

**Town of Lyme**  
**LYME ZONING BOARD OF ADJUSTMENT**  
**Minutes – June 15, 2017**

**Board Members:** Present - Frank Bowles, Rob Titus, Alan Greateorex

Absent: Walter Swift, Bill Malcolm

**Alternate Members:** Michael Woodard, Dan Brand

**Staff:** David Robbins, Zoning Administrator; Adair Mulligan, recorder

**Public:** Jackie Glass, Dave Shafer, John Campbell, Philip Elder, Susan MacKenzie, Jane Levey, Aaron Rich, Bret Ryan, Barry Schuster, Joseph Miller, Barbara Woodard, Peter Hutchins, Chris Jackson, Rusty Keith, David Roby, Russell Barnes, Karen Menge, Michael Whitman, Patience Rich, Earl Strout, Kris Pekala

Chairman Frank Bowles called the meeting to order at 7:30 pm. He appointed Dan Brand to sit as a regular member on all three cases and Michael Whitman to sit as a regular member on the Miller and Menge cases, understanding that Michael would recuse himself for the Hutchins case. The minutes of the meeting of February 16 were approved on a motion by Alan seconded by Rob. The minutes of the meeting of April 20 were approved on a motion by Rob seconded by Mike.

**Application #2017-ZB-28, Joseph Miller (Tax Map 402 Lot 48)**

Joseph Miller has applied to the Lyme Zoning Board of Adjustment for Special Exceptions under sections 4.62 B 2 and 8.24 to replace a failing septic system on his property at 28 Shoestrap Rd in the Rural District. The proposed replacement system will be within the Steep Slopes Conservation District. The house, built in 1968, sits on 7 acres of land. The house and current septic system are located in the steep slopes conservation district.

- The actual lot size is 307,603 sf.
- Steep slopes =  $188,491 * 80\% = 150,793$  sf.
- Local Ag Soils =  $22,928 * 40\% = 9,171$  sf.
- Total reduction = 159,964 sf. The lot size after conservation district reductions is 147,639 sf.
- Max building footprint = 2,953 sf.
- Max lot coverage is 17,717 sf.
- The current house has a footprint of 2,060 sf; with a 480 sf deck, the lot coverage is 2,540 sf.

Joseph explained that his septic system is failing, and his septic designer has conducted perc tests and identified a good location that could allow a Presby gravity fed system and use the existing tank. David Robbins produced a letter from the Planning Board supporting the proposal and considered the location appropriate as long as conditions are applied requiring best management practices for erosion control. The area above the house is not steep but would require a pumped operation; both the designer and the state prefer a gravity-fed system.

Deliberations: Alan moved to grant a special exception under sections 4.62 B 2 and 8.24 to replace a failed septic system within the steep slopes conservation district with the following findings of fact:

- Replacement of the system is allowed by special exception
  - There is no other reasonable location for the system
  - The application meets the test of section 8.24A (except that the board cannot guarantee state approval) and B; sections C through E do not apply
  - Conditions of section 10.40 are met;
  - The Planning Board has approved the placement.
- Conditions:
- The applicant will use best management practices with significant attention to the potential for erosion

Mike seconded the motion and it was unanimously approved.

Out of Deliberations

**Application #2017-ZB-29, Peter Hutchins (Tax Map 401 Lot 42)**

Peter Hutchins has proposed to construct a new covered porch (32' X 8' = 256 sf) with stair case (6' X 12' = 108 sf) at the rear of the house and a new entry way (16' X 7' = 112 sf) on the east side of the house on his property at 36 Goose Pond Road in the Rural District. The total new additional footprint and lot coverage will be 440 sf. His property is a .5 acre lot (21,780 sf) with a small portion of the lot in the Shoreland Conservation District (3,633 sf). The lot calculation is as follows:

- $21,780 - (3633 * 80\%) = 18,874$  sf.
- The allowed lot coverage is  $18,874 * 12\% = 2,265$  sf.
- The allowed building footprint is  $18,874 * 6\% = 377$  sf.
- The existing house was built in 1965 and has existing footprint of 1024 sf.
- Due to the small size of the property all the AG soils on the property are excluded by the pre-zoning building zone.
- The lot is approximately 117 feet deep across the center of the house; the proposed new construction will be in both the road setback and the rear property line setback.

Alan offered a correction in the calculations based on the updated drawing that was submitted to the board, noting that the 6'x10' staircase would be 60sf, not 108sf, so the actual proposed increase in lot coverage is 421sf, which does not exceed the allowable lot coverage. Rob asked if the house is located on the westernmost part of the lot. Peter said that it is. Frank noted that Mike has recused himself and asked Peter if he will accept the determination of a four-person board, and Peter accepted. David Robbins noted that his measurement of distance from the centerline of the road was calculated using the aerial photograph. Mike said that he had physically measured the distance using a 200' tape. Peter said he had had no concerns from abutters, and David said he had sent the notice to Hanover abutters and received only a comment from Jim Kennedy, who expressed an interest in having the yard light removed.

Deliberations: Alan moved to grant special exceptions under sections 8.22, 8.23, and 8.25 to add a covered porch, entry way, and stair case within the road setback and the rear property line setback, with the following findings of fact:

- The additions will consume 421sf of the allowable 1,000sf of footprint expansion permitted by special exception for a non-conforming structure
- Total lot coverage will increase from 1,024sf to 1,445sf
- The intrusion into the front and rear setbacks will increase by 421sf
- There is no other possible location for the additions due to the location and size of the lot
- This will leave 579sf for future expansion.
- Conditions of section 10.40 are met

Conditions: best management practices will be used, and the applicant will consider the possibility of removing the light. Rob seconded the motion and it passed unanimously.

Out of Deliberations**Application #2017-ZB-30, Karen Menge and Peter Fritz Feick (Tax Map 401 Lot 53.1)**

Karen Menge has appealed to the Lyme Zoning Board regarding a decision of the Lyme Planning Board to approve a site plan for Holt's Ledge LLC for the property at 65 Dartmouth College Hwy, Tax map 401 Lot 53.1 (AKA Maxfield's) to convert the use of two of the buildings on the property to offices. The existing buildings are scheduled to be replaced under section 8.27. Both buildings were non-conforming due to setback intrusion. The Planning Board approved the submitted site plan on April 11, 2017.

David noted to the board that the Planning Board is allowed to approve the conversion of a non-conforming business use to another type of business use under section 8.12 during site plan review, provided the intensity of use does not increase. During the Planning Board meeting on April 25, 2017, David Roby and Karen's brother, Richard, requested that the Planning Board re-hear the application. The Board declined to re-hear with a 2-2 vote. Karen has appealed to the Zoning Board under RSA 676:5 III, as an appeal of an administrative decision.

Frank expressed his intent to conduct a transparent hearing and reported that in advance, the board had requested counsel on how to evaluate the appeal. He proceeded to read into the record the advice sent by town counsel, as follows:

"I think the ZBA has two reasonable options on how to proceed given the new information not reviewed by the PB when it made its May 11 decision:

1. Consider all relevant information in reviewing the PB's decision, including any new information that the PB did not have the benefit of at the time of the PB's decision; or
2. Remand the zoning related issues back to the PB, to allow the PB to hold another duly noticed hearing to review all of the purportedly new evidence and reach a more informed decision. If the abutters are still unhappy with the more informed PB decision, they may again appeal back to the ZBA any issues related to the interpretation of the ZO.

My preference and suggestion would be for option #2, to allow the PB to hear all relevant information before making the decision, because I believe the PB should have the first crack at hearing the evidence and interpreting the ZO in the context of the site plan review application. However, the ZBA could choose to rule on the zoning related arguments and not require the extra steps of going back to the PB." (Steven Whitley to David Robbins June 5, 2017)

Frank continued that the ZBA may hear and rule on the interpretation of the Zoning Ordinance but not on issues associated with interpretation of Site Plan Review. Those issues could be raised in Superior Court. Frank said that the ZBA could accept the charge of dealing with additional information or could send it back to the Planning Board if new information is available. The board then agreed among themselves to proceed with the hearing.

David Roby said that the Planning Board did not do a proper job when it heard the case and suggested sending the case back to the Planning Board so it could thoroughly review the project. He added that in this case, Karen Menge's brother Rich Menge could also attend. Rob Titus asked Karen whether she had new evidence to provide.

Karen compared the proposed new use with the previous use (gas station, steel building business) and said that she had new evidence regarding the frequency and intensity of prior use, and the scope of the business. The gas station was discontinued in 2009. This was not presented to the Planning Board. She noted that section 8.27 of the ordinance also states that new violations cannot be created, and said that the Planning Board had not evaluated this. She cited the May 25, 2017 Planning Board minutes regarding keeping a grandfathered use so that the town could retain more businesses, although she believes that these businesses will result in an increased intensity of use. Regarding hours of use, she said she could not measure prior use, but noted that there had been only one employee, which would have limited the use. Rob asked if Karen intends to propose more evidence, and Karen said she does. Frank observed that it appears there are more data that the Planning Board should consider.

Karen continued that a drive is proposed on an area that appears, according to her deed, to be on her land. Frank noted that this question could best be resolved by a surveyor. Karen asked why a change of use was not addressed when the construction permit was issued. David Robbins replied that the project was not presented as a change of use, adding that the former gas station building would be removed before the new buildings can be occupied. Karen pointed to section 8.13, noting that the gas station business had been discontinued in 2009, more than 24 months ago. She cited section 4.46, observing that one of the buildings that was removed was a three-sided shed with no utilities, but is now proposed as a primary structure. She concluded her presentation, agreeing that her other questions are site plan review issues. She did note that Section 7.22 requires screening, which exists primarily on her property. She asked if this means that she will have to maintain screening on her side of the property line. Frank said that the Planning Board has already spoken to that. Karen recalled that there was scant discussion of it. David observed that Karen had not been present at that meeting, and so the board did not have as much information.

Frank invited the public to contribute pertinent information. Attorney Barry Schuster, representing Bret Ryan, said that adequate information should have been provided to the Planning Board in a timely manner. He asked that the request for an appeal be denied since the Planning Board went through its process.

Frank expressed concern about whether the Planning Board had fully considered section 4.46A of the ordinance, and read this and the other elements of that section for the benefit of the public in attendance. Alan added that the intent of that section, as noted in the ordinance, is to encourage the ongoing viability of older buildings in Lyme, but that in this case, the older buildings will be removed as part of the project. In reply, David noted that the use is being converted but not the structures because the applicant has chosen to make his conversion using section 8.12 rather than section 4.46. It was noted

that the primary structure on the lot is the main residence, which is conforming, plus two grandfathered nonconforming business use structures and a conforming accessory dwelling unit.

Rob reminded that the ZBA's role is de novo review, and that the board can send the application back to the Planning Board if it believes more information is needed. Frank then read into the record town counsel's reply to a question from Frank about the advisability of the ZBA hearing testimony that should properly fall into the area ruled on by the Planning Board:

"I understand your concern over option 1, and to be clear, for much the same reasons you identified I recommend option #2 over #1. This said, I do believe that option #1 is available to the ZBA. There is no statute or court case that directly speaks to this question. However, I believe the ZBA's authority to hear administrative appeals includes the ability to rule on questions of interpretation even when the PB did not have all of the same information that is before the ZBA. RSA 674:33 is the state statute that gives the ZBA its authority to hear administrative appeals. See RSA 674:33, I(a) (hear and decide appeals made by administrative official regarding interpretation of the zoning ordinance). That statute also spells out the powers that ZBA may employ in hearing those appeals: "In exercising its power under paragraph I, the zoning board of adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from *and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.*" RSA 673:33, II. I believe the italicized language which is fairly broad provides the ZBA authority for option #1.

"Generally, the statutory process envisions the ZBA making the final decision on all zoning related interpretations at the local level. This is why zoning related appeals from various administrative officials must go to the ZBA prior to being reviewed by a court so that the ZBA has the ability to confirm or correct the zoning interpretation of the administrative official prior to court review. Because the ZBA has the final say at the local level on zoning related questions, it could review the administrative official's zoning interpretation, and even consider new evidence in deciding how to interpret the ordinance at the local level. It would seem to elevate form over substance to obligate the ZBA to send this back to the PB, when the ZBA is perfectly capable of rendering an informed decision on how to interpret the ordinance based on the limited record from the PB as well as the new evidence presented with the appeal." (Steven Whitley to David Robbins June 9, 2017)

Deliberations: Rob Titus moved, pursuant to zoning board authority under RSA 674:33 and RSA 676:53, to remand this appeal to the Planning Board for consideration of possible additional evidence regarding sections 8.12, 8.13, 8.27, and 4.46 of the zoning ordinance, noting that any additional evidence regarding site plan review is outside the Zoning Board's purview. Frank seconded the motion and discussion ensued. Frank asked how the Planning Board reconciled section 4.46A with the project plans, and said he did not like adding to delay, but thought it should be addressed. Mike Woodard said he thinks this is a slippery slope, and could drag out the approval process with potential dramatic effects. The board voted unanimously to approve Rob's motion.

Out of Deliberations: Alan asked whether the board should offer instructions to the Planning Board. Frank recommended that the Planning Board consider how to resolve 4.46A especially, along with the other questions, and consider all evidence put forth by both sides. Speaking as a private citizen, Frank urged Karen Menge to work with the applicant so that a new business could function in Lyme in a way that works for her as an abutter. David said that the next Planning Board meeting at which this case could be heard would be July 13, and asked Karen to submit her information. Rob advised Karen and the applicant to explore mediation. Frank concluded with his hopes that there will be a major improvement over what previously existed on the site.

Meeting adjourned 8:58pm  
Respectfully submitted,  
Adair Mulligan, Recorder