

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

Regular Meeting

June 19, 2013

Minutes

Present: Members: Bob Stephens, Russ Nolin, Robert Zewski, Joseph Crowe, Ken Bickford
 Alternate: Natt King, Jerry Hopkins
Staff Present: Administrative Assistant, Bonnie Whitney

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. Zewski moved to approve the Zoning Board of Adjustment Minutes of June 5, 2013, as written, seconded by Mr. Nolin, carried unanimously.

Motion: Mr. Crowe moved to approve the Zoning Board of Adjustment On-site Minutes of June 15, 2013, as written, seconded by Mr. Bickford, carried unanimously, with Mr. Zewski abstaining.

Mr. Stephens noted the Planner had provided members with an article from the Local Government Center website. Mr. Woodruff commented that while all members are familiar with the subject of the handout, Local Officials Making Decisions: Understanding Conflicts of Interest and Disqualifying Bias, he wanted to address the board briefly. He has received more than one call this week, regarding conflicts of interest, requesting to have one or more members step down on one or more of the cases this evening. The handout was just a reminder to the members regarding this subject.

IV. Hearings

1. Continuation of Public Hearing Bear's Nest Trail, LLC (64-5)(Bear's Nest Trail)
 Variance to Article III.B.3 and XIV.5.C

Mr. Stephens stated that this was an application for a variance for relief from Article III.B.3 (minimum setback from lot line) and XIV.5.C (no structure on slope greater than 25%) to allow the existing recreational Lookout Tower to remain in place on the Property.

Mr. Stephens stated that for this particular structure to remain as it is currently, three things need to happen: 1. The applicant has to be granted relief from Article III B(3), which is the setback. 2. They have to be granted relief from Article XIV.5.C, which is the steep slopes, and they have to obtain a building permit. This evening, the only things before the board is the first two items. The issue relating to the building permit is not before the board. This was specifically noted because one of the things the ZBA is charged with is dealing with an Appeal of an Administrative Decision. If the applicant cannot get

a building permit because the Code Enforcement Officer (CEO) determines something is not appropriate, they have the right to appeal that decision to this board. If the board were to have a discussion tonight on anything relating to the building permit, they jeopardize the applicant's ability to receive a fair and honest hearing. So Mr. Stephens asked that the board refrain from that conversation.

Attorney Chris Boldt was present representing the applicant. Mr. Boldt stated that he was unaware of anything specific regarding the Planner's comments that would apply to this case. He wanted to make sure that there wasn't anything that he needed to be aware of regarding a statement somewhere else. Mr. Stephens queried the board, asking if any member (5 permanent members and 2 alternates) present felt that they could not meet the jury standard. All members (permanent and alternate) present indicated they did not have any conflict.

Mr. Boldt stated he was there on behalf of Bear's Nest Trail, LLC, noting the plans shown on the board. They are requesting two variances as referenced by the Chair. He stated that this is a request for relief from the ordinance for an existing structure. He noted that they should have obtained approval prior to the construction of the structure, but that they did not and are here to proceed forward.

There is an encroachment into the 20 foot setback to the Land Trust land on the southwest corner of the recreational Lookout Tower ("the Tower"). They are 17.7 feet from the corner, where 20 feet is required, even with the 18" that is frequently given for drip edge encroachment. They are 29" total to close to the property line. There was a blazed tree which was slightly off the actual line, which apparently was part of their problem. They have been in touch with the Land Trust and a representative is present this evening. Mr. Boldt noted there is an encroachment into the Trust's land along the hiking trail. They have agreed to move the trail and replant that area and some of the areas around the Tower with native vegetation and allowed to go back to natural. As the site walk also indicated, there has not been any erosion to date. They are planning to install water bars, and drainage structures both down slope and up slope of the Tower.

Mr. Boldt stated that Joanne Coppinger, PE was present as the storm water expert, noting her report was provided in the materials submitted.

Mr. Boldt pointed out two areas within the existing cut field that are treated differently, noting them on the plan. The smaller area will be allowed to go back to natural and will not be pruned. The area in the closer inner circle will be allowed to go back to natural, but pruned as necessary, to no lower than three (3) foot.

Mr. Boldt stated that there were four things they needed to get. The two variances from the ZBA, a building permit from the CEO, and a Conditional Use Permit (CUP) from the Planning Board.

Dan Ellis was present from Ames Associates to address any technical questions they may have.

Mr. Boldt stated the variance for the slope ordinance provision was one of the building conditions that is set forth in that ordinance. It states that structures aren't to be on slopes greater than 25%. He noted the area of the structure itself is where there is the 35% issue, which is why they are asking for the second variance for the structure to remain where it is.

Mr. Boldt stated that on the site walk there was a question regarding wiring in the peak of the Tower. This is for a proposed ceiling fan/light that is to be powered by a generator. There will not be any wires or lines run. Another question asked on the site walk was regarding the height of the structure. Mr. Boldt stated the contractor had measured the height and the average height is 27 feet.

Mr. Boldt noted the criteria as set out in the materials addresses the requests for both variances as they go through. Mr. Boldt addressed each of the criteria for the granting of the variance as detailed in the application. He then answered any questions from the board.

Mr. Woodruff spoke to the request for variances and referred to his staff memo of June 14th, noting the tower was constructed without permits or inspections and other regulatory issues were not permitted in advance of construction. The trail up to the tower was constructed with the knowledge of staff and did not need permits. The applicant is before you as a result of code enforcement action in an attempt to do their due diligence in obtaining proper permitting, construction to all applicable codes and for the safety of users and the general public due to the structure's unique location and design.

He stated that the applicant's Attorney has presented a very thorough and compelling argument for granting both requests for relief from the ordinance. However, from a practical standpoint, if the structure is not modified as per the engineering report and code, if the variances are not granted, and if the conditional use by the Planning Board is not granted, the effect would be two-fold; first, the structure would have to be demolished, which would further affect the land there, and second, the mitigation strategies proposed by the applicant will not happen, therefore looking at the application from a pro and con basis leads me to believe the greater good would be accomplished by granting and requiring mitigation strategies and re-vegetation around the tower vicinity. Therefore he recommends the Board grant the variances with the conditions outlined above.

Don Cahoon, (CEO) stated that there was not a permit issued at the time of construction. They have applied for one since. They are trying to straighten things out with the engineer, where he wants to be with the structure, to get it approved. He thinks that they will be able to get there. The CEO stated that they used a hemlock or pine post to support the Tower, which is on a steel plate in concrete. The post is not pressure treated wood, exposed to the elements, and could possibly rot. The engineer is under the feeling that it still meets the code, and he does not. He has contacted the Code Council to get their opinion on the article. Ultimately it is his decision. Mr. Stephens stated that it is influx and not a consensus agreement that they know what the resolution is going to be. Therefore it may come to a point that the applicant may wish to appeal the CEO's decision, and that is why the board should not get into a line of questioning regarding the building permit.

Mr. King noted his concerns with the path up to the Tower, commenting that it is a 4 wheel drive trail and asked if they intended on keeping it that width. Mr. Boldt stated they have not discussed that with the owner. The width was used in their calculations on whether they are or are not within the Steep Slope Ordinance. They are acting as if they are under it. Mr. King would like to see it made into a true walking trail. Mr. Boldt what his recommendation would be. Mr. King stated to make it a true walking trail. Mr. Boldt asked what constitutes making it a true walking trail. Mr. King stated that he would contact the forest service and get back to him. He was not sure what that would entail. He has a very good idea what a walking trail is verses a vehicle trail. Mr. Stephens questioned if there was a zoning related issue to that line of questioning on the trail, if the trail was in violation of the ordinance. Mr. King stated that it is on a steep slope and that is his concern. Mr. Stephens asked if they knew what the slope was. Ms. Coppinger stated a 21% average. Mr. Boldt stated that the existing path, with the proposed water bars and the drainage structures closer to the Tower meet the ordinance.

Mr. Zewski commented the mitigation of the water coming off the abutting Trust property and is lessening what the runoff would be without the proposed catch basins. As noted in the Erosion Control & Stormwater Runoff Report, the total runoff is slightly less.

Mr. Bickford questioned the Town's ability to take care of the property. If there were a fire and the Town could not get a fire truck anywhere near, is there any liability on the Town because of that. Mr. Woodruff stated that the Town's Subdivision Regulations speak to the need to have an access to lots that are created for the purpose of having dwellings. Moultonborough allows the construction of dwellings on

created lots that have access on privately owned roads. When the Planning Board approves subdivisions they require a limit of liability notice be recorded either on the plat or a separate instrument. There is no privately maintained road in this instance and it is not a dwelling. Mr. Woodruff stated they could make that a condition of approval if they wish.

Mr. Stephens opened the hearing for public input.

Don Berry, President for the Lakes Region Conservation Trust was present representing the Trust who are abutters. Mr. Berry stated that Mr. Boldt had approached them regarding the encroachment and the relocation of the trail and asked for their input on some of the modifications that are being made. Mr. Boldt has noted those this evening. The relocation of a portion of the trail, the water bars, retaining wall behind the structure, the re-vegetation and soil in the area which encroaches on the Trust land. They have addressed the physical impacts on their property that have occurred as a result of the project. They did not have a discussion about whether they agreed or disagreed on what the standards for a variance are. It was a discussion on what the impacts were on their property. Mr. Berry had a general question. In one of the discussions of the criteria a comment was made about the fact that the one of the purposes of the setback requirement is to avoid a dense building situation and the suggestion that isn't the situation here as they abut conservation land. He asked if he was correct in understanding going forward on this property, or on any property they own, that they should assume that it's easier for an abutter to get a variance from a setback requirement because their land is not developed or that some other land owner that has an undeveloped parcel will find it easier for an abutter to get a variance? Mr. Stephens replied that there are five standards that the board is charged with to evaluate. That is one of the five. Every application is unique to itself. You cannot give a carte blanche answer for that.

Mr. Stephens asked Ms. Coppinger to describe the mitigation, which she did. He then asked if there was any proposed drip edge erosion measure. She stated none at this time, but that it can be added to the plan. Mr. Bickford questioned the catch basin, asking the type of vegetation and the percentage that in the basin. Ms. Coppinger stated that it would be 100% whether it is grass or shrubs. Mr. Woodruff commented that there is a conservation soil mix that is used when closing in gravel pits.

Mr. King questioned the size of the clear cut. Dan Ellis referred to the plan noting the clear cut and disturbance area immediately around the structure was 10,400 SF and the large area was 32,500 SF, for a total of 42,900 SF, or just shy of an acre. Mr. King asked what was the percentage of the remaining lot and if there was a suitable location to relocate the structure. This was discussed briefly, there appears to not be any information available on the remaining lot. Mr. King felt that this information would be necessary to make a decision. It was noted that the board has received an application and that is what they need to act on. Mr. King noted his fear of people doing something first and then asking for relief after.

Mr. Stephens asked if there were any additional questions from the board or public at this time. Mr. Stephens closed the public hearing. Mr. Zewski questioned if they were addressing each request separately? The board discussed this briefly asking if they could write two separate Notice of decisions. Mr. Woodruff indicated that could be done. Mr. Stephens stated that they would address the criteria for each request separate and write two notices of decisions. The voting members were Bob S., Russ, Bob Z., Joe and Ken.

The board went into deliberative session to discuss each of the criteria for granting the variance for the setback issue at 8:40 PM and came out at 8:47.

Motion: Mr. Zewski moved to approve the request for a variance from Article III B (3) for **Bear's Nest Trail, LLC, Tax Map 64 Lot 5**, to close the public hearing and to direct staff to draft a formal Notice of Decision, for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed

for accuracy only, and signed by the Chair at the next scheduled meeting, seconded by Mr. Bickford, carried unanimously.

The board then went into deliberative session to discuss each of the criteria for granting the variance for relating to the steep slopes at 8:48 PM and came out at 9:00.

Motion: Mr. Bickford moved to approve the request for a variance from Article XIV.5.C for **Bear's Nest Trail, LLC, Tax Map 64 Lot 5**, subject to the following conditions: 1. Re-vegetation shall be on 100% coverage over the disturbed area, excluding trail and structure footprint areas, to be noted on the plan. 2. Construction of stone drip edge erosion control under the roof edges. 3. Waiver rights to any liability against the town for utilization of town services to the Tower. 4. Recording of the Notice of Decision in the Registry, and to close the public hearing and to direct staff to draft a formal Notice of Decision, for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only, and signed by the Chair at the next scheduled meeting, seconded by Mr. Zewski, motion passed, four (4) in favor (Stephens, Zewski, Bickford, Crowe) and one (1) opposed (Nolin).

Mr. Stephens noted the right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

The Board took a five minute break at this time.

2. Continuation of Public Hearing NH Route 25 Storage Realty Trust (141-8) (61 Whittier Highway) Variance to Article VI.F.(6)g

Mr. Stephens and Mr. Bickford stepped down from the board for this hearing. Mr. Nolin chaired this hearing and appointed Mr. King and Mr. Hopkins to sit on the board with full voting privileges.

David M. Dolan, of David M. Dolan Associates, P.C. agent for the applicant noted since the time the application was filed the property has been transferred to 61 Venture, LLC. Mr. Bickford, Mark and John Stephens who are members of the LLC were present this evening. The proper authorizations were provided with the application submittal. He briefly described the lot, location, size, current development, and use of the site. Mr. Dolan noted that in 2005 a site plan was approved and a special exception was granted for commercial use on the property, which basically included any uses allowed in the commercial zone. The present use of the property are a one (1) bedroom apartment, a gym, food pantry, landscape/maintenance contractor and one unit used for private personal storage.

There is a utility easement for Public Service which is 100' wide that straddles the property line and adjacent to that is another easement for the NH Electric Coop. Mr. Dolan noted the wetlands surround three sides of the property and are depicted on the plan.

Mr. Dolan referred to the Existing Conditions Plan which was approved and developed. Things have migrated to what was originally a paved parking area, to material/vehicle storage. Parking and material storage has been occurring right up to the property line.

Mr. Dolan stated that they are before the Planning Board at this time with an application for a site plan amendment and a part of that is for a Conditional Use Permit (CUP) relative to the wetland. They are before the ZBA for a variance request to allow parking within 3 feet of the side property line. The area is disturbed or altered at this time. The proposed site plan depicts an outside contained storage area for mulch and landscape related materials and to align the parking to accommodate the existing use and potential future use for tenancy of the building based on what was approved. There are 15 spaces in

front of the building and spaces 16-42 near the property line. Spaces 19-42 encroach on the side setback of 10', which is required for parking. It starts a 3' and increases as it moves northerly. One of the points of discussion before the Planning Board is relative to a CUP, which may require some reconfiguration of the parking in that area. Some of those spaces may be relocated if possible. At no point will any of the spaces be closer than 3' from the property line. The configuration might vary slightly. Mr. Dolan addressed each of the criteria for the granting of a variance and answered any questions from the board.

Mr. Crowe questioned what the setback was for the clear area for the power lines. Mr. Dolan stated there is a 50' setback from either side of the PSNH power lines. Mr. Dolan stated there is a joint use agreement that will be amended to include that PSNH will allow the owners of the property to occupy land within the right-of-way subject to "at your own risk".

Mr. King asked if this application was dealing only with the side setback and not the CUP. It was stated that was correct.

Mr. Nolin opened the hearing for public input. There was none. He then asked if there were any additional questions from the board at this time, it was noted there were none. He closed the public hearing and the board went into deliberative session to discuss each of the criteria for granting the variance at 9:35 PM and came out of deliberative session at 9:40 PM.

There was no further input from the board or public. The voting members were Russ, Bob Z., Joe, Jerry and Natt.

Motion: Mr. Hopkins moved to grant variance for **61 Venture LLC, Tax Map 141 Lot 8**, for relief from Article VI.F.(6)g subject to the following conditions: 1. That the existing gravel areas adjacent to the proposed parking be re-vegetated as per the plan submitted with the application. 2. That the variance would not apply to parking space numbers 23-28, inclusive if the Planning Board does not grant the Conditional Use Permit to allow said spaces construction in the wetland buffer as those spaces would be subject to both a setback variance and a Conditional Use Permit to be allowed, and to close the public hearing and to direct staff to draft a formal Notice of Decision, for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only, and signed by the Chair at the next scheduled meeting, seconded by Mr. Zewski, motion passed, five (5) in favor (Nolin, Zewski, Crowe, Hopkins, King) and none (0) opposed.

Mr. Stephens and Mr. Bickford returned to the board at this time with full voting privileges.

3. James E. Morris & Deborah dePeyster (61-2)(518 High Haith Road)
Variance to Article VII.D(1) and E

Mr. Stephens stated that this was an application for a variance for relief from Article VII.D(1) and E for the expansion of a non-conforming residential cottage within the existing building envelope.

Jim Morris and Debbie were present for the hearing. Mr. Morris presented the application for variance. He noted the property is currently owned by Hale Realty Trust and they are in negotiations to purchase the property. He went onto briefly describe the location of the lot, characterization of the lot and the development of the site. The lot was created in 1974, prior to zoning. When zoning was adopted it made the existing dwelling non-conforming as it does not meet the required 20' side setback. They would like to expand the existing dwelling into the conforming building envelope. There was an enactment of an article in the Zoning Ordinance which was approved in 2013, which limits expansion to 20% of the existing gross habitable floor space. This would limit them to approximately 140 sq. ft. They

would like to double the footprint, while staying within the building envelope. Mr. Morris stated keeping in mind that they could construct a larger building, not attached, and not a dwelling unit within the building envelope. Mr. Morris provided the board with several photos of the property showing the existing foliage, noting it is heavily wooded on either side. Mr. Morris stated that they had come in to speak with the Planner regarding the expansion of the dwelling. That is when they were told of the 20% limitation. At that time, Mr. Woodruff explained to them that provision in the ordinance ultimately was intended to apply to the expansion of residential properties in the commercial zones. That is why they are requesting the variance. Mr. Morris addressed each of the criteria for the granting of a variance and answered any questions from the board.

Mr. Woodruff referred to his staff memo of June 14th, in which he attached a copy of the 1974 subdivision plat that shows that the Planning Board in 1974 subdivided the property in its present configuration. The variance request is to expand a dwelling that is non-conforming as to its location, within the building envelope by approximately 600 square feet where that 20% maximum would allow about 110 square feet. Mr. Woodruff read his opinion from his memo into the record. He feels that the request for relief should be granted as The applicant's proposal to build an addition that conforms to the building envelope would normally not need any relief from the ordinance, however, this past year, the ordinance was changed to preclude the expansion of nonconforming structures, with the exception of residential dwellings where they may expand up to 20 % of the existing floor area. The intent of this change was meant for instances where residential structures and uses were located in the Town's commercial zones, not in residential zones and was additionally intended for a future time when residential is not allowed in said zones. That is currently not the case and this part of the change may have been premature and unfair to those who would like to expand their dwelling within the allowed building envelope despite the fact that the existing structure is nonconforming as to one or more of today's dimensional requirements. Additionally, the subdivider (owner until 2004) was aware the lot line was created with the structure so close to it in 1974 and no part of the addition will be outside the building envelope.

Mr. Nolin commented that the area of the existing dwelling is very small and asked if the ZBA could require the foundation to be laid out by a surveyor, so that if there was an error, they would not need to be back for a variance. Mr. Woodruff stated the board could require as part of the foundation permit, the surveyor complete a foundation survey. This would locate the foundation.

Mr. Nolin questioned a notation on the 1974 plan that read "No portion of Parcel 1 shall be used for septic waste disposal or dwelling construction." Mr. Woodruff stated he did not know what was meant by the note as there is a cottage and septic on the lot. He stated this would be a civil matter and the applicant would be moving forward at their own risk, should they grant the variance. Mr. Morris addressed this issue. He explained how the lot was created, the reason why and noted that that the 1974 deed, when the parcel was created, does contain that language, but that the remainder of the language in the deed was not noted on the plat. The condition in the deed continues on to state unless all applicable governmental approvals have been obtained.

Mr. Stephens noted a letter of opposition from abutter's at 524 High Haith Road.

Mr. Stephens opened the hearing for public input, noting there was none.

Mr. Stephens asked if there were any additional questions from the board at this time, it was noted there were none. He closed the public hearing and the board went into deliberative session to discuss each of the criteria for granting the variance at 10:10 PM and came out of deliberative session at 10:14 PM.

There was no further input from the board or public. The voting members were Bob S., Russ, Bob Z., Ken and Joe.

Motion: Mr. Crowe moved to grant the request for **James Morris & Deborah dePeyster, Tax Map 61 Lot 2**, for a variance from Article VII.D.(1) and E subject to the condition that a foundation certificate survey be submitted at the time of application for building permit to the Office of Development Services, and to close the public hearing and to direct staff to draft a formal Notice of Decision, for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only, and signed by the Chair at the next scheduled meeting, seconded by Mr. Bickford, motion passed, five (5) in favor (Nolin, Zewski, Crowe, Hopkins, King) and none (0) opposed.

Mr. Stephens noted the right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

V. Correspondence

VI. Unfinished Business

VII. Adjournment

Motion: Mr. Stephens made the motion to adjourn at 10:22 PM, seconded by Mr. Crowe, carried unanimously.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant