

**Zoning Board of Adjustment
November 30, 2017 6:30 PM
Board of Selectmen's Room/Municipal Building
15 Sunapee Street/Newport, NH**

PRESENT: Melissa Saccento, Chairman; David Lain, Vice Chairman; Beth Cassorla, Scott McCoy, Alternate; Tim Beard, Alternate

ABSENT MEMBERS: Virginia Irwin, Alternate; Ben Nelson, Jeffrey Kessler, BOS Representative

VIDEOGRAPHER: Nancy Meyer, NCTV

STAFF PRESENT: Julie M. Magnuson, Planning & Zoning Administrator

COMMUNITY MEMBERS PRESENT: Edward and Gail Smith, Eily Rowe

CALL TO ORDER: Chairman Saccento called the meeting of the ZBA to order at 6:30 p.m. and introduced the sitting members. Alternate Scott McCoy was appointed to sit for Ben Nelson. Alternate Tim Beard was appointed to sit with the Board for discussion, but had no voting privileges at this meeting.

MINUTES: October 26, 2017

On a motion by Mrs. Cassorla seconded by Mr. McCoy; *the Board voted to approve the minutes of the October 26, 2017 meeting as presented. The motion passed 3-0-1(Lain abstained).*

Chairman Saccento reviewed the ZBA format for the applicants and public present.

NEW BUSINESS:

Case #1056: Keith Rowe (Owner) requests a Variance from the terms of Article II, Section 207.1 of the Zoning Ordinance to permit the keeping of 3 chickens (only egg laying hens). The property is identified as Map 110 Lot 105 and is located at 28 Middle Street in the Single Family (R-1) Zoning District.

Chairman Saccento opened the public hearing.

Ms. Magnuson was acknowledged. She read aloud the Administrative Review into the record. She informed the ZBA members of a proposed Zoning Ordinance Amendment on the Keeping of Hens that was before the Planning Board. She explained Zoning Ordinances and enforcement in Newport for the Board and public.

Chairman Saccento acknowledged Mr. Keith Rowe and asked him to read his application. Mr. Rowe addressed the Board members and read his application into the record. He explained that the complaint that Ms. Magnuson had indicated in her Administrative Review was because his hens had gotten out of their enclosed area because rooftop fencing was not installed in their coop area. Mr. Rowe stated that urban farming was becoming popular. You did not need a lot of land to raise chickens. The extra eggs laid by his hens went to friends and his tenant. He then read letters from abutters in favor of his keeping three hens on his property.

Mr. McCoy addressed the applicant and asked if there were two families living in his home. He was told yes.

Mr. McCoy asked if (from Mr. Rowe's letter), that other people are keeping chickens? ZBA members stated it was irrelevant to the case before them. There was a short discussion on chickens in the R-1 District. Mr. McCoy asked if there was currently a precedence of keeping hens in the neighborhood. He was told no; any precedence would have been an illegal precedence.

Mr. McCoy asked about the complaint. Mr. Rowe stated there had been one complaint because they had escaped the enclosure and someone called about them roaming around his yard. Mr. McCoy asked, for clarification that the complaint was due to roaming chickens, not noisy or because of smell. Mr. Rowe stated that was correct.

Mr. McCoy stated he drove by the Rowe property. In the application it stated that the chickens were contained out of view. They were in full view. Mr. Rowe stated that he had meant that he would build a fence so you could not see them. Mr. McCoy stated that the application did not state that.

Mr. McCoy asked if the enclosure could be moved somewhere else. Mr. Rowe said they could be moved 'tighter to the house'.

Mr. McCoy stated there was not a lot of room on the property. The hutch was against the wall of his neighbor's (abutter) garage. It was also on the property line (and wall) of another abutter. Mr. McCoy addressed the applicant and reminded him that the proposed variance would go with the property forever. Mr. Rowe agreed to this point.

Mr. McCoy asked if there was another place he could put the enclosure. Mr. Rowe said they would be visible from the road if moved. Mr. McCoy reminded him he had stated he would put up a fence around the enclosure. Mr. Rowe agreed that he had stated he would put up a fence.

Chairman Saccento asked Mr. Rowe to post the map of the neighborhood on the whiteboard for the viewing audience and explain where the chicken coop was. He did and showed the Board which neighbors he had letters of approval from and those supportive of the Rowe's having hens.

Mr. Lain asked Mr. Rowe what kind of structure the hens were in. Mr. Rowe said it was a coop (wooden) with a roof that was surrounded by chicken wire fencing. The top of the enclosure was now covered with chicken wire fencing to prohibit the chickens from getting out of the enclosure.

Mr. Beard addressed Ms. Magnuson and asked if they were to decide where the structure was to be located or whether the ZBA was to decide if the applicant could have chickens on their property.

There was a general discussion among the Board members concerning the coops not being in the minimum setbacks from the road as stated in the proposed Planning Board Ordinance Amendment. For clarification, Ms. Magnuson told the ZBA members that in R-1 the setbacks were 25 feet in the front, 25 feet in the rear of the property and 10 feet on the side property line. There was nowhere on the property to legally place the coop. She stated that the house was located in the minimum setback area.

Mr. Rowe stated that he was hoping that the proposed fencing would block from view the fact that the minimum setbacks were not being observed.

Ms. Magnuson addressed the Chair and stated that in response to Mr. Beard's question, the ZBA could put any conditions on any of their decisions. If Case #1056 was granted a variance, the ZBA would be setting precedence in the R-1 Zoning District or any other district that currently does not allow the keeping of hens.

Mr. McCoy addressed Mr. Rowe and asked what he would do if he did not get the requested variance. Mr. Rowe said that he would comply with the Town's wishes. If they said get rid of the chickens, he would get rid of the chickens. The family would not be happy, but they would comply.

Mrs. Cassorla asked what the size of the enclosure was. Mr. Rowe stated about 30 square feet. Mrs. Cassorla asked if that was 30 square feet of outdoor space or 30 square feet including the brood. Mr. Rowe stated it was including the enclosed area.

Mrs. Cassorla stated 10 square feet per chicken of outdoor space was recommended. Mrs. Cassorla stated she had a chart from the University of Tennessee on keeping of chickens (she would share the information with Ms. Magnuson for the Planning Board).

Mr. Rowe revised his square footage of his pen. He stated that what he built was 4 feet wide by 8 feet for the coop. He stated that the enclosed area was between 50 and 70 square feet. Mrs. Cassorla asked him how much outdoor space there was. Mr. Rowe repeated between 50 and 70 square feet. The numbers excluded the hutch. The hutch was approximately 12 square feet. Mrs. Cassorla asked, for clarification, if Mr. Rowe had 72 square feet in the enclosure. Mr. Rowe stated yes, as a guess-ta-met.

Mrs. Cassorla asked him to repeat his calculations. Mr. Rowe stated the circular structure was approximately 4'x10'.

Chairman Saccento asked if there were abutters present. Ms. Magnuson stated that Mr. and Mrs. Edmund Smith were in attendance. They lived in the neighborhood, but were not abutters. It would be the discretion of the Chair as to whether they could speak.

Chairman Saccento acknowledged the Smiths and stated they could address the Board on Case #1056.

Mr. Edmund Smith addressed the Chair and Board, stated that he lived across the street and that he had nothing against chickens. He stated that around 4 a.m. the hens start squawking; he guessed they were laying their eggs at that time. His biggest concern was the predators that have started moving into the area. The Smith's house was about 100 yards from the Sugar River. In the last couple years there were more fisher cats, coyotes and birds of prey (hawks and eagles) in the neighborhood. The fisher cats and birds of prey were his main concerns for domesticated animals (cats and small dogs) in the neighborhood.

His concern was that the predators smelled the chickens and went into the neighborhood to hunt them.

Mrs. Gail Smith stated that if the ZBA granted a variance it would set precedence; it would not be three chickens, but a whole neighborhood of chickens. She stated that the Rowe's were good neighbors, but they (Smiths) were concerned about the predators. If they allowed the Rowe's and then others, they would have more problems with predators.

Chairman Saccento acknowledged Miss Eily Rowe. Miss Rowe listed the animals that her family had as pets, if there were predators. Chairman Saccento thanked her for her comment.

Addressing Mr. Rowe, Chairman Saccento asked if he would like to address the Smiths comments. Mr. Rowe stated:

1. As far as the noise, it was the first he had heard of anyone complaining about the noise from the chickens. He did not believe the chickens made as much noise as a neighborhood dog (the Smiths were referring to).
2. As for predators, they have had the chickens for over two years. In those years he has not had an issue with predators.

The Town should create an ordinance stating that people's dogs and cats should not be able to roam free in their yards. The cats and dogs would be prey to the predators.

Chairman Saccento stated that traditional pets are regulated differently. Ms. Magnuson concurred, stating they are regulated by the Police Department. They have ordinances stating that dogs must be kept under the control of their owner at all times. Having a dog out in a fenced in area is under the owners' control.

Mr. Rowe argued that such an animal would more likely be available for a bird of prey.

Mrs. Smith rebutted about her fenced in dog. Chairman Saccento reminded the public and applicant of the ZBA format. She stated that the ZBA was not meeting about the dog, but about the chickens. Mr. Smith asked if he could just wrap it up; he reiterated that their concern was the predators.

Chairman Saccento returned to the Board for questions.

Mrs. Cassorla addressed the Chair and stated that by her calculations there was 40 square feet for the enclosure that the hens are currently occupying. You then had to take away the size of the coop: addressing Mr. Rowe she asked if 12 square feet was the size of the coop. He agreed that the coop was about 12 square feet. Mrs. Cassorla addressed the Chair and stated the applicant needed 10 square feet (outdoor) per chicken. Chairman Saccento asked if there was 40 square feet on the property that was within the setbacks. Mrs. Cassorla reiterated her question of the setbacks for the Rowe property. Ms. Magnuson reiterated for the ZBA members that in R-1 the setbacks were 25 feet in the front, 25 feet in the rear of the property and 10 feet on the side property line.

There was a lengthy, general discussion on the proposed Zoning Amendment, Case #1056, the setbacks for the proposed Zoning Amendment the Planning Board was working on and the fact that the Rowe's would still have to go before the ZBA for a variance because they would not meet the new requirements.

Mr. Lain addressed Ms. Magnuson and asked, for clarification, if the variance was granted it would set precedence. Ms. Magnuson stated yes, for anyone in the R-1 Zoning District. She listed the areas in Town that it would cover.

Ms. Magnuson gave some examples of other cases in Town where she had sent a Notice of Violation. The individuals got rid of their chickens.

Their being no further questions from the Board, Chairman Saccento asked if there was anything further the applicant would like to say. Miss Eily Rowe addressed the Chair and stated that she loved the chickens and they ate their chickens eggs. Mr. Rowe stated it was important to know the source of their eggs. He has a health management certification. There was nothing he could add.

Chairman Saccento addressed the Board and asked if there were final questions. Mrs. Cassorla stated she had a question for Ms. Magnuson. She asked if the Planning Board, in their discussions had determined a size for enclosure space. There were some places that had requirements for the type of flooring the chicken coop had to have. The reason she asked was because if the requested variance for Case #1056 passed, she wanted to know if they were making the best precedence possible and the safest and most humane practice possible.

Ms. Magnuson stated she did not know if New Hampshire had best management practices for the keeping of chickens. She guessed that they did.

Mrs. Cassorla stated that if the ZBA granted the variance that they put in a condition that the applicant follow the best management practices as set out by the State of New Hampshire.

Chairman Saccento said she was thinking about the neighborhood and the closeness of structures. If there was a chicken coop at every house...there was a short discussion. Mr. Lain stated that he did not believe the ZBA should set precedence.

Chairman Saccento acknowledged Miss Rowe. She explained why they had chickens to the Board members.

There being no further questions or comments from the public or Board members, on a motion by Mrs. Cassorla, seconded by Mr. McCoy; ***the Board voted to go into Deliberations. The motion passed 4-0-0.***

Mr. Beard stated there were different sides to the question: noise and health. He gave negative scenarios for each side to the question. Personally, to allow a few chickens with restrictions in this case was fine; but to allow fifteen other families in the neighborhood to have chickens as well would be too much.

Ms. Magnuson addressed the Board and explained the process to investigate any other families in the neighborhood who own chickens.

Chairman Saccento asked if the ZBA should grant a variance, or wait for the Planning Board. Mr. Lain stated he felt the ZBA should not set precedence when the Planning Board was working on a Zoning Amendment. The ZBA should wait and see what the Planning Board comes up with. There was a discussion on either tabling or continuing the case. A decision would not be able to be made on case #1056 until after the 2018 Town Meeting in May. Mr. McCoy and Ms. Magnuson stated that the Rowe's are in violation (even with the proposed Zoning Amendment).

Ms. Magnuson stated that legally she had given him a Notice of Violation that had given Mr. Rowe options of how to come into compliance.

1. Discontinue use of keeping poultry on the property.
2. Apply for and receive a Variance from the Newport ZBA.
3. File and prevail an Administrative Decision (needed to be done within 30 days of the Notice of Violation; it had not been done).

Mr. Rowe did go into the Planning and Zoning Office to file for a Variance.

Mr. Lain asked if the violation was due to the complaint. Ms. Magnuson stated yes; that was typically how she learned of violations. Ms. Magnuson then reviewed the procedure she had gone through in processing Case #1056.

There was a discussion on:

Granting the variance for the future land owners
The expectation of living in an urban environment
Hardship and a nonconforming lot
Setbacks and lot coverage for structures (30%)
Expectations of neighbors/future owners

Variance Statement of Reasons and Discussion

Chairman Saccento asked for motions on questions one through five.

1. On a motion by Mrs. Cassorla; that:

Granting the variance would not be contrary to the public interest because: The applicants would only have 3 laying hens, there would be no roosters so there would be no noise issues.

The motion died for lack of a second.

1. On a motion by Mr. McCoy, seconded by Mr. Lain; that

Granting the variance would be contrary to the public interest because: noise and odor from farm animals would have an adverse effect on the neighborhood. Chairman Saccento stated there had already been a complaint by a neighbor. She did not see how it would not be contrary to the public interest. She called for a vote. ***The motion passed 3-1-0 (Cassorla voted no).***

Because the first question failed, the Variance was denied. The Board was encouraged to consider each of the additional criteria to solidify the fact that all of the criteria were carefully considered.

2. On a motion by Mrs. Cassorla,

The spirit of the ordinance would be observed because the protection of the R-1 District as being a residential against having farm animals such as a cow; because there is no rooster and it is only egg laying hens there would be no noise. Mr. Rowe has made the structural changes to the coop to prevent future escape of his hens. The motion died for lack of a second.

2. On a motion by Mr. Lain, seconded by Chairman Saccento,

The spirit of the ordinance would not be observed because it would be setting precedence for an area that could be overrun with chickens.

Chairman Saccento stated that on the ordinance that the Planning Board was writing, it specifically listed poultry as one of the animals not allowed in the R-1 Zone. There was a discussion on animals in the proposed ordinance as well as setting precedence on granting a variance on an Ordinance that the Planning Board was working on. ***The motion passed 3-1-0 (Cassorla voted no).***

3. On a motion by Mr. McCoy, seconded by Mr. Lain; that:

Granting the variance would not do substantial justice because the expectation of the neighbors is one of an urban setting and not one having farm animals. The Chair stated that owners should do due diligence and find out what was allowed on their property. Mrs. Cassorla stated that urban farming was on the rise. The ZBA was going to see more and more such cases come before them. With good animal husbandry and making sure that the chickens are treated humanely is a concern. Chairman Saccento concurred. Chairman Saccento called for a vote. ***The motion passed 3-1-0 (Cassorla voted no).***

4. On a motion by Mr. McCoy, seconded by Mr. Lain; that:

The values of the surrounding properties would be diminished due to the possible perception of odor and noise by the animals and by setting precedence. There was discussion on perceptions and diminished property values and new owners to the neighborhood. Chairman Saccento called for a vote. ***The motion passed 2-2-0 (Cassorla and Saccento voted no).***

Unnecessary hardship

Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

5. On a motion from Ms. Saccento, seconded by Mr. Lain; ***there is a fair and substantial relationship between the general public purpose of the ordinance provision and the specific application of that provision to the property because it is in an urban area and in a tiny lot; there is no clear space within the setbacks to have the chicken enclosure if that were to become a requirement. It is too small an area in general.***

The motion passed 3-1-0 (Cassorla voted no).

Ms. Magnuson stated a point of order. Part A and B of the hardship question had to be moved as one, not separately.

Chairman Saccento rescinded her motion; Mr. Lain rescinded his second.

5. On a motion from Chairman Saccento, seconded by Mr. McCoy; ***there is a fair and substantial relationship between the general public purpose of the ordinance provision and the specific application of that provision to the property because the lot size is too small to be keeping chickens.***

AND:

That the proposed use is not a reasonable one because it is an urban area and the lot is too small.
Chairman Saccento called for a vote. ***The motion passed 3-1-0 (Cassorla voted no).***

Chairman Saccento called for a motion to memorialize the decision of the ZBA to deny the Variance. On a motion by Chairman Saccento, seconded by Mr. Lain; ***the Board voted to deny a Variance for Case #1056.*** Chairman Saccento called for a vote. ***The motion passed 3-1-0 (Cassorla voted no).***

Ms. Magnuson addressed Mr. Rowe and stated that a Notice of Decision would be signed within five business days. The Chair would sign it and it would be sent to Mr. Rowe. Mr. Rowe would have 30 days to appeal the decision if he felt something illegal or unjust has happened tonight or Mr. Rowe had 30 days from receiving the Notice of Decision to come into compliance with the Ordinance.

The Chair and Board thanked Mr. and Miss Rowe for coming to the ZBA meeting. The Chair thanked Miss Rowe for her comments.

On a motion by Mrs. Cassorla, seconded by Mr. McCoy; ***the Board voted to adjourn at 7:48 pm. The motion passed 4-0-0.***

Respectfully submitted,

Maura Stetson
Scribe

Approved December xx, 2017