

Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254

Regular Meeting

October 21, 2009

Minutes

Present: Members: Bob Stephens, Jerry Hopkins, Russell Nolin, Ray Heal, Bob Bernstein
Alternate: Nicol Roseberry; Town Planner, Dan Merhalski

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

III. Approval of Minutes

Motion: Mr. Hopkins moved to approve the Zoning Board of Adjustment Minutes of October 7, 2009, seconded by Mr. Nolin, carried unanimously.

IV. New Applications

V. Hearings

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

Mr. Stephens stated this was a rehearing for an area variance for David Muskopf and Mary Allain.

Present in the audience for the hearing were David Muskopf, Mary Allain, Peg Richards, Jane Cohen and Nancy Talbot and attorney's Doug Hill, Scott Harris and Regina Nadeau.

Doug Hill, attorney for the applicants, gave a presentation to the board starting with a recap of the August 5, 2009 hearing, stating that by denying the variance the building would have to be torn down and built over as it would not be able to be relocated. Mr. Hill reviewed the voting of the criteria of August 5th, noting that Hardship was the only standard (3a & 3b) without a 4-1 vote in favor. Mr. Hill addressed each of the criteria for the granting of an area variance noting numbers 2 & 5 are tied together and felt they met them. If 3a was not voted in the affirmative Mr. Hill stated it would be impossible to use the lot without a variance. Number 3b must be found as there is no alternative that would impose an undo financial burden on the applicant, and that substantial justice would be done if the variance were granted

Mr. Hill addressed some of the arguments raised by the opponents at the prior hearing and referred to the Supreme Court decision, noting that there was no line established on the plan by the court, only the one drawn by Attorney Nadeau. Mr. Hill stated the right to access via the reserve lot to 75' of frontage has not been impeded, and the court did not order the Muskopf house to be taken down.

Mr. Hill submitted a file to the board which included the Initial Petition, response of Muskopf/Allain, Map of Muskopf-Allain and Association lots, Partial Copy of transcript of Deposition of Susan Mansur, Decision of Carroll County Superior Court, Mansur v. Muskopf, August 1, 2008, Decision of New Hampshire Supreme Court, Mansur v. Muskopf, August 5, 2009 and Decision of New Hampshire Supreme Court, Malachy Glen Associates v. Town of Chichester, March 20, 2007.

Attorney Scott Harris gave a brief presentation to the board. Mr. Harris stated that he had tried the Mansur v. Muskopf cases in both the Superior Court and Supreme Court and had taken the Mansur's depositions. Attorney Harris stated the Master of the Court ordered the Mansur's to post a \$100K bond for any damages related to stopping the project. The bond was not placed and the Muskopf's proceeded in making the home weather tight. Mr. Harris referred to the H.D. Trojano plan and two previous decisions that resulted in the issue relating to the Muskopf lot and the Swallow Point Association lot.

Mr. Harris referred to an excerpt from the deposition of Mrs. Mansur in which he asked Mrs. Mansur if what was important to her was that there was sufficient land attached to the reserve lot so there could be a dock on the lot. During litigation it was discovered the dock was illegal as there was not sufficient water frontage as required by NH DES. Mr. Harris submitted a letter to the board dated February 28, 2006 from Richard & Susan Mansur to David Muskopf and Mary Allain regarding gifting of land by the Association to the Muskopf property.

Nancy Talbot, director of Swallow Point Association, stated the original dock was installed without permission by Mr. Mansur's family, was not a permitted dock and that it had been added to over the years.

Attorney Regina Nadeau, representing the Mansur's gave her presentation to the board. Ms. Nadeau started with the argument relating to the injunction, noting that it had been lifted when the Mansur's did not place the \$100k bond, but they did not tell them to go ahead, and they were proceeding at their own risk. Ms. Nadeau stated that in December only the footings were in the ground, not even the foundation when they were aware there may be a problem. Ms. Nadeau addressed each of the criteria claiming the Mansur's property value was diminished by the loss of access to the waterfront, and the buffer from the Muskopf property is non-existent to the beach area, therefore impinging on their rights. Ms. Nadeau stated this all hinges on the hardship standard and feels that the hardship was self imposed. They were put on notice of a possible boundary line issue when they only had footings in the ground.

Peg Richards, director of Swallow Point Association, noted that Ms. Nadeau had referred to the association land as a beach area, noting that the land has only been used to launch boats and has never been used as a beach area.

Nancy Talbot agreed with Mrs. Richards, stating the association land was only to access the water, and not for other uses.

Jane Cohen, an association member, spoke to the easement rights noting that all members have the same rights. She stated that nothing has changed since she has been there and that the association land is seldom used. The members have access rights only, and she feels that the Mansur's rights have not been impacted. Ms. Cohen also noted that the Muskopf's home has improved the looks of the neighborhood.

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. Stephens moved to go into deliberative session. Seconded by Mr. Hopkins, carried unanimously.

The board went into deliberative session at 8:45 PM. The board then discussed each of the criteria in deliberative session.

Motion: Mr. Hopkins moved to come out of deliberative session. Seconded by Mr. Stephens, carried unanimously.

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

Motion: Mr. Hopkins moved to direct Town staff to draft a Notice of Decision for Board discussion only at the next regularly scheduled meeting of the ZBA on November 4, 2009 to grant the application for an Area Variance for **David A. Muskopf and Mary E. Allain, 119 Swallow Point (200-38)**, continue the application to November 4, 2009, and have the approval effective upon completion of all normal Code Enforcement inspections and receipt of the Certificate of Occupancy.
Mr. Stephens seconded, requesting an amendment deleting the word application, Instead place of "grant the application" to "grant the variance." seconded by Mr. Bernstein as amended.

Mr. Merhalski questioned for clarification purposes the motion as made, stating the motion as made has the variance to be effective upon completion of the inspections by the CEO and the Certificate of Occupancy. Mr. Merhalski questioned if the board would like it to be a condition of approval. Mr. Stephens stated it should be a condition, not effective upon.

Mr. Hopkins moved to amend the motion to make the approval conditioned upon the receipt of a Certificate of Occupancy. Seconded by Mr. Bernstein as amended, granted 4-1 in favor with Mr. Nolin opposing.

VI. Correspondence

1) Planning Board Draft Minutes of October 14, 2009 were noted.

VII. Unfinished Business

VIII. Adjournment

Motion: Mr. Berstein made the motion to adjourn at 9:20 PM, seconded by Mr. Hopkins, carried unanimously.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant