

**TOWN OF LOUDON
ZONING BOARD OF ADJUSTMENT
MINUTES OF
July 27, 2006**

REGULAR HEARING

Chairman Dave Powelson called the Loudon Zoning Board of Adjustment meeting on July 27, 2006 to order at 7:30 PM at the Loudon Community Building.

I. ROLL CALL:

The following members were present: Dave Powelson, Chairman; Roy Maxfield, Vice Chairman; Ned Lizotte, Roy Merrill, George Saunderson, and alternates Jon Huntington and Howard Pearl.

II. ACCEPTANCE OF THE JUNE 22, 2006 MINUTES:

Roy Maxfield made a motion to accept the minutes as written. Roy Merrill asked to amend the minutes (page 11) to say that Bob Ordway would not answer his question of Mr. Ordway's relationship to VOA. Mr. Maxfield asked the secretary if she knew what the tape of the meeting reflects. The secretary reported that the tape is at the office but that she does recall something of that conversation. Mr. Maxfield asked Mr. Ordway if what Mr. Merrill said was correct. Mr. Ordway stated that he did not say he would not answer, he simply referred it to VOA. Mr. Merrill said he does not believe that is true and wants to go by the tape. Chairman Powelson asked if it would be possible to approve the minutes with the provision that the secretary review the tape to review for completeness of this discussion and amend the minutes accordingly. Mr. Merrill said he would agree with that. Ned Lizotte seconded the motion as amended. All were in favor.

III. NEW BUSINESS:

Chairman Powelson announced that the first order of business would be a motion for rehearing filed by Roy Merrill's attorney. Mr. Powelson said although this was not listed on the agenda the matter must be acted upon in a timely manner. He asked Mr. Maxfield and Mr. Merrill to step down and then appointed Jon Huntington and Howard Pearl to be voting members for this case.

Chairman Powelson said it is the purpose of the Board to decide whether to accept the motion for rehearing and fairly soon. Mr. Huntington asked what Mr. Powelson is asking for. Mr. Powelson said he would like to make a motion to deny the appeal. Mr. Huntington said he would second that motion. The chairman stated that the Board made their decision, accepted an appeal, made a decision again, and feels their position has been made. He reported that he has talked with town counsel, Attorney Bart Mayer, and has several comments to the points in the appeal. The points in the appeal (see full text on file at ZBA office) and **comments** are as follows:

1. ZBA granted applications for a special exception and two variances for the Volunteers of America following a public hearing on June 22, 2006.....
2. The owner of the property in question (Map 20, Lot 9) is Barbara Brown.
3. A zoning board of adjustment may grant a rehearing if in its opinion good reason therefore is stated in a motion for rehearing.

4. Mr. Merrill owns property immediately abutting the Brown/VOA property and has standing to file a motion for rehearing under RSA 677:2.
5. The ZBA's decision of June 22, 2006, granting VOA's applications for special exception and variances were unreasonable and unlawful. ***The ZBA properly covered in discussion and hearing all points necessary to approve special exception and variances.***
6. The participation of ZBA member Roy Maxfield tainted and unduly influenced the ZBA's decisions..... ***Minutes show that Mr. Maxfield recused himself and neither voted on a motion nor participated in any deliberations of the Board. Mr. Maxfield did make comments during the public hearing portion of the meeting but when the Board entered into deliberation any statements made by Mr. Maxfield focused exclusively on procedural issues. Mr. Maxfield was the chairman for many years and is much more familiar with procedural issues than Mr. Powelson or any of the others therefore he sat in an advisory capacity and made no comment on the substance of the appeal nor Board members' observations .***
7. Moreover, three of the five ZBA members who voted on VOA's applications for special exception and variances on June 22, 2006 (Saunderson, Lizotte, and Powelson) participated in an illegal "voice vote" on January 26, 2006, to grant VOA a variance to the 10-acre minimum lot size required for an elderly housing project.....***There were no requests made that any Board member be recused other than Mr. Maxfield and it is now too late to raise that issue.. Furthermore, no Board member would be recused for the reasons stated in the Motion for Rehearing as the discussion and "voice vote" at the January 26, 2006 meeting was advisory only, and in response to a request for guidance for the applicant, VOA. As evidence of the fact that this was merely a nonbinding guide to the applicant, at least one of the individuals who participated in that voice vote ultimately voted against the variance.***
8. The ZBA's concern, both on January 26, 2006, and at the hearing on June 22, 2006, with the price at which Merrill and VOA were going to sell and buy an additional 2 acres, so that the variance would not be required, was unreasonable and unlawful.....***During the hearing in June the Board, the VOA's attorney, and several individuals specifically stated that negotiations between private parties and the price to be paid for the property were not issues with regard to this application pending before the Board. Nevertheless, Mr. Merrill repeatedly returned to this issue. It was not the Board but rather Mr. Merrill who insisted on discussing the price of the property.***
9. VOA sought both a use variance (for the 33-unit project under one roof) and an area variance (in order to meet the 10-acres minimum requirement).....***Mr. Powelson stated the Board did not mention Supreme Court decisions of Simplex and Boccia in the hearings because they are not in the Loudon Zoning Ordinance. The ordinance has taken the results of those two court cases and the language was adopted and put into the Ordinance in Section 701.2. He said the Board was cognizant of these cases when this decision was made.***

Chairman Powelson went on to say that the ZBA is not required to make specific findings or rulings, unless requested by a party. He stated that Mr. Merrill had failed to make a request for any rulings or findings. Having answered those points of the motion, Mr. Powelson said as the Motion for Rehearing fails to allege any error with respect to the Board's substantive decisions he would recommend this be denied. He asked if there were any questions from the Board. Jon Huntington stated that it seems they have covered all the bases and the Board did bring up the point that they are not here to deal with prices of land but to approve an application. He said Mr. Merrill did get a variance for his piece of

property. He said that piece was denied in favor of the Brown property and finding that the project could be done on 8 acres instead of 10 because of the well requirements. Mr. Merrill still has the variance on Lot 10 and can develop that himself if he chooses. Mr. Huntington feels it was discussed at length and those who voted felt the same way.

Mr. Merrill asked if he could discuss the points brought up. Chairman Powelson said he was not sure he could as the Board is expected to make a decision on the motion for rehearing as presented. Howard Pearl asked if the reason to deny is because this is a second appeal. Mr. Powelson said yes and no, explaining that the Board heard the case and then heard it again and whether or not this is a second appeal there is really nothing of any substance not covered. Ned Lizotte said he disagrees, saying he still thinks there is reason to rehear this partly because of point #9. He referred to the minutes of last month saying he feels there was failure to meet the land use variance requirements. Mr. Lizotte said with this land use variance there has been such a push to move things along that the Ordinance is being pushed aside because there were options that were not explored or were done privately. He said he feels #9 is a valid point, especially with what he brought up at the last meeting where the VOA attorney retracted the financial hardship and tried to change the application. Chairman Powelson clarified that the area variance in point #9 of Mr. Merrill's refers to the 10 acre minimum requirement and the use variance refers to the 33 units under one roof. Mr. Lizotte said he was not talking about the 33 units but about the land, an area variance. Mr. Powelson stated that hardship for an area variance is a little different than a use variance. Area variance is spelled out as a reasonable alternative whereas the use variance description states there is no other possible use for the land.

Mr. Merrill asked what the hardship was that determined VOA needed an area variance, adding that his attorney had not found that the ZBA had reason for hardship and that by law you have to have a hardship to have a variance. Howard Pearl asked why a variance was granted if the Zoning Ordinance requires 10 acres, was it because VOA could not afford the additional 2 acres or because there was no other land available at a reasonable price. Ned Lizotte said it was granted because this is an important project and that seems to be thin. Mr. Pearl agreed that the project can be done on 8 acres but the ordinance says 10 acres and he asked where the hardship was determined. Mr. Lizotte read from ZO Section 701.2 #2b "The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant to pursue, other than an area variance." Mr. Pearl said his question is, if rehearing the case, would the facts change or if they are what they are and the Board feels strongly about the decision they made last month then they should stick to it. Jon Huntington asked what the opinion of the town attorney was. Chairman Powelson stated that in his discussion with Attorney Mayer he was lead to believe the Board had properly covered all the points. Ned Lizotte questioned if that was with regard to procedure. Mr. Powelson said procedure and substance. Mr. Lizotte said he is not a legal mind but he disagrees with the lawyer. He said from this discussion it sounds like there might be the same split as last month so the decision would be the same as last month, asking the Board if that was a fair assessment. The chairman said the best way to determine that would be to take a vote and decide if there is any other substantive discussion. **Chairman Powelson called for a roll vote on the motion to deny the appeal. Howard Pearl – no; Jon Huntington – yes; George Saunderson – yes; Ned Lizotte – no; Dave Powelson – yes; 3 Yes – 2 No; motion for rehearing denied.**

Roy Merrill and Roy Maxfield returned to the Board.

IV. PUBLIC HEARINGS:

Case # 06-10 William Taranovich - Special Exception - Map 21, Lot 23. David Dolan, surveyor, represented Mr. Taranovich and Dan Aversa. Mr. Dolan explained the purpose of the

special exception. Mr. Taranovich has a minor subdivision application before the Planning Board, with the access to lot #2 being a common driveway that goes through lot #1. The special exception has been requested because the driveway crosses the side setbacks in each lot. There would be a 50' easement across the abutting lot for the driveway to lot #2. Mr. Dolan stated that the Zoning Ordinance allows a driveway to serve 2 or more lots. They have been to the Planning Board and to this Board last month. The driveway would be kept in the easement, out of the 75' buffer for the adjacent wetlands. There is an existing driveway that was roughed in a couple of years ago.

Jon Huntington asked Mr. Dolan to point out Wiggins Road on the plan. Mr. Dolan showed the road and wetlands. Roy Merrill said one of the first comments made by Dan Aversa at the site walk was that he would prefer accessing lot #2 from Wiggins Road but he would have to bring it up to town standards. Mr. Merrill said it appears that it would basically need one culvert and has minimal wetlands. He said that Julie Robinson of the Conservation Commission had no problem with that. That would require no special exception and would not involve the steep slopes. Mr. Merrill said another reason for feeling Wiggins Road access was the better choice is that the land across the road from this piece is for sale which means there will be more development on the road. He said he, other Board members, and Julie Robinson walked Wiggins Road and found that this lot is a short distance from a house with power so it would make sense for this lot's driveway to come off Wiggins Road and bring Wiggins Road up to a driveway standard.

Dan Aversa stated that he did not say that Wiggins Road was his first choice. Mr. Merrill said that was the first thing Mr. Aversa had told the group. Mr. Aversa said that soil scientist Peter Schauer agreed that the common driveway was a much better option with less impact than accessing from Wiggins Road would have. He noted the dog kennel that sits so close to Wiggins Road, saying no one would want to pass that daily. Mr. Merrill mentioned a recent minor subdivision by the Gay family on Wiggins Road which would lead him to believe that Wiggins Road will get built up and that area of the culvert and terrible wetlands that the group couldn't see will be addressed regardless. Mr. Aversa asked if the Gays would access the new lot from Bee Hole Road. Mr. Merrill said they would access from Wiggins because the lot is on the corner and runs up the land that is for sale. Mr. Aversa asked where the driveway to that lot would be and Mr. Merrill said there was nothing in at this point. Mr. Aversa stated that he had talked with Joe Bohi and he had said that Wiggins Road is very ledgey and doesn't think you would ever see it as a town road.

Mr. Aversa stated that the common driveway would have the least impact. Ned Lizotte disagreed with him, saying he had come in from Route 129 on Wiggins Road and found it to be in fairly good shape. Mr. Lizotte noted there is already a house and power out there and two for sale signs, all making it seem so clear to come in from that way. He said he also walked the other side. Mr. Lizotte said accessing Wiggins from Route 129 would make sense because the road before this property had no issue of wetlands and with regard to drainage it seemed fine. Dave Dolan asked to clarify that Mr. Lizotte was suggesting coming in from Route 129. Mr. Lizotte confirmed that to be what he meant, saying that Wiggins is a passable road and goes to the beginning of this property. He said they would not need any variances or special exceptions. Mr. Aversa said the reason everyone favors accessing through Lot #1 is that it keeps them away from the wetland area whereas accessing from Wiggins takes them right through the wetlands. Mr. Lizotte said it is an alternative to having a common driveway; Lot #1 would have Bee Hole access and Lot #2 would have Wiggins access from the 129 side without any special exceptions.

Mr. Merrill said he was totally surprised when he walked Wiggins Road from the Bee Hole end, saying there was one little rise and then it was almost flat near this piece. An unidentified man in the audience interjected with his thoughts on the road and shot accusations of not knowing what he was talking about at Mr. Merrill. Mr. Merrill attempted to clarify to the man what area of the road he was discussing. Dan Aversa asked to set that

matter aside. He said he has talked with Chester Gay about bringing Wiggins Road up to town standards, noting that Mr. Gay said he was deeding some of his property to his son, and Mr. Gay told him if he needed more property to accomplish the road width it was going to be pretty expensive. Mr. Aversa said putting that with the matter of the barking dogs and what his experts have said makes the original plan the better option. Ned Lizotte said those were great points but once again suggested looking at accessing from the 129 end of Wiggins. Mr. Aversa asked if Mr. Lizotte knew how far that was. Mr. Lizotte reviewed what he had said about coming in from that end saying there was already power lines going to a house a few hundred feet from where this property is, the for sale signs across from this property, and the road already being in decent shape so requiring less to bring it up to standard.

Roy Maxfield stated that he does not like the plan. Mr. Aversa asked him if the issue is the wetlands or wanting him to come in from 129. Mr. Maxfield said the issue is the driveway going through the slope. Roy Merrill said he knows enough about contracting that getting a 12' driveway in that road would be very minor and to say they would have to buy land from another owner is untrue. He also noted that there is already a right of way through there. Dave Dolan said he had recently walked the road and there was standing water on the opposite side of Wiggins Road from this property, saying water to water leaves about 15' of road. He also said the average width is 33'. Mr. Merrill said there is no slope on either side of the road and they could easily get the 12'. Mr. Dolan said he believes they would have to bring the road to town standards. Mr. Merrill said he disagreed and there is other access noting the Decato property that has ample frontage on Route 106 but they couldn't access from 106 so they came in from Chichester Road. He said it is his opinion if this lot is to be sub-divided it should be accessed from Wiggins Road. Dan Aversa said it made sense to come in from Route 129 if that is dry but coming from Bee Hole is too wet. Mr. Merrill said he disagrees that the area is as wet as being said and reported that even Julie Robinson was amazed at the issue being made about the wetlands. Mr. Aversa said he was going by what the experts are saying about the area.

George Saunderson asked if the Conservation Commission had a problem with the driveway plan. Mr. Dolan said they did because they are within 75' of the wetlands. Mr. Aversa said the Planning Board told them they are allowed to do the driveway plan but they needed to come to the ZBA for the 30' crossing of setbacks. Chairman Powelson asked how much of the wetland buffer they are crossing. Mr. Dolan outlined the wetland buffers on the plan, saying they would stay as far out as possible and have minimal impact on the wetlands. He said by definition driveways are not structures, therefore they are allowed to cross slopes. Mr. Aversa said he would like to have that option but will also look at the other end of Wiggins. Ned Lizotte said they may have to do some clipping but he believes it has value as an access.

The chairman asked if there was anyone who would like to speak in favor of the application. Bob Ordway stated that the Planning Board had walked the property and approved the plan. He said Wiggins is not much of a road once east of the houses and said the group must not have walked the whole section or they would have seen a wet hole where horse manure has been dumped on the road. Peter Schauer is the one to be listened to Mr. Ordway said. Mr. Merrill said the wetlands shown on the map are not nearly the size of wetlands near the driveway. Mr. Ordway also referred back to the case that Mr. Merrill had mentioned about a piece on Wiggins being subdivided saying there is no plan to subdivide that piece or ask for a driveway. Mr. Merrill said he felt the Planning Board should have sent the Gay case to the ZBA, noting that Wiggins Road has been there since the 1800s so one more month to properly decide a case should not have been a problem.

Mr. Aversa mentioned junk and dogs on the neighbor's property as deterrents for the sale of his lots. He asked the Board for the 30' in case approaching from 129 does not make sense, saying he does not want to have to come back to the ZBA. Ned Lizotte said

the back corner of the property is dry and in fairly good shape and he is not a soil scientist but it is clear to him that access to the building area seems to make more sense from 129, noting that it does not seem to have the complications that the other plan does. Mr. Lizotte stated he is not in favor of common driveways because of potential boundary issues.

The chairman asked if there was anyone who would like to speak against the application. There was no one. Dave Dolan said it is his understanding that a Class VI road would have to be upgraded to town standards. Dan Aversa said he appreciated the Board bringing up the other option but he is here to decide on 30' area of setback if he has to go that route. He did agree to look at the approach from 129. Jon Huntington asked if the Planning Board approved three lots. Mr. Dolan said two lots were approved, pointing out each on the plan. Roy Merrill asked if the PB gave them a contingent approval. Dan Aversa said they received approval contingent on getting the ZBA approval of crossing the setbacks. Mr. Dolan said the PB told them to go to the ZBA and then come back to them. Mr. Merrill then clarified that they do not have PB approval if they were told to come back with the ZBA ruling. Mr. Aversa said if the ZBA gives them the 30' then they are approved. He also said they have been working on this a long time, trying to do what everyone has asked. George Saunderson asked how much frontage each lot has on Bee Hole Road. Mr. Dolan stated that each lot has about 300'. Mr. Saunderson said it would appear that Lot #2 would have about 450' along Wiggins Road and he asked if the intention is to divide Lot #2. Mr. Aversa said there was no such intention. Chairman Powelson closed the hearing; case to be brought back up under Unfinished Business.

Case # 06-11 Karl Colby – Special Exception for Reduced Setback – Map 29, Lot 52. Mr. Colby explained his request for a special exception due to a lean-to on his garage being 5' short of the side setback. Chairman Powelson read a letter from Ronald McCoo whose property abuts the area of the lean-to. In the letter Mr. McCoo stated that he has no problem with Mr. Colby's request. Roy Merrill asked where the property is located. Mr. Colby said it is Hoit Road, School Street. Roy Maxfield said he has seen the garage and lean-to and had suggested to Mr. Colby that he go before the Board to avoid any future problems. Mr. Colby stated that Code Enforcement Officer Fiske told him that a fence put up by Mr. McCoo several years ago is fairly accurate at the property line. Mr. Maxfield said the area is about the only option on the property due to the septic system and well and he has no issues with the request if Mr. McCoo does not. George Saunderson asked if there was a foundation. Mr. Colby said there is no foundation, just a lean-to with four posts.

The chairman asked if all abutters had been notified. The secretary reported that they had. Mr. Colby asked a procedural question with regard to abutter notification, asking how one can abut oneself and have to send notification. Mr. Merrill explained the legal need for self notification. Chairman Powelson asked if there was anyone who would like to speak in favor of or against the application. There was no one. The chairman closed the hearing; case to be brought back up under Unfinished Business.

V. UNFINISHED BUSINESS

Case # 06-10 William Taranovich - Special Exception - Map 21, Lot 23. Roy Maxfield made a motion to deny the application. Seconded by Roy Merrill. Mr. Maxfield said he has reluctantly listened to the wetlands group in the past but with the town having approved the wetlands section to the Ordinance he now feels the Board has to listen to them. Ned Lizotte said there is another alternative that needs to be addressed first. Roy Merrill said he feels they could easily put a driveway in from Wiggins and if they can't do it but can show a reason or hardship that they can't then they have the right to come back but their first obligation is to go that way which in the long run would make more sense for the town. George Saunderson said Mr. Merrill's response seems reasonable to him. Jon Huntington

agreed. Howard Pearl said there seems to be a reasonable alternative. Chairman Powelson stated there is a motion to deny this application, based mostly on concerns of the Conservation Commission with regard to the impact on the wetlands and wetlands buffer zone. Mr. Lizotte said it was that as well as other alternatives to access the larger lot without having a common driveway. Jon Huntington asked if that motion is made with Roy's comment is that giving Mr. Aversa false hope, that if he can't come in from Wiggins Road he can come back to the Board and expect to get a permit. Mr. Maxfield said that was not part of his motion. Mr. Merrill said he did not make the comment as a motion. ***The chairman asked for a roll vote on the motion to deny the application. George Saunderson – yes; Roy Merrill – yes; Ned Lizotte – yes; Roy Maxfield – yes; Dave Powelson – yes; Unanimous; application for special exception denied.***

Case # 06-11 Karl Colby – Special Exception for Reduced Setback – Map 29, Lot 52. Roy Maxfield made a motion to approve the side setback reduction from 30' to 25' for the purpose of an addition to his barn. Seconded by George Saunderson. The chairman asked if there was any discussion. Mr. Merrill stated it is more than reasonable, that 5' is not a big deal particularly if the neighbor is in favor of it. Mr. Maxfield said Mr. Colby has done a lot of work to the property and it all enhances the piece. ***Chairman Powelson called for a roll vote on the motion to approve the application. George Saunderson – yes; Roy Merrill – yes; Ned Lizotte – yes; Roy Maxfield – yes; Dave Powelson – yes; Unanimous; application for special exception for reduced setback granted.***

VI. DISCUSSION:

Roy Maxfield asked to address the matter of one Board member with a personal agenda and asked the Board to have the member removed for causing discontent, aggravation, and malfeasance. He cited a couple of examples of behavior he feels is unacceptable. Mr. Maxfield said he would put that as a motion even though he doesn't expect anyone to vote for it but he wants it on record. Jon Huntington seconded the motion to allow for discussion. There was discussion and rebuttal amongst the Board members after which Mr. Maxfield withdrew his motion.

VII. ADJOURNMENT:

George Saunderson made a motion to adjourn this meeting at 8:50 p.m., seconded by Ned Lizotte. All were in favor.

Respectfully submitted,

Donna White, Secretary