

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

**Regular Meeting**

**February 1, 2012**

**Minutes**

Present:       Members:     Bob Stephens, Jerry Hopkins, Russ Nolin, Joseph Crowe  
                  Alternates:   Ken Bickford, Natt King; Town Planner: Bruce W. Woodruff  
Excused:       Member:       Nicol Roseberry  
                  Alternate:     Robert Zewski

**I.     Call to Order**

Mr. Stephens called the meeting to order at 7:32 PM and introduced the members of the board to the public. Mr. Stephens appointed Ken Bickford to sit on the board with full voting privileges in place of Nicol Roseberry.

**II.    Pledge of Allegiance**

**III.   Approval of Minutes**

Mr. Nolin noted an error in the second motion on page 2, showing that he had made and seconded the motion. The tape will be reviewed to reflect the correct members making and seconding the motion. Mr. Hopkins requested the vote on the second motion on page 5 reflect that he and Mr. Bickford were the opposing members.

**Motion:**       Mr. Hopkins moved to approve the Zoning Board of Adjustment Minutes of January 18, 2012, as amended, seconded by Mr. Bickford, carried unanimously.

**IV.   Hearings**

1.     Continuation of Public Hearing Elizabeth & Scott Dolfi (188-30)(80 Wyman Trail)  
       Variance from Article III, Paragraph B(4)

Mr. Stephens stated this was a continued hearing for Elizabeth & Scott Dolfi. There was no one present in the audience representing the applicant.

The board reviewed the Draft Notice of Decision prepared by staff, as directed by the board at the hearing on January 18<sup>th</sup>. Mr. Stephens requested an amendment to the Draft Notice of Decision, Item #11. He stated that at the hearing there was discussion regarding the open area created by the removal of the two sheds. Members were concerned that the area could be used to extend their beach or use the area as a result of the removal. During the hearing there was testimony that the area would be allowed to go back to natural vegetation. Mr. Stephens requested adding verbiage requiring native shrubbery to be planted in those areas to prevent humans from utilizing the area. Board members were in agreement with adding language as suggested by Mr. Stephens.

There was no further discussion regarding the hearing.

**Motion:** Mr. Crowe moved to approve the application for **Scott & Elizabeth (188-30)** for a variance, as detailed in the amended Draft Notice of Decision, and to authorize the Chairman to sign the Notice of Decision, seconded by Mr. Nolin, passed by a vote of three (3) in favor (Stephens, Nolin, Crowe), two (2) opposed (Hopkins, Bickford) and 0 abstentions.

2. Irene B. George, Trustee of the Irene George Trust, Gail G. Childs, Douglas and Stephanie Desjardins Appeal from an Administrative Decision

Mr. Nolin stepped down from the board at this time. Mr. Stephens appointed Mr. King to sit on the board with full voting privileges.

Mr. Stephens stated that this was an application for an Appeal from an Administrative Decision. The decision to be reviewed is of the Code Enforcement Officer, Building Permit approved on 12/19/11 for Tax Map 200 Lot 12. Owner of Tax Map 200, Lot 12 is Albert & Heather Popoloski.

Christopher T. Meier, Esq. from Cooper Cargill Chant, P.A., representing the applicant and abutter, Irene B. George and the interested parties, Gail G. Childs, and Douglas and Stephanie DesJardins, presented the appeal. Attorney Meier noted the appeal is for a Building Permit that was issued in December for the building of a dwelling unit on a beach front lot, which is Map 200, Lot 12. All of the applicants have rights to use the lot that is proposed to be built on. They have a right of way (ROW) down to the shore, and the right to use the entire shorefront and beach front of the lot. Attorney Meier briefly described the dimensions of the lot, and stated in respect to the Ordinance, the appeal is based upon Article VI, Paragraph C, which states that every dwelling unit that has access to the shorefront must have 150' of frontage for the first dwelling unit that is able to use the shorefront, and an additional 50' of frontage if the dwelling unit is outside of 250' from the shorefront, or an additional 150' of frontage if the dwelling unit is within 250' of the shorefront. Attorney Meier noted there was about 200' of shorefront for the lot. Under current zoning, the lot would service at most, two dwelling units. There are currently eight (8) existing dwelling units which currently have deeded shared access to the shorefront of the Beach Lot. He stated the shore frontage was overburdened as it is, as a pre-existing non-conforming use. Attorney Meier went on to state that the building permit that was granted proposes to build an additional dwelling unit on Lot 12, which would have deeded rights to use the shore frontage, and that additional dwelling unit would over burden the lot. He stated that there isn't the shore frontage to accommodate the additional dwelling unit and therefore they argue that building permit was issued in error, because simply there was not enough shore frontage to service the additional dwelling unit that is proposed by the application.

Attorney Meier noted a second issue with the application. He provided the Board with a plan which was submitted with a Shoreland Application. The plan showed the lot, with the ROW through the middle of the lot, which he alleged was set by previous litigation, and that is where the ROW has to stay. The proposed dwelling unit was depicted on the Shoreland Application Plan. Attorney Meier stated that Article III of the MZO requires a dwelling unit to have a setback of 50' from the centerline or 25' from the edge of a ROW or road. He stated that was an access point in which all of the lot owners can drive to the shore front and is a ROW for vehicular access and the proposed dwelling is located within the 25' setback from the ROW and 50' from the centerline. He noted for either of the two stated reasons, they would argue that the appeal should be granted and the building permit should be rescinded.

Attorney Meier argued that all of the applicants bought their houses with the understanding that Lot 12 would not be built on. The Popoloskis purchased the lot while there was pending litigation. He gave a brief history of the litigation in the Carroll County Superior Court, noting that there still is an action pending at the Carroll County Superior Court.

Attorney Meier provided the Board with a letter from 2004 in which it was indicated that the lot wouldn't be built on. All of the applicants and others that had pre-existing rights to use Lot 12, bought with that understanding, the Popoloskis knew that there was a dispute over whether Lot 12 could be built on when they bought it. Therefore they ask that the zoning law be enforced it's written. The proposed dwelling unit over burdens the shore front and takes away from the back lot owners use of the lot. Attorney Meier went on to claim that he found nothing in the application for the building permit that indicates that the Popoloskis informed the building inspector of the back lot owner's rights. It appears that the CEO was likely unaware that the shore front was already burdened by dwelling units having access to it, and therefore granted the permit for the additional unit in error.

Town Planner, Bruce Woodruff gave the Town's position on the appeal. He first clarified that the appeal before the Board was specific by the applicant, and left it up to the Board, if they were allowing the additional allegation that the CEO issued the permit in error because the location of the house is not 25' from a ROW access within the lot. This was not contained in the application. He stated what was in the application, was that the appellants were asking for the ZBA to review the decision of the CEO to issue the building permit and reverse that decision based on an alleged misinterpretation of Article VI, Paragraph C. Mr. Woodruff briefly recapped Paragraph C of the ordinance.

Mr. Woodruff stated the history over whether or not the lot is developable at all has been to Court. There is a court decision which is not before the ZBA. The CEO waited until there was a court decision that said the lot could be developed. Based upon the decision, and the fact that the lot was created with the other eleven lots in the subdivision, in 1971, made it so he could issue a building permit. It was the determination of the CEO that Lot 12 was a lot of record. Mr. Woodruff stated that the MZO has a lot of record savings clause, which says that any lot that was created prior to the enactment of the Zoning Ordinance in Moultonborough (October, 15, 1985), those lots were developable, as long as they met setbacks. Mr. Woodruff contended that the appeal put before the Board by Attorney Meier should not be considered by the Board as it was not in the application. He went on to say, if the Board should do so, the ROW access that is on Lot 12, is a ROW in favor of others, and is not a viatic easement such as a roadway that provides frontage for lots that were created, like town roads or privately maintained roads that create the frontage. The front setback of 25' or 50' was only meant for the frontage ROW for the public to pass and repass, not for any interior ROW easement. Therefore there is not a setback to the ROW within the lot. Mr. Woodruff stated again that it was up to the Board as to whether or not they consider that portion of the appeal which was presented this evening.

Mr. Woodruff went on to state the other reason as to why this lot was considered a developable Lot. He stated that when a lot has been made substandard by the ordinance today, a lot which was created long ago, has rights that are vested as the subdivision was substantially developed. It is the Town's contention that the subdivision has been substantially developed, therefore any lots that have not been built on are vested and continue with the same rights that the other lots in the subdivision currently hold.

Mr. Woodruff read the following portions of his staff memo into the record. *The subject property is located on the water on Kona Bay Road in a neighborhood of single family structures. The property is encumbered with a beach access easement and beach use rights in favor of eleven nearby lots. These rights, and whether this lot has development rights of its own has been the subject of past court action and decision. The court has ruled (separate attachment) that the lot does have those rights with certain conditions. The CEO issued a building permit based on this order and on the basis that the lot is a lot of record. **Reason for Staff Recommendation:** Since this lot was created at the same time as the other eleven lots in this subdivision in 1971, it predates the Ordinance, which was enacted on October 15, 1985 and its eventual development is governed by MZO Article VII, B. (3), second paragraph, which has continuously been interpreted to mean that a substandard lot with area and frontage less than the*

*current ordinance's standards may be developed so long as the building setback standards are met. This eligibility for development rights includes relief from the shore frontage requirements cited in MZO Article IV, C. These frontage requirements are intended to be standards used at the time of subdivision (creation) of lots, not after the fact on pre-existing lots. In fact, this requirement cannot be applied now to the other eleven lots that have access for the additional required frontage, because they, like this lot, predated the frontage requirement and the enactment of the entire Zoning Ordinance.*

*The Moultonborough zoning ordinance has a clause permitting any substandard lot pre-dating the ordinance to be exempted from frontage or lot size requirements. **II. Substandard Lots – Issue B: Lots Which Are Part of a Vested Subdivision (RSA 674:39 and 676:12, V).** The second type of case where a substandard lot may be legally immune from a regulation, even where there's no "savings" or "lot-of-record" clause, is when that lot is part of a vested subdivision. A development project which is a subdivision can acquire vested rights to be completed, just as can a project on a single lot. The substantial investment in the subdivision as a whole can confer vested rights on every lot within that subdivision, even though no construction may have occurred on the specific lot you're looking at. See *Navin v. Exeter*, 115 N.H. 248 (1975). *Henry & Murphy v. Town of Allenstown*, 120 N.H. 910 (1980). Furthermore such vested rights are protected by the following two statutes: (a) **RSA 674:39** says that any recorded subdivision plat is exempt from later changes in zoning or subdivision regulations for a period of four years. However: (i) The exemption doesn't extend to regulations that are there to protect public health standards; and (ii) There must have been "active and substantial construction" on the site within 12 months of the approval date, if the planning board or regulations specify what type of work qualifies as "active and substantial."*

Mr. Woodruff closed with stating that the issue is that substantial construction of eight (8) other lots has occurred, so there is a vesting of rights that flow to Lot 12.

Mr. Stephens requested clarification of a reference contained in the Planner's memo regarding that the proposed construction must meet the setbacks. Was it the setbacks which are current? Mr. Woodruff stated that has been what the CEO has interpreted it to mean, applied the savings clause for Lots of record. So, the setback would be 20' from the sideline, 25' from the ROW, the public ROW, and 50' from the shoreline. Mr. Woodruff stated the ROW access easement that is on the lot, is not what was meant by the requirement in the ordinance of 50' from the centerline of the ROW or 25' from the edge of the ROW. Those would be applied to a frontage road, with a public or a viatic easement on it.

Mr. Crowe noted that Attorney Meier mentioned ongoing litigation in Carroll County and questioned if he would expand on that. Attorney Meier stated the current litigation had a number of aspects to it and went onto explain what those were. He gave a history as to how the litigation started and where they stand at this time. Mr. Stephens stated that those proceedings were not germane to the proceedings before the ZBA. The ZBA must determine if the CEO was justified in issuing a building permit based on the constraints of the property and does it meet the applicable requirements of the ordinance. Attorney Meier took issue with Mr. Woodruff's comment that the court has already decided that this was a buildable lot, and went on to claim that they specifically excluded any zoning issues. Mr. Woodruff referred to Court Order, in which all members had a copy, in which item E states "Ellakona Realty, LLC, or any subsequent owner of the beach lot, may build a residence or other structure on Lot 12....." and this is what the CEO based his decision on.

Mr. Stephens opened the public hearing to the public. Attorney John Bielagus, counsel for the Popoloskis took umbrage with the misleading information that was given to the board by Attorney Meier. Attorney Bielagus vehemently disagreed with Attorney Meier's allegations and presentation. Attorney Bielagus provided the board with a copy of his argument in support of the issuance of the building permit.

Attorney Meier rebutted the fact that the shore frontage requirement for each dwelling unit is exempt for non-conforming lots, and the only thing that our ordinance saves is existing lots. The size of the lot.

Mr. King questioned if the original 1971 plan reflected that Lot 12 was not a building lot. The answer was no. Jim Grappone commented that Lot 12 was deeded by the state as unbuildable, and that they have now issued the appropriate DES permits for Lot 12.

Geri Farnell, Esq. made an appearance on behalf of abutter Miriam Cooper. She submitted an affidavit from Ms. Cooper in support of the proposal for the Popoloskis to construct a home on Lot 12.

Ms. Whitney commented if the Code Enforcement Officer used the argument made by Attorney Meier regarding the shore front lot becoming over burdened by one additional dwelling, than he would not be able to issue any permits for dwelling units in either Suissevale or Balmoral.

Rob Childs, an interested party who owns a lot in the subdivision with his wife Gail, noted when they purchased their lot, the subdivision plan did not show that they could use only a part of the lot, it showed they could use the entire lot. Mr. Childs stated that the back lots were taxed on the beach lot. There was a brief discussion on the assessed value of the lot, that the assessed value was increased from \$90,000 to \$900,000 at the request of the prior owner to indicate it was a buildable lot, and then they filed for an abatement of the taxes. There was conflicting testimony as to whether or not the back lots were assessed a portion of the taxes for Lot 12, or if they were entirely for Lot 12.

The board went into deliberative session 8:36 PM to discuss testimony presented and came out at 8:40 PM. Based on comments made during the deliberative session, Mr. Meier requested an on-site visit of the site, so that Board members could see that the proposed dwelling would over burden the lot. Board members discussed the request, with some noting they were familiar with the site, and that an on-site visit was not necessary in making their decision of the appeal before them.

Mr. Stephens asked if there were any additional questions from the applicant or the public, it was noted there were none.

**Motion:** Mr. King moved to continue the Public Hearing for Irene B. George, Trustee of the Irene George Trust, Gail G. Childs, Douglas and Stephanie Desjardins to February 15, 2012, and to direct staff to draft a Notice of Decision upholding the Code Enforcement Officers issuance of building permit on December 19, 2011, for Tax Map 200, Lot 12, seconded by Mr. Bickford, carried unanimously.

Mr. Nolin returned to the Board at this time with full voting privileges.

## **VI. Correspondence**

1) Board Members were provided with a copy of a letter dated January 30, 2012, from the Town Planner to Rock Pile Real Estate, LLC, stating the Board voted unanimously to approve their request for withdrawal of the applications for variances and they will be considered closed.

2) Planning Board Draft Minutes of January 25, 2012, were noted.

3) Board of Selectmen Draft Minutes of January 19 & 26, 2012, were noted.

## **VII. Unfinished Business**

## **VII. Adjournment**

**Motion:** Mr. Stephens made the motion to adjourn at 8:50 PM, seconded by Mr. Hopkins, carried unanimously.

Respectfully Submitted,  
Bonnie L. Whitney  
Administrative Assistant