



Enfield New Hampshire

Zoning Board of Adjustment

Minutes of August 2nd, 2016 Meeting (approved September 13th, 2016)

Call to Order

A regular meeting of the Enfield Zoning Board of Adjustment was held on August 2nd, 2016 in the large conference room at the Enfield Public Works Building. It began at 7:03 PM and was presided over by Mike Diehn, Chair.

Roll Call

Board, Alternates and Staff

Attending: Mike Diehn, Chair; Tim Lenihan, Vice-Chair; Kurt Gotthard, Clerk; Cecilia Aufiero; Ed McLaughlin; Tom Blodgett, Alternate; Phil Neily, acting Zoning Administrator

Guests

Barry Schuster, Lebanon and Cassidy Neal, Lebanon, attorneys for the Foleys;
W. Robert Foley, Enfield; Maureen Foley, Enfield; Michael Foley, Enfield; Meaghan Foley, Enfield; Lauren Foley, Enfield;

Nate Stearns, Norwich VT, attorney for the Hazeltons, Conlons and Judith Currier;
Judith Currier, Enfield and Leesburg VA; Mike Conlon, Enfield; Sue Hazelton, Enfield; David Hazelton, Enfield;

Paul Currier, Enfield; Gabriele Currier, Enfield; Enfield; Debra Ford, Enfield; Lois Sachleben-Groth, Enfield;
John Currier, Enfield and Leesburg VA; James Bonney, Enfield; Peter Spinch, Enfield.

Approval of Minutes

A motion to approve the minutes of the July 6th, 2016 meeting was made by Kurt Godhardt, seconded by Ed McLaughlin. Discussion: Aufiero asked why the minutes were so short. Diehn answered that he was dictating the minutes after an injury and included only the most pertinent or required items.

Motion carried 5/0

Public Hearings

W. Robert Foley Trust Variance re-hearing

Chair Diehn explained that this will be a re-hearing of the Foley's application for a variance. He said that as the Hazeltons had appealed and been granted the rehearing, the administrator and the Chair believe that the Hazelton's should go first during the testimony phase. Later, attorneys Schuster (for the Foleys) and Stearns (for Hazeltons, Conlons and Curriers) suggested to the board that Schuster present the variance application first and Stearns respond. The board agreed.

Chair Diehn said that speakers making the initial presentation and response would be limited initially to ten minutes but could ask for five more minutes. Follow on speakers would be allowed three minutes plus one more upon request.

Chair Diehn informed the members of the public present that the board members had received and studied all the materials submitted by all parties by the July 21st deadline set in the July 6th appeal hearing and that since those materials were all in the public record already the board would not be reading that material into the record. Persons present who'd written letters were welcomed to read them aloud during the speaking time if they like.

Zoning Administrator's report

Administrator Neily read the public notice of this re-hearing. That notice is in the file of record for this hearing.

Mr. Neily then submitted to the board for their consideration notifications he'd received from the NH DES that the applicant's (the Foleys) applications for a wetland permit and their septic design had been granted and approved.

Ms. Aufiero asked Mr. Neily if the conditions of approval were in the documents he was submitting and he said no, that these are notifications with brief summaries. Neily offered to pull up and submit the full notifications complete with conditions and the board asked him to do so. After a time away from the table, Mr. Neily returned with the complete documents and at 7:30, after the Foley's presentation by Attorney Schuster, the board discussed the shoreland permit and septic design approval. Ed. McLaughlin asked that the conditions of the shoreland permit be read into the record. The Chair asked McLaughlin and Aufiero to read the conditions aloud which they did. The board entered the shoreland permit and septic design approval into the record. Members of the public may obtain the text of the permit on-line at <http://www2.des.state.nh.us/OneStopPub/WetLand/2016-01781.pdf> or view it in the file. The septic design approval doesn't appear to be available online yet at the time of this writing.

Neily pointed out that the parties to this hearing could not possibly have submitted these documents because they were created after the July 21st submission deadline we'd set for for the parties to the hearing.

Presentation of Appeal

Attorney Barry Schuster presented on behalf of the Foley's, noting at the outset that Maureen Foley and Robert Foley are present. Schuster requested that all materials from all previous hearings be brought forward into the record. The Chairman and the board indicated non-verbally that their request would be granted.

Attorney Schuster accepted that the burden of proof is still on the Foley's to demonstrate that granting this variance request would meet the five criteria and asserted that they have done so. He asserted that because there is "no threat to public health, safety, and welfare," the variance would follow the spirit of the ordinance. He asserted that denying the variance would be a hardship because of the following unique characteristics of the plot make the general provisions of the ordinance not apply here: the very small size and odd shape of building envelope, and that the road is used very lightly and only by residents and therefore the setback isn't as important here in guarding the public safety, etc. He pointed out that when constructed, the house will be twenty to thirty feet back from the traveled portion of the right-of-way (ROW).

Mr. Diehn asked Schuster about if in Schuster's submitted statement he had written that the Foley's property line could be argued to extend to the middle of the ROW. Schuster answered yes and that a better point would be that the Foley's, it could be argued, own by right of prescription the parking area in the right-of-way adjacent to their recognized property line because only they ever use it and no-one else has ever claimed it.

Attorney Schuster asserted next that the Foley's application meets the substantial justice criterion because Mr. Foley has COPD (chronic obstructive pulmonary disease), a recognized disability and cited a 674:33 V, reading that the ZBA may grant a variance "without finding a hardship ... arising when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises" - 674:33 V

He drew the board's attention to maps of neighboring properties he provided in his packet and said that the history of permitting for the Hazelton and Conlon houses shows that in the past everyone has treated Rollins Point as a narrow road with plenty of space for everyone to get through and he asserted therefore that suggestions that granting Foley's variance request would create congestion and overcrowding is an exaggeration without any basis. He says there is plenty of room on the Foley property for the house they plan to build.

Attorney Schuster said that matters of the cottage size and the boulders and trees raised by the opposition in Attorney Stearns letter really aren't relevant to the location of the building, the subject of the variance request.

Schuster submitted also a photograph of Rollins Point from in the lake of the Conlon's and Foley's cottages. The board accepted the photograph into the record.

Ed McLaughlin asked if Foley is requesting anything to do with the 50' wetland setback. Schuster said "no."

Kurt Gotthardt asked if the language in 674:33 V says a variance granted to someone with a disability would go with the person and not the land. Schuster explained that the ZBA *may* put that condition on the variance, but that it isn't required.

Kurt also asked if there was a house design done yet and Schuster said no, the only have a footprint.

It was at this point, 7:30 PM, that the discussion about the shoreland permit and septic design approval happened.

Support and Opposition

Speaking in opposition:

Attorney Nate Stearns of Norwich spoke on behalf of a group of residents of Rollins Point that stand in opposition to granting the Foley's variance request. Stearns opening statement summarizes their position well: "the project will result in overcrowding of the land, is contrary to the public interest, is not of benefit to the public interest and is a violation of the spirit of the ordinance." Stearns asserts that the Foley's aren't proposing simply to move a cottage a few feet but rather to build a large new structure far enough into the setback that the result will change the overall character of the area. Stearns characterizes the change proposed by the Foley's as a 250% (sic.) increase in the developed footprint on the lot with nearly half the new building inside the sideline setback.

He then pointed out that all the lots out on the point where the Foley's lot is are very small with small buildable envelopes; that they all suffer from the same problem and the Foley's lot is not unique in that

respect. He pointed out that if all those property owners were granted similar variances and setback encroachments of this sort were made a standard in this area, the result would be a drastic change of character of the area.

Attorney Stearns responded to a few points in Attorney Schuster's supporting statement ("the packet"):

Schuster wrote: if denied this request, Mr. Foley would lose the ability to use, enjoy and upgrade his property in the same manner as his neighbors. Stearns said: the neighbors have the same setback requirements and aren't encroaching. He asserted that encroachment is not a general characteristic of the area. . McLaughlin asked if other structures on Rollins Point encroach now, Stearns pointed out on the map showing which do.

Schuster wrote about some other, larger houses that have been re-developed, comparing them to the project planned by the Foley's and suggesting if those houses are acceptable, so should be the Foley's. Stearns said: Both the house the Newman's built and the Hazelton's current house are larger, yes, but they are on larger plots which accommodate them without encroaching on the setbacks.

Stearns then said that the general public has an interest in preventing overcrowding of the land, especially such a prominent point of land on the lake. The project the Foley's propose would be very visible from the lake. He asserted that if we grant this variance and thereby set a standard that similar encroachments into setbacks for similar reasons are OK, it's not hard to see that soon the character of the area will change and the lakefront crowding will get worse.

Schuster wrote: Mr. Foley would be denied the same rights that the neighbors enjoy if the variance were denied. Stearns says this isn't really true; the neighbors are subject to the same setback requirements as Mr. Foley is and he in fact already encroaches into the setback with his grandfathered cottage. Attorney Stearns finally pointed out that it's long been settled in the US that zoning restrictions are permissible and can curtail private property rights. So, there is no right to build inside of setbacks.

Tim Lenihan asked why Stearns, in his packet, focused on Bacon v Town of Enfield (150 N.H. 468 A.2d 788 (2004)) instead of Shopland v Town of Enfield (151 N.H. 219 855 A.2d 392 (2004)). Stearns responded that they focused on Bacon because their contention is that this project does not comply with the spirit of the ordinance and is not in the public interest because of the Foley's variance would promote overcrowding of the land. While those were the basis of the original denial of in the Shopland case, when the case got to the NH Supreme Court, that Court focused on the unnecessary hardship criteria. However, in Bacon, the Court's long discussion was about the spirit of the ordinance and public interest criteria and how overcrowding of the land and cumulative impacts of that overcrowding relate to those criteria. Lenihan asserted again that the fact pattern of Shopland fit this case better. Stearns re-iterated that he used Bacon because the discussion at the Supreme Court illuminates the points of law on which his position rests.

Diehn pointed out that in Bacon, it was the wetland setback and here it's the sideline setback. Stearns agreed but said again that it's the discussion by the Court in Bacon that's so important, not the specific variance.

Lenihan asks how, given the size of Conlon's and Hazelton's houses, could the house the Foley's propose be thought to change the character of the neighborhood? Stearns responded by saying it's not so much the overall size as it is the relationship of the house size to the lot size and that if other people in the area were given similar variances, the cumulative change to the neighborhood would be dramatic.

McLaughlin brought up the point that the larger the lot, the lower the taxes because of the multiplication factor in the tax regulations. He says that means the concept in Enfield is that a lake lot is a lake lot and that the size differences don't matter. Stearns won't speak to the tax code. Kurt Gotthardt pointed out that Ed's point is about tax purposes and not zoning; Diehn and Aufiero agreed.

Supporters speaking in rebuttal:

Attorney Schuster spoke to say that the Foley lot is smaller, yes, than the Hazelton and Conley lots, but also the house will be smaller than the Hazelton and Conlon houses. "It's proportional," he said.

Maureen Foley spoke to describe the situation she and her father face. His health is declining and he can't safely get into the house and around the property and they are asking for the variance so they can re-build the house to allow the two of them to live together.

Robert Foley spoke briefly about his condition and his need of assistance.

Opposition speaking in rebuttal:

Sue Hazelton spoke. She's sympathetic with Mr. Foley's condition. She still opposes the variance request because allowing it

Mr. Lenihan asked Ms. Hazelton how it would impact the environment. She responded that they'd already cleared the area along the shore. Lenihan pointed out that the experts at the NH DES have approved the shoreland permit application and asked if Ms. Hazelton has any evidence to show the state was wrong to approve the application. Mr. Lenihan asked if a second story would affect their view of the lake and Mr. Hazelton said it probably would but that wasn't the issue. McLaughlin explained the he also wanted to know the answer to My. Lenihan's question.

Mr. Hazelton spoke to say that his concern is for the general public, that Rollins Point provides a distinct benefit for the public. He believes that this project would impact much more than just the Foley property during construction and asserted that Rolins Point is a fragile landmass. He believes that if the project is completed, there will be full-time, year-round traffic on the point that will bring in road salt and sand. He says that the reason the point is still in such a natural condition is that for eight months of the year, it's been empty. In future, the snow plows will need to put the snow somewhere.

Mr Hazelton sympathized strongly with the Foley's; he told us his mother had died of COPD and he's well aware of what happens and he believes there are alternatives that would allow Maureen and Bob to live together that don't involve building on Rollins Point and that they could still enjoy the summer on at their camp on the lake. He asserts that the impact he believes this project would have is not warranted by their wish to live together on the point.

Gabriel Courier of Crystal Lake in support of the Foley's. She talked about her mother's and her experiences with COPD and described the difficulties her mother had because she couldn't manage the stairs and was locked inside the house until she passed. She points out that owning two homes and a cottage is a huge tax burden and they should be able to live in just one home. Courier applauds Ms. Foley for wanting to take care of her father.

Paul Courier of Crystal Lake Road, a newcomer to the area, he's only been living here 50 years, spoke in favor of the Foley's application. He's known Bob Foley for years, says the Foley's are good people, that Bob has been a supervisor of the checklist for many years. Courier believes this process has got out of control.

He points out that many large houses have been built in the Crystal Lake area and their construction didn't result in the damage to the land that Mr. Hazelton suggested might.

Celie Aufiero responded to Paul Courier that the role of the ZBA is not to make judgements about people or their situations but instead to consider how their requests will affect the land in the town. Aufiero told us that she too has COPD and understands personally what's it's like. She pointed out for the members of the public that the ZBA really can't use that information, the personal circumstances. The problem before the board is a matter of land use and the impact your use would have on the lake and surrounding properties. We follow what the people voted on, the zoning ordinance, and we have to go by that.

Diehn spoke about the personal difficulty he has with disappointing people applying for variances but he recognizes that his job as a ZBA member is to set aside that difficulty and think about what has the town as group said they want to do with the land in the long term. He sees the ZBA's role as to be a relief valve so that an individual's constitutional rights as a landowner are not violated by the zoning ordinances in the small number of situations in which there is a question. He supported Aufiero's point that this is **not** about whether we like the applicants or think they have a good reason for doing what they want to do; it's about what the request before the board would mean for the lake area, in this case, over the long term. He believes that just this one change by the Foleys probably wouldn't have a great effect, but that in allowing this variance, we'd be setting a precedent for allowing other similar variances and the cumulative effect could indeed be large and irreversible.

Attorney Schuster spoke again to say that having to build a house in the shape of the permissible building envelope would be a hardship and that yes, a new house there would look different and change the views of the current residents, but that happens other places in town also.

John Currier of Leesburg VA rose to speak. (Mr. Currier owns property on Rollins Point and has been a member of the community for many years) He says it's unfortunate that the situation has had to come to this in public. Yes, there are buildings in the setback, two garages - his - a cottage belonging to his brother-in-law, and one Mr. Schuster hasn't mentioned: Mr. Foley's present cottage. And so, Mr. Foley is already enjoying whatever rights they all have. They hold property on Rollins Point because they love the setting. He says that while it may be true that just the Foley's planned house wouldn't make a big change, he sees that if one or two more properties were expanded as the Foleys intended to do, the Point wouldn't feel at all like it does today. He said this isn't Route 4 or 4a or 13 acres, this is a squeezed together little piece of land.

Judith Courier, Leesberg VA and Rollins Point Road: spoke to say that Mr. Courier has said everything she felt she'd need to say and to re-iterate that she's disappointed all this had to be done in the public view.

Continue or Continue?

Chair Diehn polled the board to see if there was any interest in Continuing the hearing to another session or if everyone would like to continue with the hearing to conclusion during the current meeting. Mr. McLaughlin opined that with the previous hearings, the time the board members had to consider the materials in the pre-meeting packets, and with the thorough coverage of the issues, the board should conclude the hearing tonight. Mr. Lenihan spoke in agreement, and no-one objected when asked by the Chair if they did.

Continuing the Discussion

Kurt Gotthardt stated the following:

Crystal Lake has approximately 160 lots around it. Most of them are small, leaving a very tight buildable footprint [on the lots]. [ed - Kurt based this on research he did in the town property records.]

The variance request is for an encroachment into the road setback area, not to build a single family house in a residential area.

The current structures within the road setback area pre-date the Zoning setback requirement.

Road setback requirements are measured from the R.O.W. [right of way]

The Enfield Zoning Regulations state the following:

Purpose

E) To prevent the overcrowding of the land.

H) To assure proper use of natural resources and other public requirements

I) To provide for the harmonious development of the land and it's environs.

Facts Found

After some discussion and review, the board found the following facts in the matter. There was some disagreement about some of these but a majority of the board asked to have them all included. No members of the public nor parties to the case objected. Mr. Hazelton, Ms. Foley, Mike Foley, and both attorneys help clarify various facts.

- The applicant is requesting a variance from lot-line setback restrictions in the Enfield Zoning Ordinance to allow them to build a new, winterized, two storey house of approx. 1,700 sq. ft. and garage of approx. 900 sq. ft. with a combined footprint of approx. 1,750 sq. ft.
- The existing structure is a season camp or cottage of approx. 900 sq. ft.
- The existing structure extends minimally into the 50 foot wetland setback but does occupy approx. 50 sq. ft. of the lot-line setback.
- The new structure would not encroach on the shoreland setback at all, but would occupy approx. 720 sq. ft of the lot-line setback.
- The NH DES has issued a shoreland permit for the planned construction, subject to conditions listed on the permit.
- The NH DES has approved septic design for the plan and the new septic system would be a Clean Solutions design.
- The other properties on Rollins Point suffer from similar size and setback restrictions.
- The Foley's plan calls for the removal of seven trees in a well established stand of pine, oak, and maple and the planting of seven replacements.
- The NH DES shoreland permit says the work may only disturb approx. 6,400 sq. f.t.
- Areas dug up but then replanted and made like new are still considered to have been disturbed.
- Approved septic design will be an improvement and would benefit the lake.
- Most lots on lakes in Enfield are small and owners would need variances to build modern structures.
- The shoreline on the property is 94 feet. The proposed build would be closer to 40 feet of that shoreline than is the existing structure today, increasing the impact on the shoreline.

- Hazelton's original expansion before the ordinance was in place and the 2nd floor addition made after the ordinance was passed didn't change the footprint of the building on their lot.
- Rollins Point is a natural environment on a small, treed point of land where camps were established early in time.
- The proposed plans would require substantial excavation.

Recess

After listing and reviewing the findings of fact, the Chair and called a brief recess at 9:16 PM

At 9:21 PM, the Chair resumed the meeting.

Public Hearing Closed

At 9:22 PM, hearing no objections from the public nor from the board the Chair declared the public hearing on this case closed.

Deliberation of Variance Criteria

Per RSA 674:33, I(b) [the board] may authorize a variance if [the following are all true]:

1. the variance will not be contrary to the **public interest**;
2. the **spirit** of the town zoning ordinance is **observed**;
3. **substantial justice** is done;
4. the **values** of the surrounding properties are **not diminished**; and
5. literal enforcement of the [...] ordinance would result in **unnecessary hardship....**

Noteworthy Points of Deliberation

Diehn, Aufiero, and Gotthardt believe that allowing the project to move forward by granting this variance request would be against the public interest and would violate the spirit of the ordinance because the new building would crowd the land of Rollins Point and might encourage further such crowding and thereby would degrade the natural environment of the point and the lake on which it sits. They argue that to allow such would be against the the public interest of preserving the natural resources of the town. Ms. Aufiero cited specifically EZO section 101 C, E, H, and I, and section 103. Diehn, Aufiero and Gotthardt assert that the Foley's did not prove these two variance criteria would be met. Mr. Lenihan and Mr. McLaughlin do believe that granting the Foley's variance request would not be contrary to the public interest and would be in the spirit of the ordinance.

All board members agreed that substantial justice would probably be done by granting the variance, but the three above felt that wouldn't overweigh their problems with the Spirit and Public Interest criteria.

Only Ms. Aufiero felt granting the variance would diminish local property values and explained that she believes the degradation to natural character of the area resulting from the project would make it less attractive to buyers were it to be allowed to go forward.

Aufiero pointed out that the Foleys can still use the property or a different building.

Motions

Motion: Moved by McLaughlin and seconded by Diehn that we grant the variance request with the condition that the conditions in the NH DES Shoreland Permit for the project be met in full.

The motion failed with two in favor (TL, EM) and three against (MD, CA, KG).

Motion: Moved by McLaughlin and seconded by Lenihan that we grant the variance as requested in recognition and support of the Americans with Disabilities Act.

The motion failed with two in favor (TL, EM) and three against (MD, CA, KG).

Motion: Moved by Gotthardt and seconded by Aufiero that we deny the variance because three of the five board members say the spirit criteria is not met; specifically that granting would violate EZO Section 101 C, E, H, and I and Section 103.

The motion failed with two in favor (KG, CA) and three against (MD, TL, EM).

Motion: Moved by Lenihan and seconded by McLaughlin that we approve the variance because despite what both attorneys said, the Hazelton’s and Conlons and Currier were the appealing party as it was noticed to the public and therefore they had the burden of proof and failed to prove their case.

Aufiero believes this is an inappropriate motion for granting or denying a variance motion. Ed argues it’s fine.

The motion failed with two in favor (TL, EM) and three against (MD, CA, KG).

Motion: Moved by Aufiero and seconded by Gotthardt that we deny the variance because it is not in the spirit of the zoning ordinance.

The motion failed with two in favor (KG, CA) and three against (MD, TL, EM).

Motion: Moved by Diehn and seconded by Gotthardt that we deny the applicant's request for a variance because it violates the spirit of the ordinance because it will promote overcrowding of the area.

The motion passed with three in favor (MD, KG, CA) and two against (TL, EM).

Decision

Denied

Application of W. Robert Foley for variance from article IV, section 402.2 (L) of the Enfield Zoning Ordinance has been **denied** based on the findings listed below, by the vote of at least three members of the Zoning Board of Adjustment.

Basis of denial

- 1. The Foleys did not demonstrate that granting this variance request would meet the all five criteria.
- 2. Granting this variance would violate the spirit of the ordinance by promoting overcrowding of the land

Next Meeting

The Zoning Board of Adjustment will next meet in regular session at 7:00 PM on Tuesday, August 9th, 2016 at the Enfield Public Works Building. (Subject to change)

Adjournment

Ed moved and Kurt seconded that the meeting be adjourned, and this was agreed upon at 10:02 PM.

September 13th, 2016

Chairman
Enfield, NH Zoning Board of Adjustment

Date of Approval