member Cormier asked how houses were allowed to be built on this private road that isn't up to standard and Planner Lewis stated that they got a variance. He mentioned the Dumonts' recently completed home along with the improvements that the Dumonts did to the road. However, there still continues to be erosion and drainage problems.

Planner Lewis referenced his July 19, 2019 letter to Ms. Anderson. In Item number 4 on the first page, Ms. Anderson indicated to that there would be no overnight camping since she had family obligations. He stated, however, that the next time he visited the site there is an 18 to 20-foot camper parked on the property. The Planner reiterated that trees have been cut down and that he wasn't aware of any permits from DES. There is a fair amount of cleared area down by the shoreline. Zoning is set up to protect the welfare of the public. When no one knows you are camping down there it is a safety problem. There are many campsites in New Hampshire operating with rules and regulations set up by the State. This isn't the case for Riverview Drive.

Member Cormier said she finds it hard that, all of a sudden, this site cannot continue as a non-conforming use. The road has been in disrepair since 1996 and she feels that if the City has allowed these nice looking homes there through a variance even though the road is substandard, I think that it is the City's fault that this issue is a problem, because they have not stood their ground and said you cannot. If this person wants to be down there, it is up to her to have fire extinguishers and also notify the Fire Department that she is residing

there. Planner Lewis responded by saying that there is no mechanism to do that. He also stated that the Dumont and Catton properties have been established with homes on foundations, with wells and septic systems. Vice-chairman Fleckenstein said that campers are personal property not real-estate.

Member Testerman said that this area has been a place where people go camping for quite a while. He asked if there is any difference with a hiker climbing Mount Washington who gets himself in trouble because he wasn't properly equipped and calls for help?

Attorney Seufert commented on Planner Lewis' remarks about trees being cut. He argued that none of that is in his letter to Ms. Anderson and none of that is part of this appeal tonight. He again stated that it is the lawful use, and the continued lawful use, of a property that our constitution and case law speak to. He believes that our constitution does not make that distinction between a house and something on wheels. "The constitution says that we have the right to continue the 'use' of the property. It has been used for camping for many years. And the last thing is, while Mr. Lewis speaks to a prior Board having discussed this issue, I don't think the grandfathered law was part of that discussion. We're dealing with a constitutional right to continue our grandfathered use."

Member Testerman asked Planner Lewis if the City Attorney can look into this matter. Mr. Lewis said that he had a discussion with the City Attorney, but that the attorney hasn't seen this case-law list. Member Cormier said that the appeal is on a different issue, on whether or not a camper is allowed or not allowed. The information brought out tonight and on the tax records is that it is a non-conforming use. Planner Lewis emphasized again that when you start talking about things that people can tow around and put in any place, you are going down a very slippery slope to say this established a protected grandfathered use. He argued that [delete-duplicate that] no one can guarantee it is in the same location as the old camper. Unless there was a survey of that old camper, there is no way to accurately say it sits in the same footprint. The issue that applied in 2016, is the same issue that applies today. "Someone wanted to put in a camper, I said no and they appealed that decision and the Zoning Board upheld my administrative decision." All the new homes down there have been built on lots that have been merged to allow for a house on a foundation, a septic system and a well. The only way to get coordinated and appropriate development of property is to build it for the zoning regulation which calls for a septic system and a well and a foundation.

Member Testerman said that he recalled the 2016 case of a woman wanting to sell her property and she wanted us to declare that camping was okay, but we wouldn't do that and that was the proper thing to do. Speaking to Planner Lewis, he continued that you told me later on that had she come back and asked for a variance we would have given her that. Vice-Chair Fleckenstein stated she has been a real estate appraiser for 30 years, and she'd never heard someone argue grandfathering based on personal property being on piece of property. She suggests that the City Attorney review the citations that Attorney Seufert supplied and try to address the grandfathering issue and see if it is appropriate here.

Chairman Feener agreed that the City Attorney should look at these decisions. He'd like the applicant to finish up their comments. Then the discussion will be open to the public for their comments and it will be brought back to the Board for a motion to continue the appeal to next month. Member Dickinson asked Attorney Seufert if following your train of logic, wouldn't it be true that any non-conforming use on any piece of property regardless of how many times it has changed hands is grandfathered? Attorney Seufert answered that this is our right under the constitution; to use the property as it had been legally used prior to the zoning ordinance going into effect. Member Dickinson said that it seemed to him that this allows anybody to do anything with a piece of property even if it is no longer acceptable. Attorney Seufert said that if the municipality decides it wants to put a new law in modifying those rights, they can't take away the pre-existing, grandfathered rights.

The discussion was opened to public comment. Mr. Charles Catton, 34 Dottie's Lane, said that he has lived on Dottie's Lane, overlooking this property, for 15 years and nobody has used that property for fourteen

years, until these people have showed up. "Therefore, there is no non-conforming use. That camper had a hundred bullet holes in it, it had trash in it, it cost them a couple thousand dollars to have it removed it was so bad. That being said, I agree with the whole non-conforming lot because the town wouldn't let me have a foundation under my existing structure. I ended up having to build a new house because my property didn't conform. The town put on my building permit that the camper had to be removed to finish building my property. If my camper had to be removed because there is no camping, then nobody should be allowed to camp."

Member Cormier asked for confirmation from Mr. Catton that no person was there, but the trailer was there. Mr. Catton answered that the trailer was there, but it was not being used for 14 years. Mr. Catton said he met the previous owner once in 14 years when he drove down and surveyed his property and left. Mr. Catton asserted that the previous owner wrote a fictitious letter to the town.

The Chair brought the discussion back to the Board. Member Cormier made a motion to forward the case to City Attorney to review the issue of non-conformance, and continue the discussion to the November 6th meeting. The motion was seconded by Member Dickinson. **The motion carried with a vote of 5-0-0.**

Z19-13: Bruce and Kathy Capron, owners, are seeking a variance from Zoning Ordinance 305:17 Number of Structures per Lot, to build a modular home on their property at 726 Salisbury Road [Map/Lot 046-403-00, Map Sheet W5] in the Conservation zoning district. The property already contains a 750 sq. foot home.

The Caprons handed packets out to the Board. Kathy Capron spoke of recently moving from Washington to Franklin where they had purchased the small house on 59.18 acres. The 1940 hunting cabin had no working dug well or septic. The property abuts the State Nursery on Route 127 and an eleven-acre farm on the other side. Across the street is a home that is only occasionally occupied since it is the family's second home. The current house is 450 sq. feet and only 40 feet away from the road. She told the Board that she sustained an injury while serving in the Army and that now it is necessary for her to have a one-story living arrangement. Since they have already invested \$75,000 in the existing house, they would like to use it as an ADU (Accessory Dwelling Unit) for Mr. Capron's ailing father, as well as their own kids in the future. The proposed home will be modular with 1980 square feet. It will have its own dedicated septic system. The well will be shared by both structures. She said they didn't have the funds to subdivide the property.

Member Cormier suggested that they might want to consider placing the new home further back on the property in case they wished to subdivide later.

Public comment: Mrs. Capron's father Chris Dumont said that there is plenty of property available for the two buildings. He added that he has built 105 homes in Franklin and since they are 55+ homes, there is no impact of the school system. He'd like to see his daughter's family have a bigger house.

Public hearing closed: Chairman Feener asked how this application speaks to the standards of an ADU. Planner Lewis said that the City of Franklin requires that the ADU be attached to the primary structure. Soon after the City Council approved the ADU language, the very first ADU the Board dealt with was up on Pleasant Street which had a large carriage house. He pointed out to the Board at the time he thought that a carriage house was an appropriate structure for a detached ADU. The potential of allowing detached ADUs everywhere results in a lot of single lots with two houses on them. This is not what the ADU language talks about. The decision rests with the Board, however, to start to deviate from the language could create a slippery slope.

Member Testerman asked if the Board couldn't just approve a second home on the property instead of using the word ADU in the decision. He indicated that the Board should get away from the ADU model in the Ordinance.

Vice Chair Fleckenstein observed that zoning doesn't allow for multiple homes on one lot so it would need to be an attached ADU. She asked if it wouldn't be better to split the parcel. Planner Lewis agreed and informed the Board that the property has already been surveyed. Mr. Lewis answered Member Testerman's remarks saying that allowing two houses on one property subverts the language of the zoning ordinance. If the Board was to approve this, a key condition needs to be that in making this decision the existing unit is a detached Accessory Dwelling Unit. This provides for the requirement that the property owner reside in one of the two units and rents out the other. Otherwise you could be creating 2 homes on a single parcel both of which are rented out, which would create an uncontrollable situation. Planner Lewis recommended an amended draft decision which would make condition number one be that the smaller house be an ADU.

Member Cormier suggest putting it in the deed that once the land is subdivided, the ADU variance would go away. Vice Chair Fleckenstein confirmed that condition # 1 would be revised. Member Testerman made a motion to approve the application which was seconded by Vice Chair Fleckenstein. Member Testerman read out the conditions and added in item 6, that if the land is subdivided in the future, this decision becomes null and void. **The motion passed by a vote of 5-0-0.**

Z19-14: George and Cathy Clemence, owners, are seeking a variance from 305:14 Lot/Yard to add a 450 sq. ft. deck on the front and sides of their house that will not meet the setbacks [11 & 25 feet side setbacks and 27 feet front setback vs. 50 feet setback required]. The property is located at 113 Webster Avenue [Map/Lot 076-138-00, Map Sheet J6] in the Lake Protection zoning district.

Mr. Clemence informed the Board that he and his wife have lived in their house for the past 17 years. It is across the street from the lake. When the lots were subdivided a long time ago, some of them were only 75 ft. by 75 feet and the new zoning ordinance requires 50 feet setbacks. He would like to put a deck around the front of his house similar to others in the area.

Member Cormier asked if the deck would be built on pilings. Mr. Clemence said it would be concrete footings and no wood would be in contact with the ground. The uprights would be pressure treated and the decking would be composite. Planner Lewis asked if the applicant had inquired about whether they need to comply with the DES shoreland act. Mr. Clemence said he had checked with DES and he filled out a short-form Permit by Notification. Basically, he is digging three holes, but DES considers decks to be impervious surfaces. Planner Lewis asked if Mr. Clemence was proposing to change the ground under the proposed deck to something other than the sandy soil that is there now. Mr. Clemence said that it would remain the same. Member Testerman asked about the concrete structure that is visible in the photograph of the house. Mr. Clemence said it was a garage that was put up in the thirties or forties. Member Cormier asked about the steps and whether they had the same setback restrictions as the deck. Planner Lewis said that every house needs some sort of access, but added that it would probably be better if the steps came off the side instead of the front.

The discussion was open to the public. No one was there to speak. Closing the public session, Chairman Feener asked for a motion. Vice Chairman Fleckenstein made a motion to approve, which was seconded by Member Cormier. Member Cormier noted a typo in the Decision for Approval, which was changed to read 'can' instead of 'cannot'. **The motion passed by a vote of 5-0-0.**

Z19-15: Richard Edmunds, Jr. and Frank & Charlotte Edmunds [owners] are seeking a variance from 305-14 [Lot & Yard] to create 4 lots where one lot will not meet the frontage requirement [391.54 ft. vs. 400 ft.] The property is located on Hill Road [Map/Lot 091-020-00, Map Sheet G6] in the C [Conservation] zone.

Tim Bernier from TF Bernier, Inc. represented the Edmunds. He stated that the property was used as a gravel pit, which is now closed. The land has been regraded. They have 99.48 % of the required frontage to create

four lots, which is a lot of frontage for a single-family residence. Three of the lots exceed the acreage making them some of the largest lots in the neighborhood. These are the first lots in this district that meets lot size and frontage. There will only be two new driveways; one is already existing, and two of the lots will share a driveway. There are six driveways across the street. Only one lot has a wetland, others can be built anywhere on property. This is a low-density development with great soils. The lot requiring a variance would have 10 times the area required by the State. Planner Lewis inquired about the NHE sign on the east side of Route 3a and Mr. Bernier said it is the telephone/power pole designation.

Public Comment:

Sean Bean, 485 Hill Road, said that he spoke at the last meeting where Edmunds sought approval for a five-lot subdivision. Although he can see the difference in the frontage from last time, he doesn't feel they should get a variance when he was denied one when they wanted to put a 12-foot deck on the house. They had to shorten the deck to comply with the setbacks. [It was ascertained that he did not seek a variance from the Zoning Board. He had only applied for a building permit which was denied due to setback issues.]

David White, 470 Hill Road, said that four is better than five, but he'd rather see three. The homes Mr. Bernier alluded to were built in the 40s and 50s, which isn't relevant. There will be an impact on the traffic with four more houses. There are currently 5 homes on the street with horses, it is already dangerous enough for the riders to travel along the road. The other issues are that it will boost property taxes and have an impact on the fire and police departments. He said a three-lot subdivision would be within the law and if you want to modify things, then you should change the law.

With no more public comments, the Hearing was closed and brought back to the Board. Member Cormier stated that this variance request does not qualify as a hardship. It might be a financial hardship, but the property can be used to meet the zoning ordinance with three lots. It doesn't meet all five criteria. By granting this it opens the door and sets a precedence.

Member Fleckenstein said that she is usually a stickler, but there are only three driveways, although it can be argued that that one driveway will have more use, it is still just three driveways. There will be the same number of access points with the four lots as there would be with three.

Member Dickinson asked for clarification about Member Cormier's position. Member Cormier stated that she is against approving this subdivision because there is no true hardship here. There is adequate room to provide for three lots. Member Dickinson said that he felt that folks should have the right to do with their property as they wished. He didn't feel it was right to deny based on a small amount of frontage, that this is a negotiation. In his view the Board made a statement as far as five lots being too many and that if the applicant came back to the Board with fewer lots that meet more of the requirements, it would be more palatable to the Board. Member Cormier stated that she didn't remember giving permission for them to come back for four lots. She added that zoning laws are made to protect the integrity of the community. It's black and white. Member Dickinson replied by saying that the whole point of this Board is to make reasonable exceptions.

Chairman Feener said that he was glad to see this come in as four lots. It makes more sense and one minor variance is nearly unnoticeable. Based on Member Cormier's argument, the Board could have denied the first applicants request for a detached ADU. The same could apply to every homeowner in the Lake Protection zone who comes for a variance. He felt that they would need to be more consistent in their rulings and asked if the Board turned everything down, how would that be viewed by the City of Franklin. Member Cormier asked if the Chairman would be willing to write a letter to the Planning Board suggesting that some of the Lake Protection zone be rezoned.

Member Testerman asked about the possibility of the Edmunds purchasing some additional frontage from an abutter. Mr. Bernier answered that they can't take a non-conforming lot and make it more non-conforming.

Member Dickinson made a motion to approve the four-lot subdivision. This was seconded by Vice Chair Fleckenstein. The motion passed with a 4-1-0 vote with Member Cormier denying since she believed that the applicant had not met the criteria of unnecessary hardship since there is enough frontage to do three lots.

Z19:16: Application Withdrawn Alek & Joy Leo, owners, and Anthony Daniel, applicant, are seeking a variance from 305:14 Lot/Yard to construct a 14 ft. by 24 ft. deck on the lakeside of their house that will not meet the setbacks [a proposed 12 ft. and 5 ft. side setbacks and 18 ft. rear setback vs. 50 feet required]. The property is located at 316 Webster Ave [Map/Lot 074-030-00, Map Sheet K6] in the Lake Protected zoning district.

Planner's Update: Planner Lewis said he hopes to take a look at the lake protection district in the near future.

Other Business:

Public Comment: none

Adjournment: Members Testerman/Dickinson motioned for adjournment at 8:30pm.

The next scheduled meeting of the Zoning Board of Adjustments is Wednesday, November 6, 2019, at 6:30 p.m. The deadline date for submission of applications for this meeting is Wednesday, October 16, 2019.