

**NEW CASTLE ZONING BOARD OF ADJUSTMENT  
TUESDAY, FEBRUARY 21, 2107  
7:00 P.M.**

**Board Members Present:** Todd Baker, Chair, Russell Cox, Rebecca Goldberg, Margaret Sofio, Mark Gardner, Ben Lannon, John Fitzpatrick

**Board Members Absent:** None

**CASE #2017-01 filed by Phyllis Stibler, Trustee of Phyllis I. Stibler Rev. Trust 1989, owner of 125 Portsmouth Ave, Tax Map 16 Lot 7, for a variance to Sec 4.2 table 1 for construction within the side yard setback.**

Guests who signed in: Phyllis Stibler, Anne Whitney, Eric Spivey, Gail Spivey

Voting members for Case #2017-01: Mark Gardner, Margaret Sofio, Russell Cox, Ben Lannon, Rebecca Goldberg

Ms. Phyllis Stibler, applicant, and architect, Ms. Anne Whitney provided an overview. Ms. Stibler has lived at the resident for 25 years, during which time she has improved the property and site. Renovation plans for a first floor bedroom and bathroom addition to the back of the house are intended to enable aging in place. The existing residence is built within the setback, near the lot line, with a deck addition abutting the boundary. The proposed plan removes the deck to add the addition resulting in a net retreat from the lot line. Ms. Whitney described the lot as triangular with a long lot line fronting Portsmouth Avenue, then angling inward, heading back. The building is sited to the left and front of the property which creates a hardship. A conforming addition would require relocating the driveway and reconfiguring the existing structure. Further, given the narrowness (40 feet wide) of the adjacent lot nearest the proposed addition, it is unlikely a structure would be built in the neighboring space.

The applicant described the five criteria for granting a variance and argued that:

1. The variance will not be contrary to public interest:

Property values will increase and conditions will improve.

2. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship:

In order to age in place, first floor bed and bath are necessary. If the addition were to be relocated to the other side of the house (without any setback issues), a much larger addition as well as destruction of the previous improvements would be necessary.

3. Substantial justice is done:

The addition allows a long time resident, taxpayer, community volunteer to remain in the home and enhance the property value, resulting in no harm, only public gain. The weight of denying the appeal is much less than what would be gained by its allowance.

4. The spirit of the ordinance is observed:

Setbacks were not a concern at the time the house was built. The purpose of an appeal process is to adjudicate conflicts that could not have been anticipated.

5. The values of surrounding properties are not diminished:  
Past property improvements during her tenure as owner have enhanced property values; this new, quality improvement that lessens the setback infringement will also add value.

Referencing the written consent from three neighbors that the applicant presented, Ms. Rebecca Goldberg asked whether the southern abutter was on record as for or against the application. Ms. Stibler was not aware of any recorded opinion from that abutter. Further, Ms. Goldberg asked, and Ms. Stibler affirmed, that the denial of the Building Permit was solely due to the setback.

Chair Baker opened the Public Hearing at 7:14 p.m.

Mr. Eric Spivey, attending with Ms. Gail Spivey, identified himself as the southern abutter (Tax Map 16, Lot 6), 119 Portsmouth Avenue, and indicated his opposition to variance. Mr. Spivey's property abuts six properties. His concern is that the proposed addition, which will be within three feet of his property line, will set a precedent and encourage encroachment by the other abutters. Further, Mr. Spivey contended that because the capacity for expansion on his .83 acre property is in the direction of the proposed variance, the overall value of his property will be diminished by the proposed work structure within the setback.

Chair Baker, addressing the concern about precedent, noted that every case is unique and considered independently.

Hearing no other public comment, Chair Baker closed the Public Hearing at 7:18 p.m.

Mr. Russell Wilcox noted that many of the town's small property owners would be eager to expand into their setbacks. Without an examination of alternatives, it is hard to see the necessity.

Ms. Whitney explained that expansion into the unrestricted portion of the lot would require:

- a larger addition
- a rework of the layout and connection with the existing house
- changes to the driveway and parking area
- aesthetic concessions, including fit with the Historic District

The applicant is scheduled for a work session with HDC on March 6, 2017.

Responding to Ms. Goldberg's question about whether a smaller area was considered, Ms. Stibel explained that the original plans were for a larger space and a deck, but that area was reduced after receiving feedback from neighbors.

Board members discussed the value and standing of decreasing a nonconformity. Chair Baker clarified that the proposal was to remove a deck and replace it with a building, and further, that any change within the setback is necessarily categorized as additional non-conforming. Mr. Ben Lannon, Mr. Mark Gardner, Ms. Goldberg, and Ms. Sofio appreciated, to varying extents, that the proposal diminished the non-conformity. Mr. Gardner added that the modest project will not likely impact surrounding property values. Ms. Sofio noted that the intent aligned with the public interest of aging in place.

*Mr. Gardner moved to accept the request for a variance subject to approval of HDC, including the variance in accordance with the plan submitted by the applicant. Ms. Sofio seconded. Motioned carried with 4 in favor and 1 opposed.*

**CASE #2017-02 filed by Stephen & Cindy Baker, Trustees of Sea Gull Revocable Trust, owners of 51B Laurel Lane, Tax map 11, Lot 27 for a variance to Sec 9.2.3.2.c for construction within the 100 ft tidal buffer, and Sec. 9.2.5.1.e for construction within 50 ft of tidal lands.**

Guests who signed in: Kevin Baum, Steve Riker, Steve Baker, Cindi Baker, David Fitts

Voting members for Case #2017-02: Margaret Sofio, Mark Gardner, John Fitzpatrick, Ben Lannon, and Russell Cox

Ms. Goldberg disclosed a minor work relationship with Mr. Kevin Baum, counsel for the applicant. While seeing no conflict, Chair Baker appointed five other voting members for the case.

Mr. Kevin Baum, of Hoefle, Phoenix, Gorman & Roberts, representing the applicants, noted the presence of Mr. Steve and Ms. Cindi Baker, applicants, and Mr. Steve Riker, Wetland Scientist with Ambit Engineering, who is also representing the applicants.

Mr. Baum replaced the previously submitted plan with a new version that indicates the location of an underground propane tank and narrated the proposed project. Existing on site are three nonconforming buildings, including a residence, in the side setbacks as well as within the 50 foot and 100 foot Tidal Buffer. The proposal is to remove the nonconforming structures, and rebuild a 3,806 square foot (1,855 square foot footprint), single family residence with garage, deck, shower, generator and propane tank, landward of the current building sites, outside of the setbacks, but still within the tidal setback-- a portion inside the 50 foot, and the entirety within the 100 foot tidal setback. Only a small corner portion of the property is outside of the 100 foot tidal buffer. Additional work within the tidal buffer would replace an ineffective seawall in place with a new, two feet higher seawall.

The applicant is seeking relief for construction within 50 feet of tidal lands and within the 100 foot tidal buffer. Status of other approvals includes:

- Wetlands application has been submitted and is pending with NH DES

- Full approval has been received from the New Castle Conservation Commission (NCCC) including a followup approval of the Landscape Master plan.
- Public Hearing of the Planning Board for a Conditional Use Permit scheduled for February 22, 2017

Mr. Baum reviewed the criteria:

1. The variance will not be contrary to the public interest and
2. The spirit of the ordinance is observed:

The general purpose of the New Castle Ordinance is to provide health, safety, and public welfare and specifically the R1 District is to accommodate and support single family residential uses. The project proposes residential use, reduces the existing nonconformity, rebuilds the seawall to be effective, is consistent with surrounding properties, and reduces multiple dwellings to one. It has been approved by the NCCC.

3. The values of surrounding properties are not diminished:

Granting the variances will not diminish the surrounding property values but will allow the construction of a new, up to date home with less impact on setbacks and surrounding properties. If there is any impact, it will improve the surrounding values.

4. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship:

The three factors of hardship include whether special conditions exist that distinguish the property from others in the area, that there's no fair substantial relationship between the general public purposes of the ordinances and its specific applications, and that the proposed use is reasonable. All three apply to the small, 13,360 square feet, "essentially entirely" within the 100 foot tidal buffer, with a large portion within the 50 buffer. There is no way to construct a residence without impacting the buffer areas, although the attempt is made to make the structure more conforming. The improvements are consistent within the purposes of the general and R1 ordinances. Most importantly, it transforms a nonconforming, three setback-encroaching structure lot, into a single, more conforming residence.

5. Substantial justice is done:

There is no public gain in denying the variances. They reduce nonconformities and allow a more up to date residence. Denial would impact general public negatively and a significant negative impact on the Bakers because they could not redevelop the property.

Mr. Cox asked, and Mr. Riker answered, that state permission for a NH DES Wetland Permit is required for construction within the Tidal Buffer Zone. Additionally, the project needs to conform to the Shoreland rules in terms of impervious surface calculations. Mr. Riker believes that the proposed work will meet the state requirements and noted that consideration is made for the improvement of existing conditions. Additionally, plans to replant the area will improve the Shoreland area.

The dock has not yet been addressed, but would require a separate NH DES permit. The town has no jurisdiction beyond the waterline.

Chair Baker opened the Public Hearing at 7:49 p.m. and recognized David Fitts, 63 Laurel Lane (Map 111, Lot 28), who described that he is a direct abutter to the right of way that separates his property from the applicants, spoke in favor of the application.

Hearing no more public comment, Chair Baker closed the Public Hearing at 7:52 p.m. in order to deliberate among the members. Members spoke favorably about the project.

*Mr. Cox moved to accept the proposal as submitted. Mr. Lannon seconded the motion. Motion carried, unanimously.*

**CASE #2017-03 filed by Jonathan Sobel, owner of 33 Cape Road, Tax Map 16 Lot 32, for a variance to Sec 4.2.1 & 7.1.2 to allow expansion to a nonconforming building within side and rear setbacks.**

Guests who signed in: Jonathan Sobel, Richard Toomey, John Hill, Carol Sherfesee

Voting members for Case #2017-03: Ms. Sofio, Mr. Gardner, Mr. Fitzpatrick, Ms. Goldberg, and Mr. Lannon.

Chair Baker distributed letters from abutters and their attorneys, and read the contents of two emails received that day from the Building Inspector, the first recommending that the application be tabled pending further research and a later email, written subsequent to a meeting with the applicant, that reversed the first email and cleared the way for the case to move forward, suggesting that the applicant address the ambiguities.

Mr. Jonathan Sobel, applicant, of 32 and 33 Cape Road, presented the application for a variance for the property at 33 Cape Road, to construct a 1½ -story garage addition to an existing, nonconforming, two- story barn on a unique and complex property. The barn sits 1.6 feet from the back lot line. Closer to the road and river, is a house, one half of which is on the subject property. At the far end of the property is the Piscataqua Cafe, which sits over the water in the tidal zone. McHenry Architecture, Portsmouth, NH, verified the existing marker and boundaries as well as the barn location, and were tasked with creating a barn addition for a small, functional two-car garage with a traditional New England appearance that will complement the 1890's English style barn-- with entry on the side rather than the gable end-- to which it will attach.

Further property idiosyncrasies have resulted in unusual circumstances. After a family feud, ownership of the residential structure and associated property was split down the center, causing the barn to sit tight within one foot of the lot line, as depicted in the plot plan that was recorded in 1992 (D-21699). A 1994 adjustment moved and straightened the lot line in exchange for the front hallway of the house. At the time, the barn setback on three sides was

less than one foot. The 1994 adjustments were again recorded ( D-23249 by Millet & Associates) along with the property restrictions, including a seasonal restriction on the Piscataqua Cafe, and a use restriction that the barn not be used as a residence. Additional restrictions were enacted in the recorded agreement, the Mutual Release of July 31, 2012. The Sobels' goal is to secure an historic listing for the cafe structure.

While the Sobels don't currently reside on the property, they have considered retiring to the site, especially if they can build a garage.

Mr. Sobel asserted that structures on all of the surrounding properties are on at least one lot line. And, all of the surrounding properties have garages. In 1976, both a garage and a barn addition existed, tight to the lot line, at the site of the proposed new garage, but were torn down. Mr. Sobel also asserted that many letters from New Castle residents have been sent in support of his application, including one from Paul Amazeen, the previous owner.

Citing opposition from neighbor, Mr. Richard Toomey, Mr. Sobel defended his lot coverage calculations that relied on the premise that the "property below the Mean High Water Line may not be used in computation of density." (New Castle Ordinance Section 4.2.1.2). Chair Baker, asked whether the mean high tide line is clear, to which Mr. Sobel responded that the surveyed and recorded plan, D-23249, identified the "high water" line and is supported by the maritime survey by Riverside & Pickering Marine. Ms. Goldberg sought clarification and Mr. Sobel confirmed that the Building Permit was not denied due to nonconformity with lot coverage.

Mr. Sobel continued to address criticism of the planned full bathroom within the proposed garage by reporting that town ordinance does not restrict the location of a bathroom. With town water and sewer available, and the barn is located approximately 200 feet from the bathroom in the house. Explaining the need for a full bath, Mr. Sobel indicated the need to wash their dogs in the winter. Affirming Chair Baker's statement that the garage is not to be a dwelling, Mr. Sobel indicated his appreciation of that restriction to the fullest extent.

Mr. Sobel reacted to the suggestion that any approval should be subject to there being no bathroom facilities and other restrictions, by stating the proposed restrictions reiterate existing ones and therefore are unnecessary. Further that because there is no town ordinance restricting it, a bathroom should be allowed. More requests for "as built plans" are burdensome and expensive. Answering Ms. Sofio, Mr. Sobel acknowledged the new Accessory Dwelling law but assured the Board that is not his intent.

The barn is an antique, 120 years old, and sits on a mound with its entrance at three feet above the mean ground level with a ramp too steep for an average car. A full asphalt driveway will be considered.

Mr. Sobel addressed the criteria for a variance.

1. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship:

The irregular, elevated, 1893 barn was built 1.6 feet from the lot line while the proposed site is level making it the most reasonable location. At the minimum width of 19 feet for a two-car garage, there is a side setback incursion to within 9 ½ feet from the lot line in the front, and to 8 feet, 1 inch in the back, where ten feet are required. On the back side, the 1.6 foot setback from the lot line would extend the barn's nonconformity.

Chair Baker inquired, and Mr. Soble responded that using the barn as a garage by adding a garage door and floor, would forfeit important barn features the side door and raised entrance. Additionally, the elevation change would make turning difficult.

2. The variance will not be contrary to public interest:

The barn is set so far back from the road, that, at best, there is a peekaboo view of the garage door so that the proposed addition does not materially or negatively impact the public interest, nor does it affect the density on the lot. In fact cars that would be on the driveway will be parked inside.

3. The spirit of the ordinance is observed:

The proposal is not contrary to the spirit of the ordinance, which does recognize narrow lots with a more generous setback. While narrow lots are addressed, this is more narrow than the average lot and requires 1 ½ more.

4. Substantial justice is done:

Mr. Sobel observed that there had previously been buildings on the same site, and that everyone in the neighborhood has a garage. There would be no negative effect on light, air, safety, or sound, given the characteristics of the abutting properties, but would clean up the cars that are parked outside.

5. The values of surrounding properties are not diminished:

Located at the rear of the property, the garage addition would improve the appearance of the property, cleaning up the cars that are presently parked on the driveway. The subject property value would be enhanced directly and surrounding property values indirectly. There would be no adverse effect on property values.

Mr. Sobel concluded by offering his assurance that there is no intent to create a house, and asked that a favorable ruling not include unnecessary administrative burdens.

At 8:49 p.m. Chair Baker opened the Public Hearing and recognized Richard Toomey, 8 North Street, Mattapoisett, MA, who, with his sisters, owns the other half of the half-house on the Sobel property, described that his property has been in his family since the 1800s. Mr. Toomey presented a drawing with lot line delineations, including the boundary that runs through the house. Mr. Toomey expressed his opposition to the proposed project based on concerns about

lot line and lot coverage. Chair Baker interjected to explain that the ZBA is only concerned with the specific reason for the Building Inspector's denial of a Building Permit.

Mr. Toomey countered Mr. Sobel's assertion that previously a structure was sited at the location of the proposed garage, and clarified that the earlier structure was an eight foot shed, and not a 19 X 30 foot garage as is now proposed.

Opposing the variance, Mr. Toomey believed it to be inconsistent with the restrictions on the land. At the time of its subdivision (separating an already nonconforming lot) in 1992, the town objected, finding that it further aggravated the nonconformance of the property and responded by imposing restrictions.

- the Piscataqua Cafe be considered part of Lot 1 (Mr. Sobel's lot)
- the Lot 1 half house not be used as more than a single family residence
- the Piscataqua Cafe cannot be used for commercial or residential purposes (except for a six month residential allowance)
- the barn may not be used for commercial or residential purposes

The subdivided property doesn't comport with the spirit or intent of the zoning laws. The proposed garage causes density. Mr. Toomey also noted his concern about the inclusion of a bathroom in the garage, there being multiple existing bathrooms on the property. Arguing against Mr. Sobel's hardship rationale, Mr. Toomey asserted that there is not such right to a garage, noting the absence of a garage on his property. The existing barn can be used to garage cars, the only inconvenience being the need to enter via a ramp.

Countering Mr. Sobel's assertion that the unusual narrowness of the lot is cause for relief, Mr. Toomey noted that the town issued an order to control density specifically because it was too narrow.

Mr. John Hill, 39 Cape Road, abutter to the subject property, whose family has owned the property since 1963, opposed the variance and described the congestion and activity generated by events that are held at the Piscataqua Cafe. The already dense area is becoming more congested.

Mr. Hill questioned whether the town should order a survey that is more current and reliable than the 1994 survey presented by Mr. Sobel, paid for by the applicant, in order to protect the abutters because of the questions that pertaining to lot lines, runoff, and possible bulking of the property.

Chair Baker interjected to ask whether the survey is accurate, and no argument was made that it wasn't.

Mr. Hill described that those who have given their support for the proposed garage are not abutters and will not be subject to the increased density and activity it will create. If the variance



is granted, Mr. Hill advocates for restrictions that would prevent the space from being finished and the building from becoming an Accessory Dwelling Unit.

Ms. Carol Sherfesse, 73 Cape Road, whose property line abuts the back of the barn, opposed the variance and indicated that she had been in touch with neighbors Phil and Marge Barrett who have voiced their opposition. Noting the difference between those who have indicated their support for the project, she characterized all the abutters as being opposed. With only eight houses on Cape Road, the impact of the parties' noise, traffic, parking, and congestion is felt. She further expressed concern about how runoff from the barn and behind the barn will affect her property, the possibility of a negative impact on her property value, and the possibility of the space becoming living quarters.

Seeing no further comment, Chair Baker closed the Public Hearing at 9:14 p.m. and turned the case to the Board to deliberate.

Ms. Goldberg asked for clarification, to which Mr. Sobel described that a Building Permit had been denied on the basis that it was an expansion of a nonconforming structure as a result of the side setback.

Chair Baker noted the application identifies the required variances for the proposal.

Ms. Sofio acknowledged that it adds density, questioned hardship given the presence of a barn, and indicated her respect for the concerns of abutters. Mr. Cox commented that he doesn't see any hardship. Mr. Gardner agreed with Ms. Sofio, acknowledged the abutters, echoed the lack of hardship, and indicated he'd vote against it. Mr. Fitzpatrick stated that, without the opportunity for more investigation of the complex case, he would vote against it.

Ms. Goldberg agreed with other members, and indicated that she would vote against the proposal. Regarding hardship, she doesn't see a direct correlation between the proposed structure and the hardship that was argued, even if the need for a garage would be considered a hardship.

Mr. Lannon noted that many of the arguments against are not directly related to the proposal. He further believes there are protections in place to prevent the structure from becoming a dwelling. However, he respects that the abutters have a stake.

Chair Baker described that if it's a fairly minor request to a nonconforming structure, and if it's supported by the neighbors, the ZBA may typically grant the variance, however, there is significant opposition in this case. The two criteria in question are diminution of property values and hardship.

*Ms. Sofio moved to deny the application based on lack of showing of hardship. Mr. Gardner seconded. Motion to deny carried unanimously.*

**CASE # 2017-04 filed by Doug + Dan, LLC, owners of 3 Walbach St, Tax Map 18, Lot 56 for a variance to Sec 4.2.1 to allow an increase of 366 sf to an existing structure with addition of 3 dormers.**

Guests who signed in:

Voting members for Case #2017-04: Ms. Sofio, Ms. Goldberg, Mr. Lannon, Mr. Gardner, Mr. Fitzpatrick

Mr. Doug Palardy, member of applicant, Doug + Dan, LLC, presented the case for an increase in livable space. This is the final stage in planning for the redevelopment of an existing structure to an inn. The request to increase space is the result of dormers proposed for the third floor. The existing roof was poorly built and not to code, including requirements for the existing staircase, necessitating dormers. The roof could have remained as it existed, but with size of the renovation at more than 50 percent, and a complete gut of the interior, the structural and conditional issues were exposed. The existing dormers, two on the rear facing Henry's, as well as five skylights, were added by cutting a hole in the roof and nailing them to the old shingles. The plans have been presented to, and positively received by both the Planning Board and the HDC. Originally the intent was for only three dormers on the front, facing Walbach Street, but because the staircase comes up in the middle, three would have been asymmetrical. In the back is a shed dormer.

The plans dated January 17, 2017 have been approved by HDC and the Planning Board. Mr. Palardy described how the proposed addition of 366 square feet of livable space to a nonconforming structure meets the criteria for a variance.

1. The values of surrounding properties are not diminished:

The historic preservation, improvement to meet code requirements to a neglected building, and no increase in lot coverage will add to neighbors' values and the Historic District.

2. The variance will not be contrary to public interest:

By allowing the dormers, the proposed inn will enable locals to house guests as an alternative to the larger hotel, and create an historical renovation in a highly visible location.

3. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship:

Without the dormers, the third floor is unlivable and not to code.

4. Substantial justice is done:

The current space is not to code and creates a life safety issue.

5. The spirit of the ordinance is observed:

The building is 200+ years old, already nonconforming. The livable square footage does not add another floor or additional lot coverage, therefore not contrary to the spirit of the ordinance.

Ms. Goldberg asked about abutters' opinions. Noting one abutter in attendance, Mr. Palardy asserted that all nine of the abutters have been in favor of the project since the beginning.

Mr. Baker asked for an update to the issues that were originally raised by the ZBA when the proposal for an inn first came before the Board. The building will be fully sprinklered; there will be a hard wire alarm system, permeable parking surface, and handicap accessibility.

Chair Baker opened the Public Hearing at 9:37 p.m., recognized Leonard Seagren, 19 Walbach Street who spoke in favor of the variance, and closed the Public Hearing at 9:38 p.m.

*Mr. Gardner moved to accept the request for the variance as submitted for the reasons stated in the application. Mr. Fitzpatrick seconded. Motion approved unanimously.*

#### Other business to come before the Board

Ms. Goldberg requested that the meeting date be moved to March 28, 2017.

#### Set date of next meeting

Ms. Goldberg requested that all the documents be printed.

#### Adjournment

Mr. Cox motioned to adjourn. Mr. Gardner seconded. Motion carried, unanimously.

Meeting adjourned at 9:42 p.m.