

Arundel Zoning Board of Appeals
Minutes
June 19, 2019

Members Present: Paul Chansky, Chairman; Raffaella Reimer, Vice Chairman; John Bell and Steven Dalzell

Members Absent: Joanne Grace and David Berg

Also Present: Jason Labonte, Applicant; Sheila Wells; Jeff Wells; Leah Rachin, Town Attorney; James Nagle, Code Enforcement Officer and Wendy Lank, Recording Secretary

1. Paul Chansky opened the meeting at 7:00 P.M. in the Library of the Mildred L. Day School.
2. **General Variance Application – Home Innovations, LLC, Owner; Jason Labonte, Applicant – 422 Limerick Road; Map 27, Lot 5A; Zoned R-1**

Chansky explained the Public Hearing process and then asked the Applicant to go through his submission with the Board.

Jason Labonte stated that after a mortgage survey was completed by their bank it was found that they did not meet the front yard setback by 4 ½'. Labonte stated that they assumed the width of the right of way was 50' and did not realize that this section of road consisting of about 1,000' has a 66' wide right of way. Labonte stated that he is in front of the Board to ask that a variance be granted in order for him to be in compliance. Labonte stated that this house is set back as far as anyone else's on this stretch of road.

Labonte stated that he was in front of the Board tonight to ask for a 4 ½' front yard setback variance so that the front of the garage does not have to be cut off.

John Bell asked Labonte why a survey hadn't been done prior to them constructing the home.

Labonte stated that he took the measurement starting at monuments on the opposite side of the road and felt that he was safe. Labonte stated that he intentionally set the house back farther as to be sure he met the appropriate setback for the R-1 zoning district that they are in.

Chansky asked about the width of the right of way and why there was a difference. Labonte explained that Limerick Road is wider at that section of road because there use to be a train track where the Eastern Trail is now and that a bridge crossed the road at that location.

Steve Dalzell stated that when he went on the site walk earlier that evening he took note of the placement of the utility poles. Dalzell stated that utility poles are usually in the town's right of way and is an indicator that is a right of way.

Labonte stated that polls can be placed on private property and these could have been placed there years ago. Labonte stated that CMP poles are pretty hard to judge.

James Nagle, Code Enforcement Officer for the Town of Arundel says he has to differ on what Mr. Labonte said. Nagle stated that 9 times out of 10 utility poles are within a public right of way.

Raffaella Reimer asked Labonte what he missed in order to be in front of the Board tonight.

Labonte stated that normally they do not do title searches on roads. He stated that they do conduct title searches on all properties they buy but those titles do not state the width of the right of ways that they abut.

Reimer asked why he hadn't done a survey. Labonte stated that most builders figure out where the corners are and most typically will not spend the \$2,000 - \$3,000 to have a survey done and he thought there was enough monumentation. He said a lot of it is about keeping the cost down.

There was a lengthy conversation between the applicant, the potential buyers of the property and the Board, about right of way widths and required setbacks

Nagle stated that when Labonte submitted his Building Permit Application, a site plan was also included and it showed the building to be within the building window.

Nagle stated that Labonte came into his office in April and told him the bank survey that was conducted shows they did not meet setback. At that time Nagle told Labonte that he wanted a survey. Labonte stated that his surveyor also states it does not meet the required setback. Nagle informed him that he needed to apply for a variance and if it was denied by the Zoning Board of Appeals he could then go in front of the Board of Selectmen and ask for a Consent Agreement.

Chansky asked Labonte if he had any closing statements. Labonte stated that the Board can grant up to a 20% variance and that they fell well within that 20%.

Nagle stated that in order to qualify for up to a 20% variance is if he was the property owner and year round resident.

At that time Attorney Leah Rachin stated that Labonte did not apply for a single-family dwelling setback variance. Rachin stated that abutters must be notified of this type of variance as they were notified of a request for a General Variance and they have a right to attend and dispute that.

Jason stated that he did not realize there was a different application and that he was only given the application for a General Variance.

Rachin stated if Labonte would rather apply for a Single-Family Dwelling Setback Variance then he should withdraw his application before the Board tonight. Labonte would need to make application and a Public Hearing Notice be sent to abutters and advertised in the paper. Rachin also noted that in section 11.7 of the LUO, Repetitive Appeals, the Board may not consider a second appeal of the same or similar nature for the same property within two years of the date of a denial of an appeal, unless, in a majority opinion of the Board, substantial new evidence is submitted that the Board's judgment would indicate that an error in law or misunderstanding of facts, has been made.

Labonte asked what the Boards thoughts and feelings were on the whole and entire situation.

Chansky stated that the public comment section of the meeting was hereby closed. Chansky stated that Labonte would have an opportunity to let the Board know of he would like to withdraw the application and proceed with a Single-Family Dwelling Setback Variance.

Rachin stated that there was one criteria that needs to be met for both types of variance requests. Leah suggested that the Board look at this criterion and decided if it could be met for either application.

Chansky stated that because this was not Labonte's "Primary Residence" we wouldn't get to the other criteria.

Chansky questioned the reasonable return criteria. Rachin explained that the Board would need to look at the reasonable return for the property before the house was constructed. The Board agreed that the property could have yielded a reasonable return.

Chansky reopened the Public Hearing to give Labonte a chance to speak.

Labonte stated that when they found out about the setback issue the garage was already built and they have done nothing else to that garage.

Chansky closed the meeting again. Chansky asked the Board Members if they were ready to vote and they were.

The land in question cannot yield a reasonable return unless the variance is granted.

Dalzell made a motion that the land in question can yield a reasonable return because the property is large enough to accommodate a house and garage of that size and still meet the required setbacks. Bell seconded the motion with the vote being 4-0 that this criterion was not met.

The need for the variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.

Dalzell made a motion that there are no archaeological, geographical, or other features that make the property unique from others in the neighborhood. Bell seconded the motion with the vote being 4-0 that this criterion was not met.

The granting of the variance will not alter the essential character of the locality.

Chansky made a motion that the granting of the variance will not alter the essential character of the locality because based on our site walk; we do not believe that the requested 4 ½' variance, if granted, would render the Property inconsistent with the rest of the neighborhood. Reimer seconded the motion with the vote being 4-0 that this criterion was met.

The hardship is not the result of action taken by the applicant or a prior owner.

Bell made a motion that Mr. Labonte conceded that the setback violation was a result of his own mistake. I believe Mr. Labonte was the author of his own misfortune and that he cannot meet this criterion. Dalzell seconded the motion with the vote being 4-0 that this criterion was not met.

Based on clear and convincing evidence presented by the applicant, the proposed use would not cause unsafe, or unhealthful or nuisance conditions.

Chansky made a motion that by granting a 4 ½' variance the proposed use will not cause or result in unsafe, unhealthful or nuisance conditions of the general public or cause the same of their neighbor's properties. Dalzell seconded the motion with the vote being 4-0 that this criterion was met.

Dalzell made a motion that the proposed application fails because it did not meet all five criteria. Bell seconded the motion with the vote being 4-0 that the variance request be denied.

FINDINGS OF FACT

1. On or about March 11, 2019, Home Innovations, LLC became the owner of the Property.
2. Applicant, Jason Labonte is a principal of Home Innovations, LLC.
3. Home Innovations, LLC constructs residential homes.
4. Jeffrey and Sheila Wells entered into a purchase and sale agreement with Home Innovations, LLC for the purchase of the Property.
5. The Property is situated in the R-1 Zone.
6. Under § 6.1.3 of the LUO, the governing front yard setback in the R-1 Zone is 50 feet.
7. During the course of obtaining financing for their purchase of the Property, the Wells' financial institution conducted a mortgage inspection survey. In so doing, it became apparent that the required 50-foot front yard setback was not met because the garage was located approximately 47 feet from the property line.

8. Mr. Labonte advised the CEO of the issue. The CEO recommended that Mr. Labonte retain his own surveyor to get a precise measurement and to confirm whether or not the bank survey was accurate.
9. The CEO specifically instructed Mr. Labonte to halt construction until the setback issue was resolved and advised him that he would be building at his own risk given the setback problem. Mr. Labonte continued with construction.
10. Mr. Labonte retained his own surveyor, who confirmed that the garage did not meet the governing 50-foot front yard setback. According to the surveyor's calculations, the garage was only 45.5 feet from the property line at its closest point.
11. Mr. Labonte was candid in stating that he made a mistake and that he had constructed the garage too close to the property line. He stated, however, that he was not taking his mistake lightly and would take steps to avoid similar issues going forward. Mr. Labonte pointed out that this situation was unusual because most town roads have a standard 50 foot right of way. Yet in this case, for a small stretch of road on which the Property is located (i.e., for 500 feet on either side of the Eastern Trail), the right of way was 66 feet not 50 feet. According to Mr. Labonte, had the right of way abutting the Property been 50 feet (rather than 66 feet), the garage would have met the front yard setback with room to spare.
12. In further support of his variance request, Mr. Labonte asserted that other houses in the neighborhood are only 25 feet from the road, and granting the variance would not result in any safety or nuisance issues. He also referenced § 11.4.3 of the LUO, which allows a "setback variance of up to 20%...to a property owner for his primary year-round residence..." and believes that this provision supports his variance request.

CONCLUSIONS:

While we are sympathetic to Mr. Labonte's request and understand that he made a genuine mistake, we must be guided solely by the general variance criteria set forth in § 11.4.1 of the LUO. Accordingly, for the reasons that follow, we conclude that the applicant cannot meet all of the governing criteria, and therefore, we must deny his request.

1. As a threshold issue, we reject Mr. Labonte's claim that he is entitled to up to a 20% setback variance for several reasons. First, he applied for a *general* variance not a "setback variance for detached single-family dwelling" under § 11.4.3 of the LUO, (which is the provision that allows for 20% setback variances). Because notice to abutters and the public hearing notice identified the pending application as a "general variance" (and not as a single-family dwelling variance), it would be improper to consider Mr. Labonte's application as a single-family dwelling variance because the criteria for the two variances are different. Second, § 11.4.3 makes clear that it only applies to "a property owner for his primary year-round residence." The Property is owned by Home Innovations, LLC and it is the subject of a purchase and sale agreement with the Wells. Clearly, the Property is not the applicant's primary year-round residence. Accordingly, Mr. Labonte cannot apply for a single-family dwelling variance under the clear terms of § 11.4.3.
2. We conclude that Mr. Labonte has failed to meet § 11.4.1.1 of the LUO, which requires an applicant for a general variance to prove that "the land in question cannot yield a reasonable return unless a variance is granted." It is well-settled law that "reasonable return" does not mean "maximum return." *Barnard v. Town of Yarmouth*, 313 A.2d 741 (Me. 1974); *Grand Beach Assoc., Inc. v. Town of Old Orchard Beach*, 516 A.2d 551 (Me. 1986). The fact that the applicant might not be able to build a garage on the home, or, that the garage might not be as large as desired does not rise to the level that the property cannot yield a reasonable return. We specifically note that the Property is large enough to accommodate a house and garage of the size built had it only been constructed 4.5 feet further back from the property line. (Vote: 4 to 0 that this criterion was **not** met.)
3. We conclude that Mr. Labonte has failed to meet § 11.4.1.2 of the LUO, which requires the applicant to prove that "the need for a variance is due to the unique circumstances of the property and not the

general conditions of the neighborhood.” In our view, there was nothing “unique” about the Property given that there are no archaeological, geographical, or other features that make the Property unique from others in the neighborhood. (Vote: 4 to 0 that this criterion was not met.)

4. We conclude that Mr. Labonte has met § 11.4.1.3 of the LUO, which requires the applicant to prove that “the granting of a variance will not alter the essential character of the locality.” Based on our site walk, we do not believe that the requested 4.5-foot variance, if granted, would render the Property inconsistent with the rest of the neighborhood. (Vote: 4 to 0 that this criterion was met.)
5. We conclude that Mr. Labonte has failed to meet § 11.4.1.4 of the LUO, which requires the applicant to prove that “the hardship is not the result of action taken by the applicant or prior owner.” Mr. Labonte was candid in conceding that the setback violation was a result of his own mistake. We have no reason to believe that the error was not an honest one. However, the reason why he was compelled to request a variance is undeniably “the result of action taken by the applicant.” Accordingly, under the plain language of the LUO, which we are bound to uphold, we must find that Mr. Labonte was the author of his own misfortune and that he cannot meet this criterion. (Vote: 4 to 0 that this criterion was not met.)
6. We conclude that Mr. Labonte has met § 11.4.1.5 of the LUO, which requires the applicant to prove that “the proposed use will not cause or result in unsafe, unhealthful or nuisance conditions.” There was simply no record evidence to suggest that a reduction of the setback from 50 feet to 45.5 feet would adversely impact the safety and health of members of the general public or of neighbors’ quiet use and enjoyment of their properties. (Vote: 4 to 0 that this criterion was met.)
7. An applicant must meet each and every one of the general variance criteria before his variance request may be granted. Accordingly, we must **deny** Mr. Labonte’s application for a general variance given his inability to meet the criteria set forth in §§ 11.4.1.1, 11.4.1.2, and 11.4.1.4.

Based on the above Findings of Fact and Conclusions, the Board of Appeals decided by a vote of 4 to 0 to deny Mr. Labonte’s application for a general variance.

Under § 11.6.6 of the LUO, “appeals may be taken from any decision of the Board of Appeals within 45 days of the vote on the original decision to Superior Court as provided by law.”

3. **ADJOURNMENT**

Bell made a motion to adjourn the meeting at 8:25 P.M. Dalzell seconded the motion with the vote being 4-0 in favor.

Respectfully Submitted,

Wendy E. Lank

Wendy E. Lank
Recording Secretary