

**Zoning Board of Adjustment**  
**June 20, 2019 6:30 PM**  
**Board of Selectmen's Room/Municipal Building**  
**15 Sunapee Street/Newport, NH**

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**PRESENT:** Melissa Saccento Chairman; David Lain, Vice Chairman; Beth Cassorla, Jeffrey Kessler, BOS Representative; Scott McCoy, Alternate

**ABSENT MEMBERS:** Ben Nelson, Tim Beard, Alternate; Virginia Irwin, Alternate

**VIDEOGRAPHER:** Nancy Meyer, NCTV

**STAFF PRESENT:** Liz Emerson, Zoning Administrator

**COMMUNITY MEMBERS PRESENT:** Reginald Morse (abutter)

**CALL TO ORDER:** Chairman Saccento called the meeting of the ZBA to order at 6:30 p.m. and introduced the sitting Board members. Mr. Scott McCoy was appointed to sit for Mr. Ben Nelson.

**ADMINISTRATION:** Ms. Emerson stated the Board members had copies of the new Zoning Ordinance packets. The only difference from the 2018 Ordinance was the addition of the Hen's Ordinance which was passed at the Town Meeting 2019.

**MINUTES:** March 14, 2019

March 14, 2019

On a motion by Mr. Kessler, seconded by Mr. McCoy; *the Board voted to approve the minutes of the March 14, 2019 meeting as presented. The motion passed 3-0-2 (Lain and Cassorla abstained).*

**Case #1076: William Bartlett (Owner):** requests a Special Exception as provided for in Article II Section 206.1 of the Zoning Ordinance and specifically the provision to permit construction of a year round yurt for personal camping. The property is identified as Map 243 Lot 013 and is located at Maplewood Drive in the Rural (R) Zoning District.

*Case #1076 was continued to the July 18, 2019 ZBA meeting. It had been noticed incorrectly.*

**Case #1077: Bert Spaulding, Sr. (Owner):** requests a Variance from the terms of Article 4 Section 403 of the Zoning Ordinance to a back lot containing less than 87,120 sq. ft. The property is identified as Map 234 Lot 031-005 and is located at 676 John Stark Highways in the Kelleyville (K) Zoning District.

Chairman Saccento opened the hearing. She acknowledged Ms. Emerson and asked for the worksheets for the Case.

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

Chairman Saccento addressed Mr. Bert Spaulding, Sr. and asked him to state his name, give his address and read his application into the record.

Mr. Spaulding, Sr. stated the first thing to correct was documentation which noted access (to the cell tower) as a right of way. It is not; it is an easement. Chairman Saccento thanked him for the clarification.

Mr. Spaulding, Sr. addressed the Board members and gave a historical explanation of the lot in question in relation to the “parent lot” as well as methodically explaining the information on the plat the Board had been given. He answered all questions about the map from the Board members.

Mr. Spaulding, Sr. explained to the Board that the reason he had decided not to have the (required) two acres for the proposed back lot was because he wanted to restrict the number of towers on the lot. If the lot was two acres there would be room for the utilities to place another tower (create a tower farm).

Mr. Spaulding, Sr. finished his explanations.

He asked the Board if they had any questions.

Chairman Saccento stated in looking at the old files in the TOPAZ office she had seen that Mr. Spaulding, Sr. had combined the Johnson lot with his lot to make the “parent” lot. He stated yes.

Chairman Saccento stated that in reviewing the maps, the acreage is 14.19 on the old one and over 15 acres on the 2015 map. Addressing Mr. Spaulding, Sr. she asked which survey is correct (the size). (*The tax cards had a different acreage, but there is a disclaimer on the card.*). Mr. Spaulding, Sr. stated that the recent survey was done by a licensed surveyor. Chairman Saccento asked Mr. Spaulding, Sr. if he had changed something over the years. He stated no.

Mr. Spaulding, Sr. addressed Chairman Saccento and gave additional historical information, referencing ZBA case minutes from 1975 on the two lots (Johnson and Spaulding) to explain the merger.

The Board had questions concerning the plat-Ms. Emerson’s computer program was down and she could not access the deed to print out for the Board members. The access, deeded right-of-way and easements were discussed among the Board members. Mr. Spaulding, Sr. asked if the Board had any questions concerning the mapping.

Chairman Saccento addressed Mr. Spaulding, Sr. and stated she still had a question on the acreage on the maps. The 5/28/2019 survey was 14.19 acres and the 11/09/2015 survey (combining the two parcels) is over 16 acres. Mr. Spaulding, Sr. stated there was a rationale for the acreage in the 2015 survey.

Chairman Saccento said she hoped Mr. Spaulding, Sr. could give the ZBA reasons as far as hardships because that is one of the huge criteria for granting a variance.

Mr. Spaulding, Sr. stated he had not gotten to that part (of the application). Chairman Saccento stated she was giving Mr. Spaulding, Sr. her thoughts; he could continue.

Mr. Spaulding, Sr. asked, for clarification, if the Board was finished with the map (explanations). He was told yes.

The cell tower is in existing use and has been since it was approved.

He read aloud and explained his application to the Board; at times using supporting documentation from the TOPAZ office files.

Mr. Spaulding, Sr. stated that logic proved that the lot did not need the 2 acre requirement; thus the request of a variance on the property. He considered himself a good land steward; Mr. Spaulding, Sr. wanted to make sure he had control of the uses on his property.

Mr. Spaulding, Sr. asked if there were questions from the Board members.

Chairman Saccento asked Mr. Spaulding, Sr. how he could state it will not have a residence on it (in the future). The Board could not say it could never have a residence, unless Mr. Spaulding, Sr. was planning on doing a deed restriction on the land.

Mr. Spaulding, Sr. addressed Chairman Saccento and stated that after Case #1077 there was a Special Exception Case. He stated, for clarification, what that allowed the ZBA to do: list the ability to say no to a house (under conditions). Continuing, he said that the ZBA had this alternative path.

Mrs. Cassorla addressed the applicant and stated that technically the ZBA could not look at the Special Exception until it had finished the variance case.

There was a discussion among the Board members about:

- Putting a house on the (reduced size) lot in the future,
- What is the need for the reduction of the lot (applicant argument was will give him control over the land/cell tower expansion)
- What is the hardship to the applicant
- Being a steward of the land

Mr. Spaulding, Sr. asked if the ZBA had gone into deliberations. He was told no.

Mr. Spaulding, Sr. then stated that ZBA members should not “tip their hand” (as to how they will vote) because under Winslow versus Holderness a Board member cannot sit to vote on the case if they do. Mr. Spaulding, Sr. stated they should “couch their questions” in such a way that they do not do that.

Continuing, he stated that he had presented to the ZBA what he did and why he did it. He also presented why it is hardship. The ZBA members had to get into the mindset that the case was of a utility (not residential).

Chairman Saccento stated she did not see Mr. Spaulding, Sr.’s hardship. Mr. McCoy addressed the Chair and stated that it was something the ZBA as a group needed to decide. Chairman Saccento concurred with Mr. McCoy.

Mr. Spaulding, Sr. stated the hardship is the two acre minimum lot size. The rationale for doing it in the first place was to make this more doable rather than eating up land.

Chairman Saccento asked the Board members if there were any further questions. There were none.

Chairman Saccento addressed the abutter in attendance, asked him to state his name and asked if he had any questions or comments.

Mr. Reginald Morse, abutter, addressed the Chair and stated he was in support of the applicant’s variance request.

Mr. Morse gave the history of the land in question as it pertained to him as an abutter. He stated Mr. Spaulding, Sr. had spoken to him about the proposed changes. He had walked the property with Mr. Spaulding, Sr.; as far as detriment to Mr. Morse’s property; there was none (noise, etc.). Mr. Morse had nothing negative to say about it.

Chairman Saccento thanked Mr. Morse for coming and speaking at the meeting.

Mr. Spaulding, Sr. addressed the Chair and stated that the hardship (in the case) is created by the Zoning Ordinance that puts restrictions or boundaries that do not have a reasonable nexus to the project. He reiterated for the ZBA that the hardship was the 2 acre limitation when (in this case) it does not have to be.

There were no further questions by the Board members.

Chairman Saccento then closed the meeting to the public. On a motion by Mr. Lain, seconded by Mr. McCoy; ***the Board voted to go into Deliberations for Case #1077. The motion passed 5-0-0.***

#### **Variance Statement of Reasons and Discussion**

The Zoning Board members went into a lengthy debate concerning the hardship prong of the variance. Some members debated there was no hardship in the case, others stated there was and explained their reasoning.

Mr. Kessler read aloud the definition of hardship as defined in the November 2015 edition of the Zoning Board of Adjustment of New Hampshire Handbook. He then stated that basically hardship is what is there (at the site).

Chairman Saccento stated she still was having difficulty with hardship as they (Newport) usually define it. Mr. McCoy concurred with her statement, stating he was trying to see how they could couch it (phrase it). There was further discussion on the ordinance and hardship prong.

Chairman Saccento told Board members that they had to be able to justify their actions to future applicants coming for a similar variance.

Mr. Kessler reminded them that it was not a blanket change in the Ordinance; variances were heard and granted on a case by case basis.

There was more discussion on the case of hardship.

Mr. Lain stated he did not see the point of hardship in the case. It is only a hardship for the tower people who might want to load it with towers. Mr. Spaulding, Sr. is trying to prevent that.

Chairman Saccento stated Mr. Spaulding, Sr. already has control of them (tower people) because he owns the property. The Board members discussed the use of the land and necessary variances if the need of the utility went away.

Mr. McCoy stated the variance went with the property forever. Why would owners need to go before the ZBA in the future for a variance? There was a discussion among Board members on this hypothetical as well as the hardship in the case.

Mr. McCoy addressed Mr. Kessler and stated he (Mr. Kessler) believed there was a hardship. He asked how he would phrase it for question five. There was a lengthy discussion among members about how question five would be answered. All agreed it was a unique situation.

Chairman Saccento asked for motions on each of the five questions (prongs).

1. On a motion by Mrs. Cassorla, seconded by Mr. McCoy; that:  
***Granting the variance would not be contrary to the public interest because the area we are discussing is currently being used by a utility and not for residential.***

In discussion, Mrs. Cassola stated there was plenty of room for access for utilities and emergency vehicles. The use will not change (residential); the abutter is okay with the variance. There was a general discussion on the lot. Chairman Saccento called for a vote. ***The motion passed 5-0-0.***

2. On a motion by Mr. Kessler, seconded by Mrs. Cassola; that:  
***The spirit of the ordinance would be observed because the use of the property will not change.*** During discussion Mr. McCoy requested adding: ***by granting the variance.*** Both motioner and seconder agreed to the amendment. ***The motion passed 5-0-0.***

3. On a motion by Mr. Kessler, seconded by Mrs. Cassola; that:  
***Granting the variance would do substantial justice because there is no reason for that lot to be larger than it is.*** There was no discussion. Chairman Saccento called for a vote. ***The motion passed 5-0-0.***

4. On a motion by Mr. Kessler, seconded by Mr. McCoy; that:  
***For the following reasons, the values of the surrounding properties would not be diminished: because the use of the property would not change due to the variance.*** Chairman Saccento called for a vote. ***The motion passed 5-0-0.***

#### 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:

On a motion by Mr. Kessler, seconded by Mrs. Cassola; ***there is not 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 ordinance prohibits the landowner from utilizing his land to the best of his ability.*** In discussion, Chairman Saccento stated she did not believe it prevented him from using it. She could not go along with that argument. She did not see where the applicant was prevented; although not ideal, Chairman Saccento stated she did not see how it prevented him from using it.

Mr. McCoy asked if there was a motion and second. He was told yes. He asked if they had to vote or could they discuss the language. Chairman Saccento stated they should discuss the motion and someone could make another motion if they chose. There was a discussion among the group as to whether the prong had to be voted on as originally moved.

Mr. Kessler made the following amendment: ***there is not 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 ordinance prohibits the landowner from exercising his control over his land and there is no benefit to the landowner or the general public with the requirement of the ordinance.***

Mrs. Cassola read aloud a different proposed motion: ***there is not 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 this is currently a utility and accessory building and forcing the landowner to conform to the lot size will prevent him from using his property in a way that the owner wants to use***

AND

***Prevents him from being a steward of the land.***

Mr. McCoy addressed the members and stated he would like to see wording about the use.

Mr. Kessler withdrew his motion.

The Board continued discussion on the wording of prong number 5.

The Recording Secretary addressed the Chair with a point of order. Mr. Kessler had withdrawn his motion. The second had not withdrawn the second. The Chair addressed Mrs. Cassorla (second) and asked if she would withdraw her second. She refused, stating Mr. Kessler's motion was fine.

The Board held a lengthy discussion on the case and wording for the fifth prong. Mr. Kessler proposed an amendment. On a point of order the Recording Secretary reminded the Board they were still without a motion and the second had not been withdrawn. She requested that Mrs. Cassorla withdraw her second. Mrs. Cassorla withdrew her second.

Mr. Kessler made a new motion: *there is not 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 given the existing use of the subdivided property the ordinance is restricting the landowner from utilizing the remainder of his land to the best of his ability.* It was seconded by Mrs. Cassorla.

In discussion, Chairman Saccento asked for clarification of "remainder". She asked if Mr. Kessler meant the large lot. She then asked if Mr. Kessler meant the applicant could not do what he wanted on the parent lot.

Chairman Saccento did not like the term want in the explanation.

The Board members discussed hardship in the Case.

Mr. Kessler suggested the following: the ordinance removes control of part of his remaining....

Mr. McCoy suggested the following: "The unnecessary one acre of land is required because of the use of the ordinance." "This ordinance requires him to give up an unnecessary one acre of his property."

Mr. Kessler stated the ordinance is denying the property owner the ability to manage his property the way he wants.

Mr. McCoy stated the Ordinance is "requiring him" to sacrifice or give up the use of property he should not have to. Chairman Saccento asked why not?

Mr. McCoy stated the original size was for residential use. This is not a residential use. This is a unique situation.

There was a lengthy discussion among the Board members on the current Ordinance, Case and future hypothetical requests for Variances on the lot.

Mr. McCoy said that:

- ❖ The 2 acre requirement is not necessary because of the use.
- ❖ The Ordinance requires him to give up an additional acre that we have determined is unnecessary.

Mrs. Cassorla stated,

- If the applicant gives up the 2<sup>nd</sup> acre he does not have to go to the ZBA.
- There would still be no road frontage.
- The hardship is he wants to limit the size (of the lot) as much as he can.

Chairman Saccento replied that if that was the only way to limit it she would agree. Another way to limit it would be deed restrictions. Mrs. Cassorla and Chairman Saccento discussed this and other options potentially available to the applicant.

Mr. McCoy and Mrs. Cassorla agreed that justice would be done by granting the variance to the applicant.

Mrs. Cassorla explained her reasons for substantial justice. Mr. McCoy and Chairman Saccento concurred with her. Mrs. Cassorla continued, stating the hardship is that without the Variance, the ZBA is forcing him to conform to an Ordinance that this Board does not think is just (see prong three).

Mr. McCoy proposed the following motion: ***there is not 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 given the current use of the land it is not necessary for the lot to conform to the requirements.*** Mrs. Cassorla seconded the motion.

As a point of order, Ms. Emerson asked if there was still a motion on the floor. She was told yes.

[Mr. Kessler made a new motion: ***there is not 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 given the existing use of the subdivided property the ordinance is restricting the landowner from utilizing the remainder of his land to the best of his ability.*** It was seconded by Mrs. Cassorla.]

Mr. Kessler withdrew his motion, Mrs. Cassorla withdrew her second.

5. i. Mrs. Cassorla made the motion that: ***there is not 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 this is currently a utility and it is not necessary for this lot to conform to back lot standards.*** Chairman Saccento seconded the motion. ***The motion passed 5-0-0.***

AND:

5. ii. Mrs. Cassorla made the motion: ***The proposed use is a reasonable one because: the back lot standard is unnecessary given the existing use.*** It was seconded by Mr. Kessler. ***The motion passed 5-0-0.***

Chairman Saccento addressed the Board members and asked if there were any conditions to the memorialization. Mr. Kessler stated no.

Chairman Saccento called for a motion to memorialize the decision of the ZBA to grant the variance. On a motion by Mr. Kessler, seconded by Mrs. Cassorla; ***the Board voted unanimously to grant a Variance for Case #1077 as presented.*** There was a discussion on the need for conditions and checks and balances on the variance. Chairman Saccento called for a vote. ***The motion passed 5-0-0.***

Chairman Saccento signed the (two) Notice of Decision for Case #1077.

**Case #1078: Bert Spaulding, Sr. (Owner):** requests a Special Exception as provided for in Article 4 Section 403 of the Zoning Ordinance and specifically the provision to the creation of a back lot. The property is identified as Map 234 Lot 031-005 and is located at 676 John Stark Highway in the Kelleyville (K) Zoning District.

Chairman Saccento opened the hearing.

Mr. Spaulding, Sr. read his application into the record. He then stated his frustration on the length of time it took the ZBA to hear his Variance Case (two hours). Chairman Saccento addressed Mr. Spaulding, Sr. and stated they were on Special Exception Case #1078 and were not to there to discuss the previous case. She asked Mr. Spaulding, Sr. to stick to Case #1078. He stated he was done.

The Chair asked if there were questions from the Board. There were none.

The Chair asked if there were questions or comments from the public. Mr. Morse reiterated his support for the applicant's intention and thanked him for following his course of action.

Chairman Saccento apologized to Mr. Spaulding, Sr.

Chairman Saccento asked if there were follow-up questions from the Board.

There being no further questions from the public or Board, on a motion by Mr. Kessler, seconded by Mrs. Cassorla; ***the Board voted to go into Deliberations. The motion passed 5-0-0.***

#### **Zoning Board of Adjustment Special Exception**

Chairman Saccento addressed the Zoning Board members and asked them to go through the three questions.

On a motion by Mr. Kessler, seconded by Mrs. Cassorla:

The proposed use will not be detrimental to the overall character of the neighborhood by reason of undue variation from the nature of other uses in the vicinity including design, scale, noise and odor; ***Standard A has been met. The motion passed 5-0-0.***

On a motion by Mr. Kessler, seconded by Mr. McCoy:

The proposed use will not be injurious, noxious or offensive or in any way detrimental to the neighborhood ***Standard B has been met. The motion passed 5-0-0.***

On a motion by Mr. Kessler, seconded by Mrs. Cassorla:

Standard C: The proposed use will not be contrary to the public health, safety and general welfare by reason of undue traffic congestion or hazards that pose a risk to life and property or be unsanitary or create unhealthful waste disposal or unhealthful conditions. ***Standard C has been met. The motion passed 5-0-0.***

Chairman Saccento called for a motion to memorialize the decision of the ZBA to approve the Special Exception for Case #1078. On a motion by Mr. Kessler, seconded by Mrs. Cassorla; ***the Board voted to approve the Special Exception for Case #1078.*** Chairman Saccento called for a vote. ***The motion passed 5-0-0.***

Chairman Saccento addressed the applicant and stated his application for a Special Exception had been approved (with no conditions). She signed the two Notices of Decision at the meeting.

On a motion by Mr. McCoy, seconded by Mrs. Cassorla, ***the Board voted to adjourn the hearing at 8:46 p.m. The motion passed 5-0-0.***

Respectfully submitted,

Maura Stetson  
Scribe

Approved on: July 25, 2019