

Town of Lyme
LYME ZONING BOARD OF ADJUSTMENT
Minutes – February 21, 2019

Board Members: Present - Frank Bowles, Bill Malcolm, Sue Ryan, Alan Groatorex; Absent - Michael Woodard

Alternate Members: Present - Lynne Parshall

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

Public: Carola Lea, Darrell Hotchkiss, Gillian Tyler, Olivia Chapman

Chairman Frank Bowles called the meeting to order at 7:32 pm.

The minutes of the meeting of January 17 were approved on a motion by Bill seconded by Sue. Frank appointed Lynne to sit as a regular member.

Application #2019-ZB-06 – Carola Lea (Tax Map 404 Lot 16) 522 River Road

Carola Lea has applied for a variance from sections 5.11, 5.12, and 5.14 to permit a two-lot subdivision creating a 2.5+ acre residential parcel with existing improvements and a 100.5+ acre parcel previously identified in and subject to a Conservation Easement. Section 5.11 requires a minimum lot area of 3 acres. The 2.5+ acre residential parcel with an existing home would have 201.5 feet of frontage. Section 5.12 requires a minimum of 300 feet. The existing house would exceed the maximum building footprint for the subdivided lot, requiring a variance from Section 5.14 (maximum building footprint). The property is located in the Rural District.

Attorney Darrell Hotchkiss explained that when Carola purchased her River Road property in 2000, she immediately placed a conservation easement on it with the Upper Valley Land Trust. The easement covers the entire property including a homestead area of approximately 2.5+/- acres that, in his words, was crudely delineated with a sharpie on a map recorded with the easement. The homestead area is excluded from the protections that apply to the rest of the acreage. The easement prohibits subdivision. The property was subsequently surveyed. Carola has put her home and the attached protected property up for sale but is having trouble finding a buyer interested in purchasing land over which they would have no control.

Atty. Hotchkiss said that Carola believes in active farming and wants the neighboring Tullar family to be successful. She wants to see her farmland used, and has given the Tullars a use easement on 25.1 acres of tillage. There is also a stone quarry (source of materials for the neighboring stone Tyler home) and a public trail on her land. She pursued trying to merge the easement land (outside of the homestead area) with the Tullars' land, which is also conserved, but as their easement was held by the Society for Protection of NH Forests and Carola's by the Upper Valley Land Trust, neither land trust could accept this solution.

The NH Attorney General has refused to allow Carola and UVLT to modify the easement by permitting subdivision but Atty. Hotchkiss indicated that this position would likely be modified to allow subdivision if UVLT had title to the property. UVLT staff have indicated an interest in acquiring title to the protected portion of the land, but Darrell cautioned that UVLT's board is waiting to confirm this interest until a path forward is permitted by Lyme planning and zoning boards. UVLT would agree to allow the subdivision of the homestead area from the rest of the acreage, as the purpose of the easement is to protect farming.

Atty. Hotchkiss noted that all neighboring homes, except for the Parsons property to the south, have less frontage on River Road than is proposed with this application. He added that at the time the easement was placed on the land, the economics of farming on this parcel were not evaluated. Discussion ensued on that point, and Adair Mulligan pointed out that the Upper Valley Land Trust is known throughout New Hampshire and Vermont today for its expertise in crafting easements that address farm economies, but that such expertise had not been developed at the time of Carola's grant of the easement..

Frank suggested crafting a single variance for all the affected areas of the ordinance with the condition that the property outside the homestead area go to UVLT. Bill Malcolm asked if more road frontage could be included. Atty. Hotchkiss said that all other frontage associated with the property is subject to the protection of the easement. Frank pointed out that

there are areas nearby that are threatened with erosion from the river, and that in the future some of this land could be taken by eminent domain should River Road have to be moved, as in a previous project just south of this property.

Bill asked about the hardship claimed. Atty. Hotchkiss said that the situation was self-created with the cooperation of the land trust, an arrangement that has made the property unmarketable because the farmland does not support the house on the property. He said that the proposal is dimensionally in keeping with the surrounding neighborhood and that Carola receives no lease payment from the Tullars for use of her land. He added that she will likely never recover her investment in the house, an historic structure that dates from 1808. Approval of the Lyme Planning Board and UVLT board will also be needed for a subdivision to move forward. Bill asked if the house will have a clear title. Atty. Hotchkiss said that UVLT has indicated that it would grant a partial release of the easement on the homestead area. Sue Ryan asked where the septic system and well are located, and if there is room for a replacement system in case it fails. Atty. Hotchkiss said that these are located on the 2.5 acre area and that he believes the septic system could be replaced in situ. Discussion turned to the driveway, which also serves a neighbor. The edge of the right of way was used for the survey.

Some board members expressed dismay that neither UVLT nor the NH Attorney General's office would permit a change in the easement unless UVLT had title to the larger, conserved, portion of the property. Bill asked why UVLT didn't follow the Lyme Zoning Ordinance's guidelines for minimum residential lot size in this district when identifying the homestead area. Adair noted that conservation easements are written to be perpetual, but towns can change their zoning ordinances and minimum lot sizes at will, and suggested that because the easement was written to preclude subdivision, the size of the homestead lot likely was not a consideration at the time. She explained that the Charitable Trust Unit of the NH AG's office has control because the 2000 transaction had tax implications that the IRS will not ignore, and that amendments to conservation easements therefore cannot result in diminished protection for the area covered by the easement. She thought that UVLT's offer to acquire the land outside the homestead area provided a good solution to a difficult situation.

Deliberations: Sue expressed frustration with the difficult situation and said she had explored whether an equitable waiver could be used, concluding it could not. She said she had trouble with the request to create a non-conforming lot, but noted that Carola has been extremely generous in her land management. Lynne Parshall asked what the down side of the proposal might be, since the house and land will remain exactly as they are. A new lot is not being created that could be put up for sale and development, thanks to the conservation easement. Bill asked what UVLT would do if it owned the land, and asked if they would subdivide the parcel and sell it for development.

Out of deliberations: Adair said that most easements include language allowing a land trust to acquire fee interest in land they already protect through an easement, but that the original purposes and restrictions of the easement remain in effect. UVLT would not be able to subdivide or sell the land for development, or it would risk losing its standing as a non-profit organization and would lose its land trust accreditation.

Atty. Hotchkiss said that approving the variance would not increase the density of the area. Lynne asked if further restrictions would be placed on the homestead area if it is created as a lot and if there is enough useable land to allow the septic system to be replaced. David Robbins said that such a system does not count in the footprint or lot coverage calculations.

Deliberations: Frank noted that the non-conforming lot that would be created is in character with the neighborhood. Sue said that the party responsible for the problem is not being held accountable. Frank said that in conserving her land, Carola had proceeded with the best intentions. Lynne said that a three-acre parcel should have been cut out of the easement when it was created, to create a legal lot. Alan noted that the easement qualifies as special conditions of the property and that it restricts any other solutions. He expressed concern about whether the variance would meet the spirit of the ordinance. Bill said he thought UVLT should buy the entire property. Lynne said that the variance meets the spirit of the ordinance because it does not conflict with the ordinance's goal of density control. Bill advised that the board take care not to create setback issues.

Out of deliberations: David Robbins confirmed that all buildings on the homestead area are pre-existing, nonconforming buildings. Members consulted the Rollins survey and identified a small shed near the driveway that is 20 feet from the proposed property line that would require a variance from section 5.13 as well. David reported that he had received emails

from two abutters in support of the variance request, and that Mike Smith had told him he supports it. Gillian Tyler, an abutter, said she supported the variance.

Deliberations: Frank advised that the board proceed with a multi-pronged variance with provisions. He said he believes no violence is being done to the ordinance by granting these variances, because there will be no ostensible changes to the property. Bill moved to grant a variance to the following sections of the Lyme Zoning Ordinance to permit a two-lot subdivision creating a 2.5+ acre residential parcel with existing improvements and a 100.5+ acre parcel subject to a Conservation Easement: Section 5.11 (Lot Size), 5.12 (Road Frontage), 5.13 (Setbacks), and 5.14 (Building Footprint). He listed the following findings of fact in addressing the tests of Section 10.50:

- (1) the variance will not be contrary to the public interest because testimony has been received that use of the land will not change; indeed, because of the existing conservation easement, there is no possible change in use
- (2) the spirit of the ordinance will be observed because the property cannot be used differently given the conservation easement
- (3) substantial justice will be done because no change will occur in the use of the property
- (4) the values of surrounding properties will not be diminished; testimony has been received from a number of abutters in support of the application
- (5) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, due to the fact that the conservation easement was drafted without foresight to the zoning ordinance in place at the time.
- (5Ai) there is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property
- (5Aii) The proposed use is a reasonable one as it will continue to be the same as at present.
- The variance will result in a 2.22 acre residential parcel laid out with 205' of frontage and 2,281sf of lot coverage
- The variance will provide for setbacks for existing structures on this property
- Reference is made to the Plan of Carola B. Lea Trust, dated April 29, 2013 and stamped July 17, 2014 by Rollins Survey, which shall control the boundaries of the new lots

The following condition was specified:

- The 100 acre lot of land will be conveyed to the Upper Valley Land Trust within two years of approval.

The board then proceeded to vote on each finding within Section 10.50:

- (1) the variance will not be contrary to the public interest – the board voted unanimously to agree
- (2) the spirit of the ordinance will be observed– the board voted unanimously to agree
- (3) substantial justice will be done – the board voted unanimously to agree
- (4) the values of surrounding properties will not be diminished – the board voted unanimously to agree
- (5) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. – the board voted unanimously to agree

Alan seconded the motion and it passed unanimously.

The board voted to authorize Frank to distribute draft minutes to all members for review before finalizing them, on a motion by Bill seconded by Alan. David confirmed that this procedure is acceptable.

Out of deliberations

Meeting adjourned 9:02pm
Respectfully submitted,
Adair Mulligan, Recorder