

**FRANKLIN ZONING BOARD
REGULAR MEETING AND PUBLIC HEARING
CITY COUNCIL CHAMBERS- CITY HALL
Wednesday, September 7th, 2011 at 7:00 p.m.**

MINUTES

Call to Order: The meeting was called to order at 7:10 p.m.

- ❑ **Salute to the Flag**
- ❑ **Roll Call**

Present: Chuck Farmer, Don Gagnon, Kathlene Fleckenstein, Floyd Sargent, Marty Russo and Planning and Zoning Administrator Richard Lewis.
Absent: Donna Tully.

Chair Farmer seated Member Gagnon for absent voting member Donna Tully.

- ❑ **Approval of Minutes: June 1st, 2011 Zoning Board Meeting**

MOTION: Member Russo moved and Member Sargent seconded to approve the minutes of the June 1st, 2011 Zoning Board regular meeting. All were in favor and the motion passed.

New Business

- ❑ **Z11-07:** Brian Nawoj, Applicant, requests an Appeal of Administrative Decision, regarding the May 12, 2011 decision of Richard Lewis that the proposal of Donald and Eileen Oliver for the demolition of an existing structure and the construction of a replacement structure meets and satisfies the provisions of Sections 305-18.C.4 and 6 and shall be considered a natural expansion of the structure for property owned by Oliver Family Irrevocable Trust and located at 25 North Shore Lane, identified as Tax Map/Lot # 032-049-00, LP Zone (Lake Protection District).

Attorney Daniel Muller, of Cronin and Bisson, PC, was present to represent the Nawoj's. He stated that there position under the Zoning Ordinance is that the demolition of the building and the replacement is not allowed as a matter of right as was indicated by Richard Lewis. He stated that the Natural Expansion portion of the Non-Conforming in the zoning was recently added. He stated that in the City Zoning Ordinance it states in section 305-40. Conflict with other laws, that when the regulations made under the authority hereof differ from those prescribed by statute, ordinance or other regulations, that provision which imposes the greater restriction or the higher standard shall govern.

He indicated that his client owns the property across the street and that this property was purchased for the enjoyment of the lake and the view. He stated the application is in regards to a decision made regarding the property across the street.

He stated the subject property is located in the Lake Protection Zone and the Webster Lake Overlay District. The house in question sits between his client, the Nawoj's, property and the lake and is in the shoreland area.

Attorney Muller stated the use expanded a few years ago with the construction of a larger garage, the minimum lot area requirements of the zone are 108,900 square feet and this property is 13,030 square feet.

The Olivers are looking at demolishing the existing structure and replacing it with a new structure, with an expanded basement and expanded 2nd floor area. He stated that this is the third attempt by the owner to complete this.

The appeal is based on Mr. Lewis' determination that the replacement of the non-conforming structure is being permitted by Natural Right. He stated that based on section 305-40, if another provision or statute is more stringent then that provision is the governing provision. He stated that the property demolition and rebuild is not allowed per RSA 483-B, Comprehensive Shoreland Protection Act. He stated a permit would need to be issued by the State of New Hampshire, Department of Environmental Services. He indicated that the plans show the cottage is 48' from the reference line and the regulations indicate that nothing new can be built within the 50' of the lake. He stated that RSA 483-B:11 allows for a non-conforming structure to be repaired or replaced in kind. He stated that in-kind does not allow for additional square footage to be added, as will be done with this project with the expansion of the second floor and the basement area. He stated unless a variance is issued by the State, this would not be allowed. He again stated that Section 305-40 of the Zoning Ordinance indicates that the more stringent standard must be applied and that this project as proposed cannot be done as a matter of right. He stated that Section 305-29.3.D(4)(a) of the Webster Lake Overlay District indicates, "No new structures or driveways are allowed within 50 feet of any surface water or wetland area". He added that the proposal is to demolish the building and replace it and the replacement is a new structure, substituted for an old one. He stated that a new structure within 48' of the lake violates the RSA. He stated that both of these arguments assume that the natural expansion is not a proper determination in this case.

He indicated that alternatively the burden is on the owner of the building to supply sufficient evidence that indicates that the use is the same. He stated they have not provided any data indicating that there will be no displacement of soil or that the water table will not be impacted, as they believe the basement will impact the water table. He stated that at a minimum evidence that the soil will not be destabilized and there would be no change to the water table needs to be provided.

Attorney Muller stated that even if the board ignores section 305-40 of the Zoning, they cannot debate that the replacement of a cottage within the 50' of the reference line is not a replacement in kind. The proposed expansion to the non-conforming structure violates the law and is not allowed.

Attorney Muller stated that from his clients prospective, the expansion will diminish their view. He stated the fact is that this is a non-conforming structure and one building has already been expanded on the property that diminished the view. He stated that in case 132 N.H. 302, Devaney vs. Town of Windham there was a proposed second floor that would have decreased the view of the water and would have decreased the natural sunlight to the abutters. The view of the lake will be adversely impacted in this case as well.

Member Russo indicated that there will be a removal of trees, as indicated by the plan, and this would positively impact the view of the lake from Nawoj's property. Member Sargent indicated that in the statements made in 2010 and by the pictures that were submitted the roof line will be reconfigured to minimize the impacts to the view, and the view will only be impacted by approximately 5%; however, the removal of the trees will increase the view by 20% off setting any negative impact based on the roof line. He stated that their argument of the view being affected makes no sense.

Attorney Muller stated they are not at the meeting to debate the project. He stated that currently the Nawoj's can see through the leaves on the trees to the lake, but that they would not be able to see through a house. He stated the question the board needs to answer is if the Oliver's need a variance or if the changes are allowed by a matter of right. He stated they are not debating whether this is a good project or not, just what is allowed by right. He stated you cannot have additional interior square footage, and that they do have the option to seek a variance, but they need to go through that process.

Member Sargent indicated he understands what the attorney is saying; however, part of the argument is the view and that saying they can't do the project based on the view, when the view will be increased is splitting hairs. He stated the Oliver's could leave the existing home where it is and that is within the 50' from the reference line.

Attorney Muller stated that there is a major difference between the existing and the proposed non-conforming structure. He stated that the City and the State are trying to prevent non-conforming structures to the greatest extent possible. He stated he didn't say that they can't use their existing structure; however, they can't build a new structure and these are two distinct issues. The Shoreland Protection Statute states no new structures are allowed within 50' of the lake.

Member Farmer stated that if the home burnt down they could rebuild, and that the structure is grandfathered, which would have no protection of the view. Attorney Muller stated if an act of God destroyed the house there are protections, but this is not an act of God and they just want a new house which is different. He stated he is not sure if the City of Franklin has these protections for acts of God as has been indicated. Member Farmer stated that the biggest argument for the last few years has been the view. Attorney Muller stated that their objection and the view goes into a legal standpoint. He stated the biggest arguments are that this is not in compliance with the Webster Lake Overlay District or the Shoreland Protection Act, and under these sections a variance is necessary. He added that if this is determined to be a natural expansion, then the board needs to look at whether it is detrimental and this is where the view issues come into play. Member Farmer asked how the view affects the natural expansion, and Attorney Muller stated that the view is an adverse impact which is covered under this portion of the ordinance.

Attorney Muller indicated that prior to this decision, they had appealed the Zoning Board of Adjustments decision to Court, and then the City changed the Zoning, and this application falls under the amended ordinance, the new proposal has a different set of laws then what was discussed in the past.

Member Fleckenstein indicated the building has to be replaced due to maintenance issues that are not cost effective to repair. She stated there is no difference between incurable maintenance and a building burning down. If maintenance needs make a building unusable and the building needs to be replaced, they owner should not be made to incur additional expenses of moving the existing foundation and they should be allowed to use the existing foundation. The changes in square footage are to meet current code requirements.

Attorney Muller stated that Zoning Policies are in general in place as Zoning hopes that non-conforming structures become obsolete. He stated the this proposal is not the same as if the home was destroyed by fire and the Shoreland Protection act allows a non-conforming structure to be renovated, repaired or replaced in kind. He stated we are talking about replacement. Member Fleckenstein indicated replacement due to it not being cost effective to do the necessary repairs. Attorney Muller stated that they can stick to the existing footprint and the existing square footage, he stated essentially the same structure with modern technology. Attorney Muller stated they also have the option of moving the structure two feet and diminishing the size of the structure. He stated if they go forward with the plan as submitted they

need certain relief from the Zoning Board, being a variance and they cannot make the changes as a matter of right.

Member Fleckenstein asked Attorney Muller if he had evidence from an Appraiser that the view would be negatively impacted and to what extent. She stated that there are a few appraisers on the board, and that the view will be increased as a result of the project then it currently is. Attorney Muller stated that a second floor was being added in the Devaney case, 132 N.H. 302, and that case dealt with the view.

Member Sargent stated that if the house burnt the Webster Lake Overlay requirements and the Lake Protection requirements would not be in effect. Attorney Muller indicated that is not the case and that this is a voluntary demolition. Mr. Muller stated that he is not sure that the City has the regulations regarding this protection. He stated that this would be a case of abandonment, it would be the same as if a storey was abandoned three years ago, there would be no protections. He stated these are different factual circumstances and that the board needs to look at what is existing and proposed and not what if something were to happen.

Member Sargent stated that the applicant could rebuild one wall at a time every six months and it would still be non-conforming. Attorney Muller stated this is an existing non-conforming structure on a non-conforming lot.

Member Sargent asked Mr. Muller, if in his opinion, the Zoning Board had the right to do anything. Attorney Muller stated that if someone did replace every wall, and used a piece meal intent, that would be a problem. He stated this is a different scenario, and is not a demolition and repair, and that the board must follow the spirit and letter of the law.

Member Farmer stated the building changed the roof line but they are not adding height. Attorney Muller stated that this is the case only if they can expand the basement down and no evidence has been shown that this is possible without disrupting the water table.

Attorney Richard Uchida, of Orr and Reno, was present to represent Don and Eileen Oliver. He stated they support the administrative decision issued by Richard Lewis and indicated that a special exception or a variance is not needed, as Mr. Lewis made an appropriate and legal decision.

Attorney Uchida indicated the property is located at 25 North Shore Lane. He stated they are looking at demolishing the cottage and rebuilding it in the same footprint. He stated they have approval for a new septic, which calls for the removal of trees (he then provided the board with some pictures of the removal of the trees and the existing property). He stated the house has a chronic leak issue and in order to rebuild and bring the building up to code and to add a bathroom the square footage is changing by 218 square feet. He indicated that the roof is flat now and this has been problematic and needs to be changed.

Attorney Uchida indicated the second floor is going to change but that the footprint is not going to change. He stated this is a natural expansion and indicated that this decision was correct, as the proposed modification are natural and the purpose and use is existing and is not changing. He stated the proposed modification is a different manner of the same use, and no one has debated this, it was a cottage before and will be a cottage after. He stated they are not creating any new non-conformity, as the footprint is staying the same and the height of the building is not changing.

Attorney Uchida indicated that Attorney Muller has indicated that the changes violate the state law, specifically being the Shoreland Protection Act, as the new structure will have a greater square footage, and Attorney Uchida stated that this was true until July of 2011, when the Shoreland Protection Act was

changed to the Shoreland Water Quality Protection Act. The new statute now reads: “483-B:11 Nonconforming Structures. I. Except as otherwise prohibited by law or applicable municipal ordinance, nonconforming structures located within the protected shoreland may be repaired, replaced in kind, reconstructed in place, altered, or expanded. Repair, replacement-in kind, or reconstruction in place may alter or remodel the interior design or existing foundation of the nonconforming structure, but shall result in no expansion or relocation of the existing footprint within the waterfront buffer”.

Attorney Uchida indicated that under the new law there is no violation, and there is no state statute that is more stringent.

Attorney Uchida indicated that Attorney Muller stated that this project violates the regulations as this is a new structure and not a replacement structure; however, under the new Shoreland Protection Act, a replace in kind is referred to as: “Replace in kind means the substitution of a new structure for an existing legal structure, whether in total or in part”.

Attorney Uchida indicated the use is not changing, the roof is changing, but they are working to increase the view of the abutter and not decrease the view. He then gave the board copies of pictures of the existing cottage with the trees present and one with the new home and the trees removed.

Attorney Uchida indicated the use is the same, the structure is the same, it is being replaced in kind, the character of the neighborhood is staying the same and they are increasing the neighbors view. Mr. Nawoj’s attorney indicated the basement could destabilize the soil; however, there is currently a basement and there is no leakage or seepage in the basement and they are retaining the existing footprint. He stated the foundation is going to be right where it always has been and there is no current evidence of destabilization.

Attorney Uchida indicated that in Mr. Nawoj’s attorney’s submission it was indicated the impact is double; however this is not possible unless they are including the square footage of the DES already approved septic, which is to replace an existing septic and this also is the same use as the existing being a seasonal cottage.

Mr. Nawoj’s attorney indicated that this project is substantially different and does not meet the requirements of the Shoreland Protection Act; however, this critical argument has fallen by the wasteside based on the new Shoreland Protection Act Requirements.

Attorney Uchida indicated that the septic plan that was submitted to DES and approved and done by an Licensed Septic Designer actually shows the house outside of the 50’ buffer.

Attorney Uchida indicated that based on these the proposal conforms to the Natural Expansion Tests and Mr. Lewis was spot on with his decision and he supports that decision.

Member Sargent asked if a copy of the new Shoreland rules were in the information and Attorney Uchida indicated they are not, but stated he had a copy, which he then showed the board.

Member Fleckenstein asked how much further down the foundation would have to go to not increase the height and it was indicated approximately 3-4 feet.

Member Farmer asked if the building would be year round or seasonal and it was indicated it would be seasonal.

Member Sargent indicated there is no new loss of view and Mr. Oliver agreed. Attorney Uchida stated there is no view impact and the view will be better.

Richard Lewis stated that Attorney Uchida hit on the points that he was going to bring to the board. He stated that since the original application was filed and now the court has new regulations in place. He stated that the Planning Board institute new non-conforming regulations to help to deal more effectively and efficiently the non-conforming structures. He stated the process is to create a fair and reasonable process due to changes in code requirements. He stated the changes to the non-conforming of the City Zoning brought the zoning into compliance with RSA 674-19, which was read for the record and states: **“674:19 Applicability of Zoning Ordinance.** – A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.”

The language in section 674-19 is very clear and led to the court decisions regarding natural expansion.

Mr. Lewis stated that issues of erosion control and stabilization would be part of the building permit process to insure that control methods are in place. He stated that getting these details is a fairly common practice.

Mr. Lewis indicated that Attorney Muller mentioned that they are not debating whether this is a good project and with the amended language of section 305-18, the amended language of the Shoreland Protection Act, they have created a fair and reasonable process.

Mr. Lewis stated that to prevent natural expansion or rebuilding after a fire is not fair. He stated if you take Attorney Muller’s argument to heart, you can make a case using the argument that if a building burnt down it couldn’t be rebuilt due to the changes in code requirements.

Mr. Lewis stated that per section 305-18(c), indicates that you can rebuild through a building permit. Mr. Lewis stated that the provisions of the shoreland protection act that Attorney Muller relied on are not in affect anymore.

Public Comment: None.

Board Discussion

MOTION: Member Russo moved and Member Sargent seconded that the Zoning Board of Adjustment move to uphold the decision of the Planning and Zoning Administrator regarding the Appeal of Administrative decision submitted by Brian Nawoj regarding the Administrative Decision, issued May 12, 2011, to allow for the proposed demolition of an existing structure and the reconstruction of a residential structure on the same footprint. In making this decision, the ZBA finds that the Administrator properly interpreted and applied the applicable provisions of Section 305-18.C, Nonconforming Structures, of the Franklin Zoning Ordinance, and that the Administrative Decision was based on an appropriate reading and application of the clear and concise language of this ordinance section as it applies to the conditions under which a nonconforming structure can be removed through a demolition permit and reconstructed so that the functional nature and use of the structure are not changed and the structure does not have a substantially different effect or impact on the abutting property or the neighborhood. The subject property is owned by Oliver Family Irrevocable Trust, and is located at 25 North Shore Lane, identified as Tax Map/Lot # 032-049-00, LP Zone (Lake Protection District). All were in favor and the motion passed.

- **Nomination of:**
 - Chair
 - Vice Chair
 - Secretary

The board opted to do the nominations when all members of the board were present.

Old Business: None.

Planner's Update: None.

Other Business: None.

Public Comment: None.

Adjournment

MOTION: Member Sargent moved and Member Gagnon seconded to adjourn the September 7th, 2011 meeting of the Zoning Board of Adjustment, at 8:25 p.m. All were in favor and the motion passed.

Respectfully submitted,

Angela M. Carey
Planning and Zoning Administrator