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Zoning Board of Adjustment
April 14, 2008

Present: Bill Green (Chairman), Laurie DiClerico, Courtland Cross, Doug Lyon, Michael Todd, Peter Stanley (Zoning Administrator), Pierre Bedard of Bedard & Associates (Applicant's Representative).

Bill Green called this meeting to order at 7:30 p.m., and the Board heard one petition tonight.

PUBLIC HEARING
Susan Rowett requested an area variance to the terms of Article VI, Section C-1 of the New London Zoning Ordinance, in order to retain an illegally constructed shed addition to the rear of an existing barn, although the shed addition fails to meet either the front yard setback requirement of 50-feet or the side yard setback requirement of 25-feet. The property is located at 683 Seamans Road, Tax Map 098, Lot 008 in the ARR zone.

Bill Green opened this hearing, called the roll, read the Notice of Hearing as posted in the *InterTown Record*, and on the Town Office and post office bulletin boards, and announced that the hearing would be recorded.

Applicant's Presentation

Pierre Bedard represented the owner at this hearing. He pointed out that in 2003, the Zoning Board granted the applicant an equitable waiver of dimensional requirement for the barn that violates the front yard setback. When, at a later date, the issue of the attached shed came up, applicant applied for an after-the-fact building permit but that was denied as the shed violates front and side yard setbacks. They then obtained an application form for an equitable waiver of dimensional requirement (for the shed), but were advised to apply for an area variance instead.

He further explained that this shed is the second one there, replacing a lean-to that collapsed under heavy snow. He pointed out that the shed is more than 100-feet from the nearest dwelling, that there exists a tree buffer along the property line between the applicant's and nearest neighbor's yard, and that the shed is attached to a non-conforming structure—that is, the non-conforming barn allowed vis-à-vis the 2003 equitable waiver of dimensional requirement. (In fact, as will be pointed out later in this hearing, the equitable waiver of dimensional requirement granted for the barn in 2003 does not make that barn a legal non-conforming structure.)

Courtland Cross confirmed that this replaces a lean-to that collapsed under snow, and then asked if this new shed is in the same footprint as that former lean-to. Pierre Bedard said he did not know the answer to that.

Bill Green asked for some clarification of the time line for all this. He reminded the hearing that in 2003, the Rowetts came in for an equitable waiver of dimensional requirement. That decision to grant states clearly that it was for the front yard setback. In other words, the barn was constructed too close to Seamans Road, and at the time the Board found that it was an honest mistake on the part of the contractor, so granted the request. But, he reiterated at this hearing, that was only for the front yard setback.

Pierre Bedard said when he was first approached by the Rowetts on this issue, they had gotten a waiver of dimensional requirement application form. However, in talking with Peter Stanley, he discovered that they really need an area variance for this.

Doug Lyon summarized: The barn does have a building permit (1999) and the subsequent equitable waiver of dimensional requirement granted by the ZBA (2003), and as far as anyone knows there was no shed on the barn at that time (the times of the site visits relevant to the building permit application). The drawing accompanying the 1999 building permit application for the barn does not show a shed or lean-to on the back. A shed or lean-to was constructed subsequent to 1999, without a building permit. That first lean-to collapsed and was rebuilt—again without a building permit. Though the size of the first lean-to is not known at this time, the current shed does not meet setback requirements.

He went on to refer to RSA 674:33-a, II, that states that the equitable waiver of dimensional requirement (granted for the barn in 2003) does not create a non-conforming use for that building, and any subsequent work on that building has to meet all requirements. He said that his position on this is that the original shed was illegal and the rebuilt shed is illegal, and the building does not meet the requirements (it is not a legal non-conforming structure) for rebuilding that shed. He said he is not even sure if the Board has the legal right to approve this even if it wanted to because the barn is not a non-conforming structure. The law says that what the ZBA did before does not create a non-conforming structure. So this is a situation in which the applicants are after-the-fact, trying to receive approval for a shed that was not legally constructed.

Michael Todd asked how the 50-foot setback is measured. He pointed out that the diagram included in the packet indicates it's from a stone wall. Pierre Bedard agreed, and said that would be the edge of the right-of-way.

Courtland Cross asked Pierre Bedard when he was brought in on this. Pierre Bedard said not until after the second shed was built. Courtland Cross then confirmed that Pierre Bedard has no first hand knowledge of what went on before the second shed was built—which clearly is a non-conforming use.

Peter Stanley said that when applicants applied for a building permit for a bathroom in 2001, he visited the site, and happened to observe then that the barn was too close to the road. He said that at that time (2001 and on a subsequent site visit in 2002), he did not notice if there were a lean-to or shed behind the barn or not. In 2003, the ZBA granted an equitable waiver of

dimensional requirement for the barn, finding that the error in setback was an honest mistake on the part of the contractor who measured the fifty-foot setback from the pavement of Seamans Road, rather than from the property boundary line which is ten feet in from the pavement.

For clarification, Courtland Cross asked if that happened before either of the lean-tos was built. Peter Stanley said he was not aware that there was a lean-to at the time; he did not notice one. A year or two later, he did notice one. He said the shed does appear in the Town's 2003 aerial photographs, but there is no record that applicants ever applied for a building permit for the shed, or for an amendment to the barn's building permit to allow the shed. Nor does the shed appear on drawings for subsequent other building projects on the property—though those drawings do show the barn itself.

As shown in the packet the Zoning Board received in preparation for tonight's hearing, on April 9, 2007, Town Administrator Jessie Levine sent a Notice of Violation to the Rowetts. The Rowetts then applied for an after-the-fact building permit for the shed, but that was denied as it not only did not meet the front yard setback, but also did not meet the side yard setback. (As stated above by Pierre Bedard, the Rowetts then began to apply for an equitable waiver of dimensional requirement for the shed, but received the recommendation that they apply for an area variance instead. Peter Stanley said that he did suggest to the Rowetts that they consult with a zoning attorney on this question.) Courtland Cross asked to clarify again that there is no record of any such application for the first shed. Correct.

Michael Todd said, so now we have a shed for which we can't find any application. He said then it seems that the burden to show that this was lawfully constructed has not been met. Pierre Bedard pointed out that historically there has always been a barn there.

Bill Green asked how much encroachment there is into the side yard setback. Peter Stanley said the shed is approximately 19-feet from that property line, and the requirement is for a setback of 25-feet. Doug Lyon added that the shed—like the barn—is also too close to Seamans Road. Peter Stanley added that had applicants applied for a building permit for the shed before it was built, they would have been required to comply with setback requirements—including being 50-feet from the front property line. The barn's e.w.d.r does not exempt the additional shed from setback requirements.

Bill Green asked Pierre Bedard to review the applicant's position with reference to the five criteria required to be met before the board can grant a variance. Pierre Bedard said that:

1. The shed does not diminish surrounding property values because the nearest dwelling is more than 100-feet from the structure, and there exists a tree buffer screening.

2. The variance would not be contrary to the public interest because a lean-to is a traditional use or addition to a barn. It will have only passive use for storage.

3. Denial of the variance would result in unnecessary hardship to the owner because the shed attached to barn is necessary for a protected and orderly storage area, but the barn itself does not meet front-yard setbacks, and because there is no other practical location to attach the shed to the barn.

4. The variance will do substantial justice because it will allow owner to avoid a requirement to demolish the shed, and generate demolition waste.

5. The use is not contrary to the spirit of the ordinance because an attached lean-to shed follows traditional use of barn structures.

No abutters or other interested parties attended this hearing, nor were any written comments submitted to the record. Hearing no further comments or questions from those present, Doug Lyon moved that the Board close the public hearing and enter deliberations. Laurie DiClerico seconded. No further discussion. Motion unanimously approved.

Deliberations

1. Regarding the question of diminution of surrounding property values:

Courtland Cross said it might be hard to determine if this specific use would diminish surrounding property values, but he said it would set precedent, and subsequent similar variances might diminish their surrounding property values. He said his second objection to this is that the shed was built without benefit of a building permit. That flies in the face of the way the rules are supposed to be followed.

Laurie DiClerico agreed that there must be concern that this will set precedent, and the possibility that down the road, a similar use will affect surrounding property values. She also expressed concern that though the owners understand the building permit process, they did not apply for one for the shed.

Bill Green agreed that in this particular case, it might be argued that there would be no diminution of surrounding property values as the nearest neighbor is some distance away.

Doug Lyon agreed that it would be difficult to determine if surrounding property values here would be diminished, but he pointed out that that isn't the primary issue here.

Michael Todd agreed that it would be difficult for the Board to make a determination on that.

Bill Green reminded Pierre Bedard that in order to grant the variance, the Board must find that all five criteria have been met. Michael Todd said that putting it another way, the applicant has the burden of demonstrating that the five criteria have been met. All the Board has to do is find or not find that they have been met.

2. Regarding the question of whether or not the use is contrary to the public interest:

Michael Todd said the procedural posture of this is what is contrary to the public interest; that is, how applicants went about getting where they are is procedurally defective. He said the rules are laid out; the rules are supposed to be followed. Granting this variance would send a message that the rules don't have to be followed, and that would be contrary to the public interest.

Doug Lyon agreed that this is clearly a case where proper procedures were not followed. As it is, it violates two setbacks and none of that is in the public interest.

Bill Green asked Peter Stanley if the applicants could at this point submit a request for an equitable waiver of dimensional requirement for the shed. Peter Stanley said this same request could not be made here, the Board's ruling is final on this request. They could come in with some other proposal for an equitable waiver for somewhere else on the property. Bill Green again asked if this building were eligible for any more equitable waivers. Peter Stanley said they could come in with such a proposal if the shed met the front setback but not the side. That might be sufficiently different to be eligible for the Board's consideration, but he cautioned that he would recommend consulting counsel on that question. Any new application would have to be materially different than this one.

Laurie DiClerio said she felt granting a variance here would be contrary to the public interest, and inconsiderate of those in Town who do follow the regulations.

Courtland Cross reiterated his earlier comment that building this without a building permit flies in the face of the regulations.

3. Regarding the finding of hardship:

Bill Green said he does not see that the property has any special conditions that would prevent a shed from being built as designed in a location that would not require an area variance.

Doug Lyon agreed.

Michael Todd said from the information presented in the packet, and from observations that can be made while driving by, it appears that no such special conditions exist.

Laurie DiClerico and Courtland Cross agreed.

Doug Lyon pointed out that there is plenty of space on the property to allow the same benefit to be achieved without undue financial burden to the applicant. He pointed out that the shed could have been built smaller or as a free-standing shed, or put in a location that does not violate setbacks. A legal lean-to albeit a smaller one, could have been built on the back of the barn.

Michael Todd asked if the shed has a concrete foundation. Peter Stanley said it has a poured concrete wall.

Michael Todd agreed that there appears to be enough space on that site that would allow a shed of the same design to be built in compliance with setbacks.

Courtland Cross and Laurie DiClerico agreed.

4. Regarding the question of substantial justice:

Laurie DiClerico said it would not be a hardship for the owners to remove this illegal shed. Courtland Cross, Doug Lyon and Michael Todd agreed.

5. Regarding the question of whether or not the variance would be contrary to the spirit of the ordinance:

Michael Todd said this variance would be contrary to the spirit of the ordinance; it is not in keeping with what the ordinance is attempting to regulate.

Doug Lyon pointed out that actually the use violates two regulations: the setback requirements as well as the requirement for a building permit.

Laurie DiClerico and Courtland Cross agreed.

Hearing no further comments, Doug Lyon moved that the Board deny this variance and require that the property owners take down the existing illegal structure. Michael Todd seconded. No further discussion. The motion to deny the variance with the additional proviso that the existing illegal structure be removed, was unanimously approved.

The public hearing closed at 8 p.m.

As a point of information, Michael Todd asked if building permit procedures have been modified to provide additional inspection for potential setback violations. That would avoid a situation like this where a foundation was poured in the wrong place. He pointed out that this all started because the barn was built in the wrong place, yet the diagram for the barn does show it as fifty-feet from the front of the property. Peter Stanley confirmed that. Now the building permit process requires that the owner physically find the bounds, and if they cannot be found, owner must hire a licensed surveyor to do so.

He went on to advise Pierre Bedard and the Board that the applicants do have 30-days to appeal the Board's decision, and if the Board denies the request to rehear this, the applicants have 30-days after that to appeal to Superior Court. If they do not appeal, they must remove the illegal structure within a reasonable time. Courtland Cross asked what a "reasonable time" is. Peter

Stanley suggested that if they do not appeal by 30-days, then the structure should be removed within 30-days after that.

Courtland Cross asked about the ramp that was discussed at the Board's last hearing. Peter Stanley pointed out that winter is now ending and building season beginning, so he would look to see that addressed soon. He said there is a process for serving a land use citation, and a schedule of fines for violations. Courtland Cross asked if anything further is needed on that from this Board. No. Doug Lyon pointed out that that application was withdrawn, so it is an existing violation now.

Courtland Cross asked why the Board even heard the variance application presented tonight. Peter Stanley referred to the Equitable Waiver of Dimensional Requirement RSA that states the granting of the barn's e.w.d.r. shall not exempt additions from the requirements of the ordinance. Doug Lyon said that mainly the Board met tonight because the applicant requested a variance and the Board cannot decline to hear a request.

Bill Green asked again if applicants could simply have requested a second equitable waiver of dimensional requirement. Peter Stanley said that can only be done once for a given structure.

Minutes – January 28, 2008

Michael Todd asked that a paragraph be added to page six or seven reflecting that during the discussion, he asked the applicant if the owners of the property under discussion owned other retail/commercial properties in Town, and when she confirmed that they do own other such properties, he pointed out they were well aware of the value of said properties by their location and that they are familiar with regulations based on their ownership of other commercial properties in Town.

Doug Lyon moved to accept the minutes with that amendment. Michael Todd seconded. No further discussion. Motion unanimously approved.

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Respectfully submitted,

Sarah A. Denz
Recording Secretary