

Moultonborough Zoning Board of Adjustment
P.O. Box 548
Moultonborough, NH 03254

(603) 476-2347

Minutes

August 5, 2009
Regular Meeting - 7:30 PM
Moultonborough Town Offices

Present: Members: Bob Stephens Jerry Hopkins, Bob Bernstein,
Russell Nolin, Ray Heal
Alternates: Nicol Roseberry

I. Call to Order

Mr. Stephens called the meeting to order at 7:30 PM, and introduced the members of the board to the public.

II. Pledge of Allegiance

Mr. Stephens introduced our new Town Planner, Daniel Merhalski to the board and public. Mr. Stephens noted that Dan will be attending the meetings and will assist the board if they have any questions. The board welcomed Dan.

III. Approval of Minutes

Motion: Mr. Hopkins moved to approve the Zoning Board of Adjustment Minutes of July 1, 2009.
Mr. Bernstein Seconded.
Motion Carried - Unanimously.

Motion: Mr. Nolin moved to reaffirm the Chairman's action as a committee of one on July 15, 2009.
Mr. Hopkins Seconded.
Motion Carried - Unanimously.

IV. New Applications

V. Hearings

**1. Mary E. Allain and David A. Muskopf (200-38)(119 Swallow Point Road)
Continued Area Variance from Article III Paragraph B (3)**

Mr. Stephens noted that this was a continued hearing for the request for an area variance from Article III Paragraph B(3) of the Zoning Ordinance, to permit the location of an existing dwelling less than

20' from the property sideline. The original hearing was held on June 3, continued to July 1 to allow for an on-site visit (June 27th) and continued again on July 1st as there was not a full board of five members.

Attorney Doug Hill was present representing David Muskopf and Mary Allain. Mr. Hill stated that he would not repeat what was said before, noting they had gone through the five points for a variance, but instead gave a quick recap. Mr. Hill stated Dave and Mary we shown and sold a lot with 90' of frontage. The deed, tax maps and site assessment sketch are all consistent, and when they closed they thought they had 90' of frontage. The Superior Court has ruled the property line runs next to the house as shown on the plan. The Mansur's would like to see the house torn down because it's in the setback, and they feel that's unreasonable and unfair. The Board of Directors for Swallow Point Association, which is the fee title owner of the adjacent lot, is in favor of the variance, as well as other individual members.

Mr. Hill responded to a few questions raised at the first hearing. Mr. Hopkins had questioned if it would be possible to remove the porch. Upon reviewing this question, the building would not be structurally impaired if the porch was cut off diagonally to create a setback of about 7'. That would not be desirable, but it would be possible. The second question asked was about the septic system. Mr. Hill noted the location of the septic tank, pump and the push lines are on the back portion of the property in the buildable area as discussed. The leach field is an offsite common leach field. If a dwelling was to be built in the back portion of the lot, the tank, pump and lines would be destroyed and would add to what they believe is an unreasonable cost. Mr. Hill spoke to view issue raised by Attorney Nadeau.

The agreement has been made that Dave and Mary essentially recklessly went forward with their project and therefore should be required to take the home down. Mr. Hill went on to give a sequence of events and an explanation of timing. They are arguing the unreasonable costs. Mr. Hill does not believe the board needs to look at all of the costs of the project to determine whether there are unreasonable costs under the variance standard. In December 2005, rumors of boundary litigation down the road. Bought land in March 2005. Building ordered in September 2005, paid for and trucked to site in November. Foundation was in place and paid for. Well in place and building contractor paid for initial phase of erection, deck paid for. Total cash committed was \$147,330. Building Permit issued in November 2005. From December 2005 through winter there are discussions with Association members, and there was mention of a boundary line agreement. The boundary agreement would require a unanimous vote of the members and that did not happen. In spring 2006 there was an allegation the building was on the association lot and litigation ensued. 2 ½ years later, the Superior Court ruled that the building was not on the association lot, but created the setback issue before the board. In June 2006 the Code Enforcement Officer wrote a letter to Dave and Mary telling them to "stop when weather tight." At that point the contractor was offsite and Dave continued on his own. Mr. Hill feels at that point Dave and Mary were irrevocably committed to the building. The foundation was in and the only sensible thing to do was to close the building up.

Mr. Hill submitted an Applicants Memorandum in support of the request for an area variance. The board took 5-10 minutes to review the memorandum submitted by Mr. Hill.

Mr. Hopkins had a question regarding the portion stating, Mr. Cahoon wrote a letter to Dave and Mary stating the work should stop when the building is weather tight. The sentence went on to state that Dave himself has continued with his own individual interior work. Mr. Hill stated yes, that there is no kitchen. There is a temporary kitchen with a hot plate. The inside of the building is partially usable, but is not finished. Mr. Hopkins questioned if the building had been inspected as it would normally be. Mr. Hill did not know the answer to this. Mr. Stephens stated that Mr. Cahoon has inspected only the portion of the building which is within the legal setback. Anything area that is in contention has not been inspected as noted in his inspection report.

Attorney Regina Nadeau was present representing Richard and Susan Mansur who are opposing the request for variance Ms Nadeau stated the Supreme Court ruled today that the Mansur's have an easement right diagonally across the applicant's property, so they are an interest owner in the property. Ms. Nadeau provided the board with a packet, which was put together in a chronological standpoint. Ms. Nadeau started with an explanation of where she and Attorney Hill disagreed on the applicable law. At the prior hearing Ms. Nadeau had said that the ZBA should not be considering manmade structures, she was not saying that under normal circumstances you can't consider other improvements on the property. This is not a normal circumstance, this is an illegal structure and the board cannot rely on the existence of the illegal structure or the cost of removing it in determining whether or not this lot is suitable for what they are proposing to do. Ms. Nadeau does not feel this is an issue of whether or not you can consider the building in any circumstance, it's whether or not you can consider the building in this circumstance. Provided in the packet is a sketch, using the same scale as their plan, that shows the house will fit as a conforming structure. Ms. Nadeau noted the first question under hardship is what is unusual about this property that makes it necessary to seek relief? They feel there is nothing unusual, but the illegal structure. The remainder of the material is material that the Applicant submitted as part of the Discovery in the lawsuit. Ms. Nadeau went over the material which included photos and dates of work that had been performed. The first photo was of the footings on the day of the log house delivery, November 27, 2005. Next was an e-mail dated December 14, 2005 from the Association noting they had brought the issue of the property line problem to the Directors. A letter dated December 13, 2005 was sent to Dave and Mary regarding the property line problem, noting a hand written comment on the bottom stating "Discussed in detail on 12/22/05." Ms. Nadeau feels this is a warning to Dave and Mary. Next was a photo dated December 20, 2005 with Mr. Muskopf's notations on the back, December 20, 2005, the same day the Wartinger Decision was presented to Muskopf's. The foundation was poured on the 20th and on the same day received an offer to move the property line was made. Ms. Nadeau felt at this time there was no question that by December 20th the Muskopf's are aware there is an issue. Next in the packet was a photo dated January 22, 2006, which shows they went ahead and capped the foundation. Next was a photo dated February 11, 2006, which shows the walls have been started to be put up, with Ms. Nadeau commenting even two months after they were certain there was a dispute. The lawsuit was then filed in March 2006. Next is a Facsimile, done by the Muskopf's surveyor, of a Progress Print dated 3-29-2006. At this time the Muskopf's surveyor was showing the house was situated within the setback. Despite this the Muskopf's proceeded to a point where there is a fully enclosed property, and enclosed porch. According to the Mansur's, the property is being used as living space, with no Certificate of Occupancy. The last document in the packet was a portion of the Deposition of David Muskopf. Ms. Nadeau stated she did have a copy of the entire deposition if the board would like. Ms. Nadeau referred to questions and answers' regarding what was completed when Mr. Muskopf was aware there was a boundary line issue.

Ms. Nadeau noted the list of expenses provided by Mr. Hill, \$99,000 for a kit of lumber that was delivered which hadn't been installed and could have been stored somewhere. A \$45,000 advance payment to a contractor for some work that has not been done. What were in the ground in the middle of December were footings. All of this could have been avoided from that point forward. Ms. Nadeau questioned if this was a self imposed hardship. This house can be situated on the property to make it conforming. There has been ample notice and could have been stopped a long time ago. There have been many efforts to try and stop this. The Mansur's do have rights to the adjacent beach, and brought the case to court as someone was claiming half of the shorefront lot.

Mr. Stephens indicated that with his vast number of years of experience in the construction field, footings are routinely protected against frost damage with bales of hay at a minimal expense.

Mr. Bernstein questioned the ruling made earlier in the day by the Supreme Court regarding the right of way and questioned where the right of way was located. Ms. Nadeau stated she believed that there is an additional 45' on the Muskopf property. Mr. Mansur stated he believes the line goes from the waterfront to the Northern corner pin. Ms. Nadeau drew with a highlighter from the waterfront to the pin. Mr. Bernstein questioned if the right of way goes through the house. Mr. Mansur noted that it does. Mr. Hill disagreed with the placement of the line going through the house. The Supreme Court did not set the line for the right of way. Mr. Mansur has a 75' easement right for access to the lake. The question before the Supreme Court was whether the easement right was just over the association lot, or whether the 75' spilled over onto Lot 38. The Supreme Court found that it does spill over onto Lot 38, but Mr. Hill does not believe that the Supreme Court drew a line from shoreline up to the corner pin. It is an access easement and is not defined by any metes and bounds. They have a right to use 75' of the shoreline.

The board questioned if Supreme Court ruling has any impact on the application as presented. After a lengthy discussion with Attorney Nadeau and the Mansur's giving reasons as to why they felt they would feel uncomfortable with using the access to the lake with the home remaining in its current location. The home could be moved back to a conforming location, making it so the Mansur's would not need to pass so closely to the Muskopf house.

Mr. Stephens questioned if there were any further questions from the board. It was the decision of the board to go into a deliberative session.

Motion: Mr. Hopkins moved to go into deliberative session.
Mr. Nolin Seconded.

Motion Carried – Jerry – Aye, Russ – Aye, Ray – Aye, Bob B. –Aye, Bob S. – Aye.

The board went into deliberative session at 8:55 PM.

Motion: Mr. Hopkins moved to come out of deliberative session.
Mr. Nolin Seconded.

Motion Carried – Jerry – Aye, Russ – Aye, Ray – Aye, Bob B. –Aye, Bob S. – Aye.

The board returned to public session at 9:07 PM.

Jayne Cohen, property owner and one of the Director's of Swallow Point Association spoke in favor of the granting of the request for variance.

Dave Muskopf addressed the Board, noting there were three people in the room that have never spoken to him and are accusing him and Mary of doing awful things over the last three years. They have never had any intention to do anything but improve the property. The house was centered on the lot based on all the information the time they bought it. To this day their deed has no reference to an easement across it. They followed all the rules that were given to them at that time. They did inquire about a survey but were informed by the town that they did not need one and the documents they had were sufficient to obtain a building permit. When they were asked to stop, they did, and were told they could go ahead. Mr. Muskopf wants people to know that they are not trying to force something on the community. In the time they have owned the property, since 2005, there has been virtually no use of the common land.

Charlie Wartinger, located two houses west of the Muskopf's spoke in favor of the variance.

The Chairman went over the criteria for the granting of an area variance. The voting members were Jerry, Russ, Ray, Bob B. and Bob S.

- 1) Affirmative – Unanimously.
- 2) Affirmative – Jerry, Ray, Bob B., Bob S.
Negative - Russ
- 3a) Affirmative – Jerry, Ray, Bob B.
Negative – Russ, Bob S.
- 3b) Affirmative – Jerry, Bob B., Bob S.
Negative – Russ, Ray
- 4) Affirmative – Jerry, Ray, Bob B., Bob S.
Negative - Russ
- 5) Affirmative – Jerry, Ray, Bob B., Bob S.
Negative - Russ

Motion: Mr. ~~Stephens~~ *Bernstein* moved to grant the area variance for **Mary E. Allain and David A. Muskopf (200-38)** from Article III Paragraph B as presented. Mr. ~~Bernstein~~ *Hopkins* Seconded.
Motion Carried – Unanimously. *Failed – 2 in favor, 3 opposed.*

**2. Ames Associates for Kimberly Crabtree (242-24)(50 Cooks Point Road)
Area Variance from Article III Paragraph B (3)**

Mrs. Roseberry recused herself from any discussion in this hearing.

Mr. Stephens noted that this is a request for an area variance from Article III Paragraph B(3)

Dan Ellis of Ames Associates presented the application for area variance. Mr. Ellis stated the application is to allow portions of the recently constructed home to remain in the setback. Mr. Ellis noted that approximately 1/10th of a square foot of the residence wall, 1/10th of a square foot of a stone chimney, and ½ square foot of a deck encroach into the setback area. The house corner and chimney corner are 19.8’ from the property line, the deck corner is 19.6’ from the property line (20’ required). Mr. Ellis stated he had spoken with the Code Enforcement Officer regarding this property. Mr. Cahoon had told him that the eaves/overhang of a building can encroach up to 18 inches into the setback, and that the setback is applied to the distance from the foundation. The figures provided are to the building, which if measured to the foundation would reduce the encroachment by an additional inch or so, making the encroachments even less. Mr. Ellis answered any questions from the board.

Mr. Hopkins questioned why this was not submitted as an Equitable Waiver of Dimensional Requirements? Mr. Ellis stated he had originally completed an application for Equitable Wavier and changed it to an area variance after speaking first with Ms. Whitney and then Mr. Cahoon. Mr. Ellis felt that it did not meet the criteria for the waiver as Mr. Cahoon had contacted the owner in writing that there may be an encroachment issue.

Mr. Ellis provided the board with four photos taken from various locations, showing the natural tree buffer along the property line that is being encroached upon.

The Chairman went over the criteria for the granting of an area variance. The voting members were Jerry, Russ, Ray, Bob B. and Bob S.

- 1) Affirmative – Unanimously.
- 2) Affirmative – Unanimously.
- 3a) Affirmative – Unanimously.
- 3b) Affirmative – Unanimously.
- 4) Affirmative – Unanimously.
- 5) Affirmative – Unanimously.

Motion: Mr. Nolin moved to grant the area variance for **Ames Associates for Kimberly Crabtree (242-24)** from Article III Paragraph B as presented.
Mr. Heal Seconded.
Motion Carried – Unanimously.

VI. Correspondence

1) It was noted that there were not any new submissions submitted this evening and the board had not continued any hearings to August 19th. It was the decision of the board to cancel the meeting.

Motion: Mr. Hopkins moved to cancel the August 19, 2009 meeting of the ZBA, and to authorize the Chairman to accept any new applications as a committee of one for the scheduling of hearings for September 2, 2009.
Mr. Nolin Seconded.
Motion Carried – Unanimously.

2) Memo from Town Administrator dated July 20, 2009, transferring supervision of Land Use Coordinator from T/A to Town Planner.

3) Letter dated July 9, 2009 from the Moultonboro Citizens Alliance inviting the PB to a “Right to Know” Seminar they are holding on August 10, 2009 at the Moultonborough Public Library was noted.

4) Planning Board Minutes of July 8 & 22, 2009 were noted.

5) Planning Board Work Session of July 29, 2009 were noted.

6) Board of Selectmen Minutes of July 2, 16 & 30, 2009 were noted.

VII. Unfinished Business

VIII. Adjournment

Motion: Mr. Bernstein moved to **Adjourn** at 9:38 P.M.
Mr. Nolin Seconded.
Motion Carried - Unanimously.

Respectfully Submitted,
Bonnie L. Whitney
Land Use Coordinator