

**FRANKLIN ZONING BOARD  
REGULAR MEETING AND PUBLIC HEARING  
CITY COUNCIL CHAMBERS- CITY HALL  
Wednesday, August 4<sup>th</sup>, 2010, at 7:00 p.m.**

**MINUTES**

**Call to Order:** The meeting was called to order at 7:19 p.m.

❑ **Salute to the Flag**

❑ **Roll Call**

**Present: Chuck Farmer, Donna Tully, Marty Russo, Kathlene Fleckenstein and Floyd Sargent.**

**Absent: Cindi Styles.**

**Acting Chair Farmer sat Member Tully in place of absent voting Member Styles.**

❑ **Approval of Minutes: of the June 2<sup>nd</sup>, 2010 Zoning Board Meeting**

**MOTION: Member Sargent moved and Member Russo seconded to approve the minutes of the July 14<sup>th</sup>, 2010 Zoning Board regular meeting. Member Fleckenstein indicated that her first name was spelt wrong and should be lene. All were in favor and the motion passed with the amendment.**

**New Business**

- ❑ **Z10-08:** Davis Family Trust, Samuel N. and Gloria A. Davis, Trustees, Applicants/Owners, request a variance to create a two car garage with cold storage on the 2<sup>nd</sup> floor on property located at 64 Thompson Park, identified as Tax Map/Lot # 117-331-00, R-2 Zone (High- Density Residential District). The garage would be located 5' from the rear lot line and 7' from the side lot line, where the requirement is fifteen (15) feet.

Samuel Davis was present to speak as the owner of 64 Thompson Park. He stated that Mr. Lewis came out and looked at the property. He stated that the City of Franklin Right of way takes up about 30' of the rear of the lot. He then passed around pictures for the board to see. He stated the property is surrounded by trees on two sides. He indicated that the neighbor's garage is right on the lot line.

Member Fleckenstein asked if there would be a full second floor for storage and Mr. Davis indicated the truss' would be put up for a second story, it will however only be used for storage of a ladder and some other materials. The garage is being built for vehicle storage and a tractor.

The garage will sit back about 100' off the roadway. He stated it will be 24' x 30', with 8' high walls and a pitched roof. The floor will be cement with drainage.

Member Russo asked if the intention of the owner is to keep the carport. Mr. Davis indicated that the carport would stay. Member Russo asked if the garage was being built behind the carport and Mr. Davis stated that it is staying and you would drive through the carport to get into the garage.

Member Farmer indicated that the owner stated that the distance in the rear of the property, to the rear lot line, was indicated to be larger. He asked for some clarification on this. Mr. Davis stated that the distance of 5' is to the stone wall. However, his property continues down the street to Bow Street, and he did not put this footage on the plans.

Member Fleckenstein asked if we had received any comments from the neighbors. Mr. Davis stated he has spoken with the neighbors and no one had a problem with his plan. Richard Lewis stated that the office did not receive any correspondence from any of the neighbors.

Public Comment: None.

#### Board Discussion

Richard Lewis stated that his draft approval addresses his prospective on the criteria. Member Russo asked about the close distances of multiple buildings, with there being three structures within a 25' radius, and asked about if any feedback has been received from the fire department on this issue. Richard Lewis stated this would be addressed at the time of the building permit being processed. Richard Lewis stated a certain type of sheetrock may be needed or another means of fire separation.

**MOTION:** Member Russo moved and Member Tully seconded that the Zoning Board of Adjustment approve the variance application request by Davis Family Trust, Samuel N. and Gloria A. Davis, Trustees, applicant/owner for a variance to construct a 2-car garage closer to the side lot than allowed. The property is identified as 64 Thompson Park, tax map/lot 117-331-00; the application is referenced as Z10-08. The Board finds that the application request meets the tests and criteria necessary for the granting of a Variance in that:

- a. The Variance will not be contrary to the Public Interest due to the fact that the area where the garage will be located is already an area that would be commonly and typically used for the parking of vehicles and the placement of other household items such as lawn equipment.
- b. The Spirit of the Ordinance is observed and substantial justice is done due to the fact that granting the variance will allow the applicant to utilize the area at the end of the driveway that is typically used for vehicle parking and other household uses. The use and layout of the use will be consistent with a typical single-family home layout.
- c. The values of the Surrounding Properties are not diminished due to the fact that the garage will be located adjacent to a heavy line of trees and shrubs that will block out the view to the property on the south.
- d. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Unnecessary hardship means that, owing to the special conditions of the property that distinguish it from other properties in the area, then: i) No fair and substantial relationship exists between the general purpose of the ordinance provision and the specific application of that provision to the property; and ii) the proposed use is a reasonable one. This test is satisfied due to the fact that to require the garage to be located farther to the north would remove a significant portion of the backyard lawn area of the applicant. Further, the shared and common driveway works to create a unique lot layout that to a significant degree forces the garage to be placed as shown on the plan submitted by the applicant.

**This approval is subject to the following conditions:**

1. The applicant or their designee shall obtain the necessary building permit for the proposed work and a Certificate of Occupancy once the work is completed.
2. Any fire code issues relative to the separation of abutting buildings must be satisfied and demonstrated in the building permit application.
3. The existing carport can be moved to just in front of the proposed garage area.

**All were in favor and the motion passed.**

7:26 p.m.

- **Z10-09:** Richard J. and Nancy G. DuBreuil, Owners/Applicants, request an Equitable Waiver of Dimensional Requirements (RSA 674:33-a) regarding an accessory structure (18' x 12'), which was built (without a permit) within the setbacks. The structure is located 44' from the property line, where a 50' setback is the requirement, on property located at 41 Sterling Drive, identified as Tax Map/Lot # 100-406-24, C Zone (Conservation District).

Richard DuBreuil was present to speak, as the owner of 41 Sterling Drive. He stated that last fall he ordered a shed and came into the office to speak with Richard Lewis about the placement of the shed. He stated that during that time frame, they began discussing the R&D Paving Company on Memorial Street, which he also owns, and the possibility of relocating the business to the Industrial Park. He stated that during the conversation, there was some confusion and he thought he was all set to construct the shed. He then came back from Florida and had received a letter that the shed did not meet the setbacks. He stated that based on the concrete pad and the area around the shed being built up and designed nicely; it would take a lot to move this structure now.

Member Sargent stated that the applicant basically thought they were all set and he asked Richard Lewis if anything about the setbacks was discussed. Mr. Lewis stated that he is not sure and that this was an honest overlook.

Member Russo stated the only remedy would be to have the applicant completely dismantle the building and move it 6' and Richard Lewis stated that was correct. Richard Lewis stated the applicant filed an Equitable Waiver of Dimensional Requirements. He stated he has referred to this form in the past as being an Oops Form. There was no intent by the owner to place the structure on the site purposely not meeting the setbacks. The RSA's have set up this Equitable Waiver of Dimensional Requirements, with their own tests and criteria, to allow someone remedy from an honest mistake, where there was no ill intent on the applicants part.

Member Farmer asked if any of the neighbors sent in any comments regarding the hearing. Mr. DuBreuil stated the building was done in good taste and showed pictures of the building on the lot.

Public Comment: None.

#### Board Discussion

**MOTION:** Member Sargent moved and Member Tully seconded that the Zoning Board of Adjustment approve the application request by Richard J. and Nancy G. DuBreuil, Owners/Applicants for a Equitable Waiver of Dimensional Requirements (RSA 674:33-a) regarding an accessory structure (18' x 12'), which was built (without a permit) within the setbacks. The structure is located 44' from the property line, where a 50' setback is the requirement, on property located at 41 Sterling Drive, identified as Tax Map/Lot # 100-406-

**24, C Zone (Conservation District). The Board finds that the application request meets the tests and criteria necessary for the granting of the Waiver in that:**

- 1. The violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after the storage structure in violation had been completed and was in use. Compliance with this criterion is demonstrated by the statements made by both the owner and the Planning and Zoning Administrator.**
- 2. The violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority. Compliance with this criterion is demonstrated by the statements by the applicant that they made the appropriate contact with the Zoning Administrator and after the discussion was told that everything was all set. Further, the Planning and Zoning Administrator indicates that overall conversation with the applicant covered several topics and the "all set" statement may well have been made in error for this specific matter.**
- 3. The physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.**
- 4. Due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected. Based on statements by the applicant, which have not been refuted, the cost and complications with moving this specific structure are substantial and would, in the opinion of the Board, outweigh the benefits of moving the structure.**

**This waiver approval is subject to the following conditions:**

- 1. The applicant or their designee shall obtain a building permit for the structure.**
- 2. The structure, if it falls into disrepair and needs to be rebuilt, must be moved or relocated so that the replacement structure meets the required setback.**
- 3. The structure is not to be enlarged in size at any point in time.**

**All were in favor and the motion passed.**

- Z10-11: Y and JC Properties, LLC, Owner; Yvon Cloutier, Applicant, requests a Special Exception to convert the basement area into a living area, being a single apartment for the owner of the property. The property is identified as 71 North Main Street, Tax Map/Lot # 098-090-00, B-1 Zone (Low- Density Business and Commercial District).**

Yvon Cloutier, as the business owner of 71 North Main Street, was present to speak for his application. He stated when you look at the property you see two commercial buildings being the salon and the restaurant. He stated the building is built into a hill and 60-75% of the building is at street level on Gerrish Street. He stated he is requesting to change the use of the first floor level from the lounge/bar into a better use that will fit into the neighborhood better, and is economically more feasible, being an apartment unit. He stated that he has looked at retail and other uses; however, due to the restricted parking and the fact that Gerrish Street is a residential neighborhood with children, he would rather put in a residential use, and this would keep it more as a Mom and Pop business. He stated that typically with the mom and pop business, the

residential unit is on the second floor, and this is just reversed. He stated he would be working closely with the code enforcement officer on building and code issues. He stated he is aware that he will need a fire barrier between floors and they believe it can simply be done by replacing the drop ceiling with fire rated panels. He stated the entrance to the apartment is off on Gerrish Street and the parking will be there as well. He stated there will be 6-7 spaces on the property line, and then there is a steep embankment to the abutting property. He stated it is possible they will be getting rid of the dumpster and going with recycling, of which they would be bringing the recycling and trash to the transfer station themselves. He stated that complying with the building code is important and as he will be living there he would like the unit safe for himself.

Chair Farmer asked how many bedrooms the unit would be and Mr. Cloutier stated it would be two bedrooms, one master bedroom and one small bedroom for the grandkids. He stated there would be 1 new bath put in, for two total baths. He stated the living space would be approximately 2,000 square feet, and 20-30 percent would be closed off to create a room for food storage.

One stairwell that was between the two commercial units on North Main Street and led down to this area has been removed. The other stairwell is maintained and currently used to bring storage and other items downstairs.

Member Farmer asked if the applicant was aware they would need to put windows in the bedrooms. Mr. Cloutier stated he is aware, there is an existing door and window area, however in order to meet egress windows will be put in for the bedroom areas.

Member Farmer asked if the unit would be used for himself or would be a rental unit. Mr. Cloutier stated that it would only work as an owner occupied unit, in the future he would want it to be acceptable to get from the apartment to the business, so that they did not have to deal with the snow. Mr. Cloutier added that in the future, if the mortgage was paid off, they would like to be able to lease it out to someone who works at the restaurant, as you couldn't rent it out because normal renters would not be able to deal with the businesses upstairs.

Richard Lewis stated that the approval would be with the building. He stated that the other businesses would make it difficult to rent, but it would be possible. It is a special exception for the property and would go along with the property.

Member Tully asked about the existing parking. Mr. Cloutier stated currently three vehicles park in the lot, as he has allowed the neighbor to keep his boat in the lot. Member Tully asked who parks in the lot now and he stated that himself and his employees, but the owner of the salon has been parking in the municipal lot. He stated when a new lease is drawn up after the parking lot is completed; he will be requiring the owner of the salon and her employee to park in the onsite lot. Member Tully asked how many employees he has at the most and he indicated 6-8 and four of the employees are family members. He stated that during the week, he only has about 4 employees and the day they have their most employees is on Sunday when the salon is closed.

Member Sargent asked if they would be able to get more vehicles in the lot if they were double stacked and Mr. Cloutier stated they would, but that the 6-8 spaces is based on no one being blocked.

Member Fleckenstein asked if there was an entrance from the apartment to the restaurant. Yvon Cloutier stated there was, but that it will need a fire rated door, and he has spoken with the state and the door will be closed and locked. For the most part he indicated they would be utilizing the apartment door.

Member Farmer asked how often the dumpster was emptied and it was indicated once a week. Member Farmer asked how many containers they would need if they went to curbside pickup and Mr. Cloutier stated they would be bringing the garbage to the transfer station as necessary.

Public Comment: None.

#### Board Discussion

Member Sargent asked if the board should put in the approval a condition that the unit can only be rented out to an employee. Richard Lewis stated that as the applicant has applied for a Special Exception and mixed uses are allowed in the zone, the board does not have the capacity to set a condition such as that. He stated the mixed use allows economic viability of the property owner.

Member Fleckenstein asked about the door and down the road if it was used as a rental if that door would have to be closed off. Richard Lewis stated that this is a fire safety concerns and would be dealt with by Chuck Bodien during the building permit process.

Richard Lewis asked if the board had any questions on the findings and conditions of the approval document and the board indicated that they did not.

**MOTION:** **Member Sargent moved and Member Russo seconded that the Zoning Board of Adjustment approve the Special Exception requested by Y and JC Properties, LLC to allow the establishment of a single-family residential unit in the lower level of the property located at 71 North Main Street, which is zoned B-1 for business/commercial uses. The application is referenced as Z10-11. In the opinion of the Board, the following Special Exception criteria are satisfied as noted.**

- 1. The specific site is an appropriate location for the proposed use or structure and the proposal is not detrimental, injurious, obnoxious, or offensive to the neighborhood: The door and driveway that will serve the residential unit are both located off of Gerrish Street, which is residentially oriented. Having a residential unit on the lower level is more appropriate than an expanded business use that could more greatly impact the neighborhood.**
- 2. There will be no undue nuisance or serious hazard to pedestrian or vehicular traffic, including the location and design of the access ways and off-street parking: The property already contains a parking area located to the north of the building. This area will be improved by the placement of improved materials that will allow for safer and easier parking by the owners and/or managers of the businesses using the property or the residents of the dwelling unit.**
- 3. Adequate and appropriate facilities and utilities will be provided to ensure the proper operation of the proposed use or structure: The parking area will appropriately serve both the business and residential uses of the building and there are existing city services[water and sewer] used by the property and the new residential use will be properly serviced by these utilities.**
- 4. The proposed use or structure is consistent with the spirit of this chapter and the intent of the Master Plan: The proposed use is consistent with the spirit of this chapter and the intent of the Master Plan in that it will allow for the appropriate utilization of this business-zoned property, will enhance the value of the property thus giving greater options and support for the primary use which is business and**

**commercial activity, and it is a type of mixed-use development that is common throughout the City of Franklin.**

**The granting of the Special Exception is subject to the following conditions:**

- a. The applicant shall obtain a building permit for all renovations and improvements to the building associated with the creation of the residential unit.**
- b. All fire and safety code issues shall be addressed prior to the issuance of the building permit.**
- c. A Certificate of Occupancy/Use shall be issued for the residential unit prior to its' initial occupation.**
- d. The parking area shall be graded and paved or improved with appropriate stone/gravel mixture. This work shall be completed prior to the occupancy of the residential unit.**

**All were in favor and the motion passed.**

8:02 p.m.

- **Z10-07:** Brian Nawoj, Applicant, requests an Appeal of Administrative Decision, regarding the decision of Richard Lewis, dated June 9<sup>th</sup>, 2010, to allow a building permit to be applied for and issued based on plans submitted for property owned by Oliver Family Irrevocable Trust, Donald and Eileen Oliver, for property located at 25 North Shore Lane, identified as Tax Map/Lot # 032-049-00, LP Zone (Lake Protection District).

The applicant, Brian Nawoj of 24 North Shore Lane, was present to speak. He stated he was speaking on behalf of the Nawoj family on the appeal of Administrative Decision. He stated the property in question is directly between their house and the lake and stated there would be a significantly diminished view of the lake for them if this home was allowed. He stated the Oliver's rebuilt their garage and their view of the lake was diminished then, as the garage was allowed to be expanded, and this approval was allowed without a variance and the footprint was extended.

Mr. Nawoj indicated that Mr. Oliver has attempted on two other occasions to get a variance and the board has denied their request. He stated the Oliver's applied for the variance as they were adding cubic content, and this application was denied.

Mr. Nawoj stated they are now again wanting to expand the building's cubic content, by adding a full cellar, and he stated he has asked for heights and elevations on the new building and could not be supplied with them. He stated the height of the ceilings will need to be at least 8', and with the full basement, this means they will be increasing the building to three full levels. He stated this is a large expansion, that will block his view of the lake and he is opposed to this.

Mr. Nawoj stated this is a much larger expansion; however, Mr. Lewis has stated that the applicant does not need a variance. In decision, it was stated that a variance is not necessary as the provisions of the ordinance are not appropriate or fair. He added that he found this to be odd. Mr. Nawoj stated a building permit was issued by a matter of right, and he has appealed the decision as he believes that Mr. Lewis is misinterpreting the ordinance.

Mr. Nawoj stated that he welcomes the Oliver's to rebuild. He stated he opposes this specific proposal as it is so large. He stated there is not another property on North Shore Lane that has a property in front of

another property. He stated the Zoning Ordinance states that you cannot add cubic content to a non-conforming structure.

Member Farmer asked what the ordinance was that he was citing and Mr. Nawoj stated section 305-18.C-4. He stated this is a city wide ordinance for non-conforming structures and it is consistent with general zoning policy, where expansion is not encouraged.

Mr. Nawoj stated that Mr. Lewis may believe the ordinance is unfair; however, he stated he objects as this is against the ordinance. He stated that this is a non-conforming structure, as it does not meet the setbacks. He stated that he owns three non-conforming structures himself. He stated the Zoning Ordinance language clearly defines circumstances under which non-conforming structures can be expanded. He stated that section C-6 allows an addition if the setback requirements are met. He stated this is not a situation where the applicant is applying for an addition; they want to demolish the building and rebuild it. He stated the addition is allowed by a special exception if it is not greater than 16'. It was stated that this proposal is within the setbacks. He stated in terms of fairness, some structures can't be rebuilt as is. The City ordinance is approved by the City whether Mr. Lewis thinks this is fair or not.

Mr. Nawoj again stated that section C-6 allows an addition by a special exception. The reason for the ordinance is to protect the neighbors and applies for all zoning districts. This is not a natural expansion of an existing use. Mr. Lewis is taking the setback requirement of 6 and applying it to C4, and this is not right. If they do not attend to add on and want to demolish the structure they must conform to the requirements. Mr. Nawoj asked if rules are made and not applied, then why have the ordinance at all, as it doesn't state anywhere in the ordinance that the administrator has the right to do this. The City has adopted restrictions and regulations regarding expansion and restrictions, and Mr. Lewis is bound to apply them whether he thinks they are fair or not.

Mr. Nawoj indicated the board needs to overturn the decision of the administrator and make the applicant apply for a variance.

Mr. Nawoj then gave the board a handout with information from the other denied variances.

8:21 p.m.

Don Oliver stated that he was here to address the technical aspects of the home. He stated the last applications were different plans and different structures, thus they have no weight on this new application. Mr. Nawoj's objections are based on a garage that was replaced in 2002, where Mr. Nawoj indicated that he would fight Mr. Oliver every step of the way on any variance application.

Brian Nawoj indicated that he never said anything like this to him. Mrs. Oliver then indicated that he did and Mr. Oliver asked that Mr. Nawoj not interrupt them as they did not interrupt him. Member Farmer then stated to Mr. Nawoj that it is now Mr. Oliver's turn to talk.

Mr. Oliver stated that Mr. Nawoj's objections are due to a replacement garage that was constructed in 2002, after applying for a demolition permit and receiving a building permit. He stated that he had the garage marked out on the property for a month prior to replacing it and stated that the original garage was 19' x 20' and the replacement garage is 26' x 20' and no one from the Nawoj's family commented on the location of the garage, except to comment that they were glad the dilapidated garage was being replaced. He stated this was an increase of approximately 140 square feet. As part of this construction, three large trees were removed from the property; ultimately increase the Nawoj's view. Mr. Oliver stated that if he was aware of any objection to the garage, he would not have proceeded with the removal and rebuilding.



Member Farmer asked if the height had changed and Mr. Oliver stated that it did, but that the Zoning Administrator had come out to the property and was okay with it as applied for.

Mr. Oliver stated that the lot is 12,171 square feet in size and was as a result of a 50 year old subdivision. The placement of the cottage and original garage was done over 50 years ago. The Nawoj's were aware of the location of the garage and the home when they purchased their property and built their house approximately 10 years ago. Mr. Oliver stated that the home and the garage are both placed on the far ends of their lot, keeping the middle of the lot wide open with just trees. The building is staying within the same footprint.

Several plans were submitted for approval and the current design should satisfactorily meet all the Zoning criteria, the roof is turned to minimize the impact. One year ago, Mike Nawoj was asked if he would review the fourth set of plans and he said he would ask Brian to join us. When the plans were opened, Brian started yelling about the garage and wouldn't even look at the plans. His brother Mike then grabbed his arm and said, "let's go Brian".

The original subdivision was done in a manner that the Nawoj's have a right of way adjacent to our garage given them lake access.

The removal of trees to install a new modern septic system will improve the Nawoj's view of the lake, but Mr. Brian Nawoj continued to be irrational, arbitrary and capricious, out of spite for something that was done legally.

Mr. Oliver stated that the Nawoj's began to build their home without a variance, without any permits and prior to any approvals. At that time, they crushed the Oliver's brick lined dug well, without saying anything about it. Mr. Oliver added that they had an easement for this well. Mr. Oliver stated they asked what was going on and were told not to worry about it and that they would be connecting them to an artisan well. He stated that they then had the easement re-written to reflect their responsibility for half of the future expenses.

Mr. Oliver stated that the Nawoj's, when rebuilding their house, also installed their septic system inappropriately, extending it into the ROW in front of their house and extending their leaching bed right into the right of way by several yards.

Mr. Oliver concluded by stating that the proposed cottage with the septic improvements meets the current Zoning Requirements and when completed it will be an asset to the neighborhood and the City.

Mr. Bartlett, engineer, then showed a copy of the plans to the board. The plans were as submitted, with the existing and proposed.

Member Sargent asked if you can drive into the garage and Mr. Oliver stated that you can. He asked what the increase was and it was indicated the garage was turned sideways. Mr. Nawoj then indicated that the garage was ten feet taller. Mr. Oliver stated it was stacked out for a month, that it was taller, but not 10' taller, and the only comments prior to the garage being built that the Nawoj's made were how happy they were that the old garage was being removed.

Mr. Matthew Bartlett, 40 Chestnut Street, Tilton NH- spoke as the Engineer for the project. He stated he is not here to debate this issue, and just to show the lay of the land. He stated on the plans the building on the

top of the lot is the garage. He stated the neither the garage nor the cottage is in a direct line of the view of the lake from the abutters. He then showed a plan that was the view of the applicant's deck from the lake. He stated that the flat roofs have been a source of leakage and it is a wonder that the stood up to the snow. He stated these types of roofs do not meet code today. He stated the ridge line will not change.

Member Farmer asked if there would be a difference in height. Mr. Bartlett stated there was not. He stated the only difference is the gable end will go to the lake.

Member Sargent asked if there would actually be an increase in the abutters view and Mr. Bartlett stated that he is not sure, and only did the view from the lake to the abutters to be sympathetic.

Member Fleckenstein asked if the point of elevation is where the arrow is. Mr. Bartlett stated the left side elevation is the entry elevation. He stated there is a group of trees that have to come down for the septic, and this will increase the abutter's view of the lake. He then showed how the gable will face the lake. The house is proposed on the exact footprint and they are maintaining the height of the ridge.

Mr. Bartlett stated that on sheet four, there are the floor plans. The basement is the lower left, which is a stand up space that will be used as unfinished mechanical space. The first floor of the house will be pulled down, which will bring the sill down and help keep the smaller profile. The main level floor plan is a very modest plan. The upstairs is open space with a ½ bath. He stated this is not even considered a second floor, but instead is finished attic space. He stated only a four or five foot path in the center of the room ceiling will be flat and the rest of the area on the second floor will have slanted ceilings.

Member Farmer asked if the home would be year round and Mr. Oliver stated that it will remain seasonal for use 6-7 months out of the year. Mr. Oliver added that the exterior elevation will not change. They have incorporated language that they want to keep the cottage style. The new structure is a simple structure that a lot of thought has been put into and is a modest proposal. The property will enhance abutting properties.

Mr. Bartlett stated the increased square footage will be approximately 200 square feet. The board determined that the current square footage is 1083 and the proposed will be 1083 plus approximately 218 square feet. It was indicated that the usable area of the second floor will be less, based on the ceiling being slanted.

Member Russo asked if the three trees in the center of the lot were being removed and it was stated that they were. Mr. Oliver stated they do need state approval to remove these trees and that they will have to compensate for the removal of the trees.

Member Tully asked to see the ridge again. Mr. Bartlett stated that the ridge is being rotated 90 degrees.

Member Farmer asked if there was a reason that they could not keep the loft area smaller and Mr. Bartlett stated there is not, they are moving the house from front to back so it will look cleaner as they have proposed it.

Brian Nawoj asked what the sill level will be. Mr. Bartlett stated that they are dropping the sill down a foot. Mr. Nawoj asked if the ceiling would be 8' foot ceilings and Mr. Bartlett stated they would not be and would be 7'6". Mr. Nawoj asked how deep the hole for the foundation would be and Mr. Bartlett stated that he cannot answer that question at the current time. He stated the footing will be just under the slab, and will possibly be 8' deep. Mr. Nawoj stated that you don't have to dig very far before you hit water. Mr. Nawoj then showed the board a picture from his home to the lake and stated that a 6' increase would affect his

view. Member Tully indicated that Mr. Bartlett has indicated no height is being added. Mr. Bartlett stated that he is not here to be cross examined. Mr. Nawoj indicated that he was not cross examining Mr. Bartlett. Mr. Oliver stated that only the utilities are being put in the basement and stated that the whole for the cellar is 5' deep currently.

Member Farmer stated that everything that Mr. Nawoj has indicated relates to his view. Member Farmer stated there is no ordinance regarding views.

Mr. Nawoj stated that he has appealed the administrative decision and that the board is not considering a variance at this time. Mr. Nawoj stated the question at hand is if the building permit issued by the Administrative decision is legal based on the ordinances, and based on the increase in cubic content, the decision is not legal, all other concerns do not matter and the views are secondary. He stated the board is determining if the administrator is allowed to violate the ordinance. There has been no attempt by the Oliver's to make the building smaller and each time there is a full scale three level building proposed. Member Farmer stated there is already an upper level.

Mr. Nawoj stated the question remains if the permit stands. He stated the Oliver's should be applying for a variance. The board needs to determine if the permit is valid or if it is a violation of the ordinance. Mr. Nawoj stated the building does not conform with the requirements for the issuance of a permit. Mr. Nawoj again stated that as the entire house is being removed and rebuilt, the board shouldn't be looking at any other section of the ordinance.

Member Sargent stated that even if the Oliver's applied for a variance Mr. Nawoj would disapprove of the proposed roof location. Mr. Nawoj stated that is what the ordinance says and he added that people have remodeled around the lake and he has no problems with that.

Mr. Nawoj then spoke about the increase in size of the garage. Member Sargent indicated that the garage is not part of the issue before the board. He stated the removal of the trees for the septic will increase Mr. Nawoj's view of the lake. Mr. Nawoj then stated that he would rather look at the lake through the trees then to have the trees removed.

9:15 p.m.

Member Sargent asked Mr. Nawoj how a full cellar would impede his view. Mr. Nawoj stated that he is not against a cellar. Member Sargent indicated to Mr. Nawoj that he has stated that he does not want the full cellar as it will increase the cubic content. Mr. Nawoj stated that the board decision needs to be based on the regulations and not what he has said. Mr. Nawoj added he has no problem with the Oliver's rebuilding; he just doesn't want it to affect him in a negative way.

Member Farmer stated that the building is a non-conforming structure that is grandfathered. Mr. Nawoj stated he wants them to have a nice place and rebuilding would be great, but he doesn't want the building larger. Member Farmer stated that the building is not going to be taller, based on the comments from Mr. Bartlett.

Mr. Lewis stated that his zoning determination was given to the Oliver's based on the plans and the representation of the plans from them. No building permit has been applied for currently or issued. Mr. Nawoj stated that based on the proposed plans, he has applied for the appeal as the new building will not meet the Zoning criteria and the Oliver's need to apply for a variance.

Angie Carey then called for a point of order. She stated that the applicant has been repeating himself over and over and there other aspects of this application that need to be discussed. She stated that the previous variances and the garage having nothing to do with this appeal and that this appeal needs to be reviewed on its own merits.

Richard Lewis stated that as it is his decision that is being appealed, he needs to state his case. He stated his decision was made based on the grandfathered law, and directed the board to the handout he distributed from OEP. He stated a challenging and interesting component of his job is interpreting the zoning. He stated that no zoning ordinance is black and white; it needs to be interpreted and applied with the RSA's in making a decision.

He stated that another aspect in his job is using case study as determined by the courts. He then read the following, being an excerpt from OEP regarding New London Land Use Assn. v. New London ZBA, 130 N.H. 510 (1988):

*"Nonconforming uses may be expanded, where the expansion is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance... However, enlargement or expansion may not be substantial and may not render premises or property proportionally less adequate..."*

And he read:

*"We must also consider the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different impact upon the neighborhood..."*

Mr. Lewis stated this was the test used when reviewing the plans for the proposed Oliver building. He stated section C-4 indicates that no additional cubic content is allowed, but what the applicant has failed to do is put this in context with section C-6 and the RSA's and case studies that have been done by the courts. Both sections need to be taken into account, along with the decision of the NH Supreme Court on the New London Case. Mr. Lewis stated that he has addressed all three sections. He stated he has looked at the square footage of the cottage. The footprint is staying the same, and the zoning district allows residential uses. He stated in reviewing the ordinance, Section 305-18, C-4 and C-6 and putting this into context with the New London Case, he came to the following determination: The height is not changing, the building is being made more functional and usable, the use is not changing, and the building will have the same effect. He stated he looked at how different the proposed use will be from the current use, the attic space may be larger and oriented differently, but the integrity is not changing and the building is not being changed in a substantial form.

Mr. Lewis stated that he takes Zoning very seriously and has been doing this for twenty-five years. He stated he takes the integrity of the Zoning very seriously.

Mr. Lewis stated that all three items needed to be taking together and you cannot separate one section from the others, as this is unfair and unreasonable.

Mr. Lewis stated if the owner applied for a permit to replace as is, and then came into after to make the basement deeper he would not need a variance and this would be approved by right. He stated if he then came back to the board to reorient the second floor area, a permit would be issued by right. If the applicant applied after that for a bathroom, this would be approved by right.

Mr. Lewis stated it is unreasonable to apply one section of the ordinance, without the other sections and without bringing in the RSA's and case laws as have been determined by the court system. He stated that case laws cannot be ignored.

Mr. Nawoj stated if this is the case, they why did the Oliver's come before the board before and get denied. The ordinance is very specific, it outlines exactly what is allowed and is very clear when it says that you cannot add cubic content when replacing a structure.

Member Russo asked Mr. Nawoj if he had an interpretation of the New London case law and he asked why this case needs to be interpreted. Member Russo asked Mr. Nawoj if he was saying that the supreme court case and decision was not ambiguous. Member Russo stated the board needs to look at all the requirements and that cases such as this that the Supreme Court relies on in its decision making is very important. The Supreme Court has stated that the ordinances are not black and white and there are serious conditions that need to be looked at. Mr. Nawoj stated that he is not familiar with this.

Member Fleckenstein stated that in 2006 the applicant applied for a substantial increase. Mr. Nawoj stated that in 2008 the addition was only for 83 square feet and asked then why this variance request was not approved. Member Fleckenstein asked if the roof height was different and Mr. Oliver stated that the roof line came across the entire length of the house.

Mr. Nawoj stated he again thinks this discussion is not appropriate in this setting and that this is an appeal of an administrative decision and not a variance and he is appealing the building permit that was issued. Member Farmer stated that a permit has not been issued yet. Mr. Nawoj stated that the Oliver's need to apply for a variance and then the board and the abutters and the Oliver's can hash this out.

Member Sargent stated that Mr. Lewis wasn't comfortable in making a decision, without looking at other matters and so he went to the higher Supreme Court in making his decision. The Supreme Court decision has more knowledge. Mr. Nawoj stated that all decisions of the administrator needed to be based on State Law and the ordinances and he added that if the Administrator made a decision that was against the ordinance of the City then the City Ordinances need to be looked at. Member Sargent stated unless there are different circumstances. Mr. Nawoj stated that the last time the Oliver's applied, they needed a variance.

9:40 p.m.

#### Public Comment

Mike Disco stated that he was present to speak on behalf of his mother, who is an abutter to the property. He stated that his mother is in support as long as the same footprint is utilized. She is fine with a new structure being built.

Member Tully asked where the Disco property is located and it was indicated it is 32 North Shore Lane. It was indicated that a copy of the tax map was in their packet which outlines the location of the Disco property.

Richard Chandler was present to speak. He stated he is not an abutter; however, he was recently the President of the Webster Lake Association. He stated there are 18 properties on North Shore Lane. There is an association that includes all 18 properties and annual dues are spent primarily for maintenance and plowing of the little private roadway. He stated he is the proclaimed Mayor, Treasurer, road agent and

sometimes negotiator of disputes between the neighbors on this roadway. He stated he does not take sides when there is a problem with neighbors, most often being with abutters.

He stated that of the 18 properties on North Shore Lane, four are new homes, seven have made improvements and 10 have put in new septic systems. He stated that any time someone builds a new home, makes improvements or replaces their septic system he is thrilled as it upgrades their little community.

He stated in his capacity as the President of the Webster Lake Association, until this year, the board of directors and himself has applauded those that make an attempt to upgrade their properties or put in a new septic system.

Richard Lewis then passed out to the board some email correspondence that was received from abutters. The emails in support of the project were from the Protzman's, Greg Disco and Maureen Disco. It was indicated that Mr. Ostrander had called to voice his support, but an email had not been received from him.

Member Russo indicated that after looking at all the issues with the past variances and cubic content, he is concerned about if this was allowed what the threshold would be. He stated how can you avoid C-4 rating of not allowing more cubic content, while staying within the other ordinances, state regulations and case laws. He stated that section C-4 seems pretty black and white, but then the justification and arguments regarding section C-6 and case laws have to come into effect. He stated he is not sure where the end is and where the line is drawn. He stated the addition of one dormer could mean a second floor, is this a substantial increase? He stated he is not sure if a variance is necessary on issues such as this.

Member Sargent stated the board just gave permission for a homeowner to rebuild on New Hampton Road, Gile Pond, where the upstairs was similar to this application, and a full bedroom was wanted.

There was a discussion between the board about the arguments given this evening and the cubic content portion of the ordinance. There was discussion about Section C-6 as it applies to section C-4 and the case studies set forth by the Supreme Court. The board discussed that based on the case law; this is not a substantial change and doesn't change the use of the structure. There was discussion about possibly changing the plan to meet all requirements; and it was determined by the board that they are not here to discuss changing the plans or approving plans, but are only here to say if the decision of the Administrator that the building permit can be issued is appropriate or if the appeal should be granted.

**MOTION: Member Sargent moved and Member Fleckenstein seconded that the Zoning Board of Adjustment moved to uphold the decision of the Planning and Zoning Administrator regarding the Appeal of Administrative decision.**

**A hand vote was taken, where Member Kathlene Fleckenstein, Member Charles Farmer, Member Floyd Sargent and Member Marty Russo were in favor of the motion. Member Donna Tully was against the motion. The motion passed.**

### **Old Business**

### **Planner's Update**

Richard Lewis stated that an application was received from September 1, 2010. He stated that the office received an email from Cindy Styles indicating that she would not be able to be at the meetings of the board for an unknown period of time due to a family illness. He stated the application that was submitted;

Member Russo is an abutter to and will not be able to vote on the matter. He stated that Floyd has recused himself on numerous occasions regarding the application. He is going to speak with Paul about this and asked permission from Mr. Sargent to give his number for Paul to possibly contact him. Mr. Sargent stated that was okay.

**Other Business:** None.

**Public Comment:** None.

**Adjournment**

**MOTION: Member Fleckenstein moved and Member Russo seconded to adjourn the August 4<sup>th</sup>, 2010 meeting of the Zoning Board of Adjustment, at 10:18 p.m. All were in favor and the motion passed.**

Respectfully submitted,

Angela M. Carey  
Planning and Zoning Administrator