

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

Regular Meeting

July 2, 2014

Minutes

Present: Members: Bob Stephens, Russ Nolin, Bob Zewski, Ken Bickford, Joe Crowe
 Alternates: Jerry Hopkins, Nick DeMeo, Paul Onthank, Richard Jenny
Staff Present: Town Planner, Bruce W. Woodruff

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 18, 2014 as written, seconded by Mr. Nolin, carried unanimously.

IV. Hearings

1. Todd A. & Brenda M. Pulis (271-13) (112 Deerhaven Road)
 Variance from Article VII (E) (1)

Mr. Stephens stated that this was an application for relief from Article VII (E)(1) of the Zoning Ordinance to allow for the construction of an attached garage without living space outside the 50' setback as an addition to an existing nonconforming structure partially built within that setback.

Attorney Chris Boldt was present representing the applicant. Mr. Pulis was present for the hearing this evening. Mr. Boldt stated that they were before the board to ask for permission to construct an attached garage on a residential structure. Mr. Boldt said as he stated in his opening passages of the application, they have conferred with the Town Planner, they are at a little bit odds with whether they need a variance because they are not adding habitable space and they are completely conforming in their proposed location. If the board feels they need a variance, they can then go through all of the criteria of how they meet. In essence he asked the board to focus their attention on the copy of the two plans provide in their packet. One is an existing conditions plan, one is the proposed. This structure was built sometime in the 1990's and it is now deemed non-conforming because the ordinance has changed since construction. To add in the 50 foot reference line for the shore land, which as you see cuts into a small quadrant of the lakeside portion of the house and you added a 50 foot stream setback, which cuts through a different quadrant of the house. North is to the top, so it's the southerly quadrant of the existing structure that is non-conforming because of the stream setback. This is at the end of Deerhaven Road where if you recall there is a gap of a couple of lots, it doesn't make a complete loop around this portion of Long Island. Deerhaven Road ends and then there is paved driveway, one servicing the Richard Russell location next door, and then it bends back and comes into the existing structure at a sublevel garage. This is built on the slope so the garage is underneath a portion of the living space. Existing garage now is partially heated because of the living above it. Going to proposed plan the proposed garage is shown in

purple. It is built over a good section of the existing pavement. The intention is to take up all of this sloth of the pavement, thereby eliminating some, as you see, that's within that 50 foot setback. A portion of the existing garage obviously is within the 50 foot setback, but the proposed garage would be wholly outside of the 50 foot setback and complies with all of your Zoning Ordinance requirements for lot coverage, tree cover, side setback, shore land setback, everything. If this was a detached garage we wouldn't be here. It's merely because we are attaching it for personal convenience for this couple so that they're not having to park and come outside in the weather to get back in the house. So my read of VII (E)(1) would say we shouldn't need a variance because we're not adding habitable space and we're not adding non-conformity to this structure. We are completely conforming. And Mr. Chairman, I give it to you on how you want to make the full spiel?

Mr. Stephens commented that he would hold Mr. Boldt at this point for one moment and he asked Bruce to give the board some back ground as well, knowing that they have had some conversation and he has had some conversation with the Code Enforcement Officer (CEO) so there has been some interpretation thus far, at least to the best of one's ability, but he thought that it is important that the board hear from Mr. Woodruff.

Mr. Woodruff stated that two years ago, about a year and a half ago, this portion of the ordinance was changed, the portion about non-conforming uses, non-conforming structures and also non-conforming lots, which really has nothing to do with what we're talking about tonight. As you know, one of the major tenants of zoning is to eventually sunset non-conforming uses and non-conforming structures because uses are usually held within structures from zoning districts where those uses are not allowed by right. The intent of the change at the time was for the future point when the zoning in town would be tightened up to the point where you would have only hopefully compatible uses in districts, and by that I mean right now today you may build a residential house in two of the three commercial districts in town. You can, on a vacant lot, come in with a building permit to build a residential dwelling and live in it in the Commercial A district and the Commercial B district. C is off the table because mixed uses are allowed, C is the village. The idea behind zoning is that you have those compatible uses that you don't put non-compatible uses together for the convenience of the quality of life for the folks that live there. You don't really want to have a house next to a night club or a house next to a factory and that is one of the basic tenants of zoning. Unfortunately in Moultonborough you still can build that house next to the night club or next to the storage buildings and the idea is that in the five year plan for changing zoning, because you don't want to dump it all on the citizens at once, is that you would eventually get to the point where you would make it so that the new housing does not happen in the Commercial A and B zones. That commercial uses happen in the A and B zones where they are allowed by right and it is that type of a district. That's why this was written. It is almost a section that is premature and I have said this to you before that in the exact converse this works very well for commercial uses but it doesn't work very well for residential uses. In this instance this is a residential use in a residential district that is allowed by right. The structure is what is non-conforming because it's partially within that 50 foot setback to the lake. What Attorney Boldt says for an argument for you making the determination that a variance is not needed here makes a lot of sense. What that would do if you did it, is you would change how the CEO and I make determination in cases like these and they would not come to you henceforth. So that's a weighty thing to consider because we do have two or three instances where we've said to folks "You really do have to only expand your non-conforming structure by 20% or less" and that's why the applicant is here tonight is because they are proposing to expand this non-conforming structure by more than 20%. So in a way I am agreeing with Attorney Boldt but I also have to think of the ramifications of our changing course in midstream from an administrative view point. I believe that there are other instances out there, maybe at least one other instance where this change would be different than the way we treated them and so I fear this idea where changing in midstream would be a kin to administrative gloss. That's the only thing that I have that makes me feel nervous about not moving forward with the variance.

Mr. Stephens said so in essence in this particular application we have a structure that was conforming at the time it was built and through whatever reasons those things, setbacks and what have

you, changed. Ok, causing it now to be declared as a non-conforming structure. The proposed applicant is saying we want to build this garage. We're going to build it within the building envelope totally. It's Mr. Boldt's point if he left a 5 foot gap between the two, he would not be here tonight, period. Mr. Woodruff stated that is absolutely right. Mr. Stephens added it is the connection point, it is the attachment to, does that then say you're expanding a non-conforming structure and I'm not sure the board is in a position to necessary make that decision here tonight. I don't know. I could poll the board.

Mr. Nolin said the expansion of a non-conforming structure as such whether it was a shed or anything else is attached to the building is attached to the structure, so therefore it is an expansion of that particular structure. That's the way we have been treating it. Mr. Stephens added that is exactly what Bruce is saying, the same thing. So no, we're not disagreeing with that, I'm just saying here's something I think that we're going to have to look at more closely down the road.

Mr. Crowe made a comment that basically that up on Moultonboro Neck Road when we had the building in where the State had taken a certain part of the sidewalk away causing the setback to change and because of those circumstances we treated it as we did required a variance and we granted it based on the fact that he was helpless. He lost it through the setback. Mr. Stephens stated the hardship was created by a condition he had no control over. Mr. Crowe replied exactly, and he sees this in almost the same way. And feels if they treat it under the same circumstances a variance is required.

Mr. Stephens stated he thinks they can go forward that way but I still think it bears a lot more work down the road in terms of the way that ordinance is applied. Mr. Nolin stated that is up to the Planning Board to put that before the electoral vote.

Mr. Woodruff added that the board does have the authority to tell the applicant that he doesn't need a variance or that he does, and by going forward with the case you telling him that he does. I believe again that if you believe that the variance is required and you hear the case there is a hardship here for certain and that is the ordinance itself which is a valid reason that's been established by case law.

Mr. Zewski questioned if the intent of this dealing primarily with commercial zones and we had one a year ago on Lake Kanasatka and I think it was the first one we ran into after the law had changed and they kind of fell into this... Mr. Nolin stated that was a tear down. Mr. Zewski commented that he couldn't remember what it was, I remember the location but I can't remember the situation. Mr. Woodruff stated the answer is yes to your first question. The answer to your second question is that the variance request that came to you was to tear down the non-conforming structure and to replace it in the same place next to the water. You did deny that request. That was not a request to expand the 20%. They did move forward eventually with an addition that was 20% that met the setbacks behind. Mr. Hopkins stated they were limited to 20%. Mr. Woodruff stated that's been point all along. They were limited to 20% even though like this lot there is a larger area that's within the building envelope. Mr. Woodruff stated the grandfathering goes away when you tear it down.

Mr. Stephens stated that it is his recommendation to the board would be that pending an opportunity for the Planning Board to revisit this entire issue here, with your assistance and Don's input and everything else, we'll move forward with this application as it has been presented. Mr. Stephens polled the voting members: Joe, Aye; Ken, Aye; Bob Z., Aye; Russ, Aye; Chair, Aye. So we're going to move forward with it. We needed to go through that process so that the board understood the complexity of the case and now we'll move forward as though it were a variance and move on.

Mr. Boldt commented that we understand that and we appreciate that the fine discussion which you had on the issue and we'll see what the Planning Board does based on that. We do believe that we meet the five criteria as is set forth in the packet of materials that includes not only the Shore line Permit that has been issued by DES but also anytime you add on DES wants to make sure you're not covering up the only place where a new septic system can go if one is needed so we have put that in to show that we have proven to DES that we can put a new septic field up outside of this proposed location. Mr. Boldt

addressed each of the five criteria for the granting of a variance as contained in his narrative submitted with the application for variance. He stated the first two have been very much melded together. The public interest and the spirit of the ordinance are viewed by the same criteria unduly to a marked degree conflict with the stated purposes of a zoning ordinance. Here you have no expressed stated purpose of VII (E)(1). As Bruce has indicated a general concept in zoning does tend to be of a use category more so than the structures because of our inherent property rights that we recognize in New Hampshire, but you want non-conforming uses to go away. You want the conformity to come into the zone. In this situation we are an allowed use, a residential use, an attached garage is a normal reasonable and allowed accessory structure under your ordinances and by meeting the setbacks that you have required, this addition in essence meets the public interest and the spirit of the ordinance. There is no change to the character of the neighborhood. There is no threat to health safety or welfare. In part DES is looking at the exact same concerns that you are looking at and has said that this project meets with their criteria under the Shoreland Permit. The expansion of this garage is going to take out impervious pavement and will have an apron of permeable pavers in front of it. The third prong is Substantial justice is done. As I have said before this board this is a balancing test, this is where you truly give a balance to what is the loss to the applicant to be denied as balanced with any gain of that denial to the public. They say there is no compensating balance gained to the public that is going to offset that loss to the applicant. Forth is the proposed use will not diminish surrounding property values. He stated that he had provided an email from abutter Richard Russell (271-12) in support of the project. This is strong evidence that there is no diminution of value. Fifth is the unnecessary hardship prong. That one is owing to the special conditions of the property no fair and substantial relationship exists between the stated purposes of the ordinance and the proposed application and that the proposed use is reasonable. Special conditions include the fact of the size, shape, and configuration of this lot. The fact that they have the paving area on it and it is being partially removed, that the garage can be placed in complete compliance with your setbacks, that if, as the Chair indicated earlier, they were five feet off, they wouldn't need a variance. They have obtained the Shoreland Permit from DES and the Septic Permit from DES. They believe that there is no fair a substantial relationship between the applied purpose of this provision of your ordinance, which is really the commercial issue, and its application to this project. They are in compliance. They can put it in. It is merely the fact that they are attaching to a structure that is partially non-conforming, and they cannot have an attached garage to this structure that wouldn't need a variance. The fact that we are attaching it means by you ruling that we have to come before you and ask for a variance. It is not expanding non-conformity. We're not adding a new building that is itself non-conforming. We believe that we meet your fifth criteria. That it is a reasonable use to have an attached garage in this residential neighborhood and we believe therefore we have met all five of the criterion and ask for your positive vote.

Mr. Woodruff stated that he believes that the application of the zoning ordinance provision in E(1) is really the hardship here because the intent of that zoning ordinance was not meant for uses that are allowed in the zoning district, and this use as a residential use is allowed in this district.

Mr. Crowe said basically I usually look for a need demonstrated by an applicant when asking for something like this, but under the circumstances and based on the fact that the ordinance came after the construction of the house and the ordinance put the house into non-conformity I think it's reasonable to award a variance for the garage under these circumstances. I'm hanging everything on the fact that the ordinance came after the construction of the house. The fact that the garage is in compliance and the only difference is that 20% in the ordinance of the attachment and under this I think it would be unreasonable not to grant it.

Mr. Onthank asked is the garage was going on slab? Mr. Boldt stated in essence yes, it's going to be on a foundation, but it's going to be raised up because it's on that slope, so I hesitate to say slab as, there's no living space.

Mr. DeMeo said you said that if this were placed a foot away from the existing structure than it doesn't... Mr. Stephens stated because the building itself is in its entirety is in the conforming building

envelope. What makes it non-conforming is the literal interpretation of the way the current zoning ordinance is written and the fact that the setback dimensions have changed over time.

Mr. Nolin stated that he has no problems at all and I think everything is reasonable.

Mr. Stephens opened the hearing for public input at this time, 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 the granting of the variance at 7:58 PM and came out of deliberative session at 8:05 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. Bickford moved to grant the request for a variance from Article VII (E)(1) for Todd A. & Brenda M. Pulis, 112 Deerhaven Road, Tax Map 271, Lot 13, 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 (Stephens, Nolin, Zewski, Bickford, Crowe) and none (0) opposed.

Mr. Stephens noted the right to file a motion for rehearing in accordance with NH RSA 677:2 would begin tomorrow.

V. Correspondence

VI. Unfinished Business

1. Review and possible authorization for the Chair to sign the formal Notice of Decision for the June 18th, 2014 granting of a variance from Article III.B (4) for Judith & Robert Trautwein (160-5)(8 Garwood Lane).

The Board reviewed the Draft Notice of Decision prepared by staff, as directed by the Board at the hearing on June 18th. There were no changes made to the draft.

Motion: Mr. Nolin moved to direct the Chairman to sign the Notice of Decision as written, for Judith & Robert Trautwein (160-5)(8 Garwood Lane) and staff to mail said notice to the applicant or applicant's agent, seconded by Mr. Bickford, carried unanimously.

2. Review and possible authorization for the Chair to sign the formal Notice of Decision for the June 18th, 2014 denial of a variance for the Karen G. Walsh Realty Trust (226-1)(51 Garnet Point Road).

The Board reviewed the Draft Notice of Decision prepared by staff, as directed by the Board at the hearing on June 18th. There being no changes made to the draft.

Motion: Mr. Zewski moved to direct the Chairman to sign the Notice of Decision as written, for Karen G. Walsh Realty Trust (226-1)(51 Garnet Point Road) and staff to mail said notice to the applicant or applicant's agent, seconded by Mr. Bickford, carried unanimously.

3. Mr. Woodruff stated that at the last meeting there was a question as to whether the board could ask for an independent appraisal. He noted that he was incorrect when he answered they could not. He was correct in his advice about not telegraphing their thoughts prior to the beginning of a case and in this instance it is a future rehearing. The bottom line is the board does have the authority to ask for any professional to come and do a peer review of another professional's evidence given to them. They can request this during a case, not before the case. He cautioned the board stating they shouldn't discuss asking for things like that before they hear the case. Mr. Zewski asked for clarification that the case they were discussing, they are talking de novo. They're hearing this for the first time. They have never heard any of this information before. They are starting from square one. Mr. Woodruff stated yes, that is correct. When they grant a rehearing and the application comes before them the second time, it really is not the second time. In your mind as quasi judges you have to drink in what you hear, evidence, testimony, reports or whatever it is and the narrative they hear, as if they'd never heard it. Members questioned if that in turn meant that the applicant cannot say "in the previous decision you said..." Mr. Woodruff commented that the applicant should tell the board everything and should not rely on something that they already said the first time.

4. Mr. Stephens asked for expansion on the hearing this evening. Mr. Woodruff commented that the intent of that section of the ordinance is to sunset incompatible uses in zoning districts. If the uses are allowed you have a great reason for granting variances such as these. However, when you look the ordinance, section E. Non-conforming structures, 1-4, they were looking at number 1, which says "Except as provided for in D. (1) above, no such nonconforming structure may be enlarged or altered in a way which increases its nonconformity, but any structure or portion thereof may be altered to decrease its nonconformity." D. (1) is in the use section, Nonconforming uses. It says except for residential structures which "may be expanded up to twenty (20) percent..." He then referred to E. (4) "Additions to nonconforming single-family structures, that were made nonconforming by a zoning amendment that changed the front, side or rear setback requirements, shall be permitted within the front, side or rear setback areas provided that the addition is no closer to the lot line than the existing nonconforming structure, and no closer than ten (10) feet from the lot line." Mr. Woodruff felt the board could have given the applicant a permit based on this section. He noted that he didn't see this section.

VII. Adjournment

Motion: Mr. Stephens made the motion to adjourn at 8:19 PM, seconded by Mr. Zewski, carried unanimously.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant