



ZONING BOARD OF ADJUSTMENT

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MINUTES OF THE BOARD OF ADJUSTMENT PUBLIC HEARING

Tuesday, May 15, 2018 – 7:00 p.m. – Town Hall Conference Room

Members Present: Liz Cummings, Lindsey Franck, Steve Gerrato, Ron Gross, Leonard Schwab

Staff: Jim Marchese – Building Inspector

Chair Cummings opened the Board of Adjustment meeting at 7:00 p.m. and a roll call was taken. The Chair explained the procedures of the Zoning Board of Adjustment, stating that a quorum was present, and the meeting was being recorded. Minutes will be available in accordance with the RSA 91-A, and will also be available on the Town's website.

1. 179 Post Road - Continued from Tuesday, April 17, 2018

Ben Pecora addressed the Board. The soft natural barrier requested by the Board didn't work; he has installed a fence that is 19' long and just under 6' high.

MOTION: Chair Cummings moved that the fence built by Mr. Pecora, as shown in the information submitted on May 15, 2018 depicting the fence and its location, be used for screening in lieu of arborvitae. Second – R. Gross; four in favor, one abstain (L. Schwab). MOTION CARRIED

2. 38 Cherry Hill Drive - U7, 10CJ; Residential Zone with Aquifer Protection Overlay

Equitable Waiver of Dimensional Requirements

Owner/Applicant: Dorado Investments

The owner/applicant is requesting an Equitable Waiver of Dimensional Requirements for a structure built 34.30' from the neighboring unit. Section 19.3, Item 'O' of the Greenland Zoning Ordinance requires a minimum distance of 35' between units.

Stephen Ells, Attorney and representing Dorado Investments, addressed the Board. Also present were John O'Neill and Michael Green, Green and Company. R. Gross stated that the applicant was tasked to review all units, and this was exactly the same as the one in April; he requested the Board expedite this case. S. Gerrato agreed, adding this unit was even better and should be moved along. Attorney Ells stated this was a little less of a problem than the one in April. They had told the Board they would check for any other units that may be a problem with distance.

Chair Cummings asked Attorney Ells to briefly review the requirements for an Equitable Waiver. Attorney Ells stated that the non-conformity wasn't discovered until the unit was substantially completed; it wasn't the result of bad faith, it was a good faith error in measuring; the slight non-conformity couldn't be seen as a nuisance and will have no effect on how the unit or abutting units will be used; it will not diminish the value of any units in that area; the cost to correct the problem far exceeds any public benefit; and it wouldn't be noticed if it was fixed.

MOTION: S. Gerrato moved to grant the Equitable Waiver of Dimensional Requirements of 34.3' where 35' is required. Second – R. Gross

Discussion: L. Schwab questioned if this was the last one. Attorney Ells deferred to J. O'Neill, stating that after the last meeting they decided to have the surveyors go to the site. J. O'Neill stated they have identified every unit; there is one more foundation that has been pinned. He assured the Board that they have completed the task and are done, and that it won't happen again. R. Gross clarified that the last one was found on the drawing and not by measuring.

MOTION: S. Gerrato moved to grant the Equitable Waiver of Dimensional Requirements of 34.3' where 35' is required. Second – R. Gross; all in favor. MOTION CARRIED

3. 57 McShane Avenue – U9, 33; Residential Zone

Appeal from an Administrative Decision, Request for a Variance

Owner/Applicant: Jenifer Campbell

The owner/applicant is seeking an Appeal from an Administrative Decision due to the determination that the construction of a septic system is considered a structure, and therefore, not allowed in the wetland setbacks under Article 18, Section 18.7.2 of the Greenland Zoning Ordinance. Four Variances have been requested for relief from Article 18, Section 18.7.2 of the Greenland Zoning Ordinance: (1) encroachment of the proposed septic system into the 75' wetland setback, to be located 40.1' from the delineated edge of wetland setback; (2) to allow a 36"x48" landing and steps to be located within the 75' inland wetland setback; (3) to allow a 36"x36" proposed landing and steps to be located within the 75' wetland setback; and (4) to allow a 4'x6"x10' (45 sq. ft. +/-) proposed covered entrance and steps, to be located on the northerly side of the proposed 650 sq. ft. building addition to be located within the 100' tidal wetland setback.

Mike Sievert, MJS Engineering, addressed the Board. Also present was Jenifer Campbell, owner/applicant. The property requires Variances for access ways to the building and also for the septic tank. They had received a letter from J. Marchese defining the septic tanks as a structure.

Attorney Derek Durbin arrived.

Attorney Durbin, representing the applicant, Jenifer Campbell, introduced himself to the Board. An Administrative Appeal has been filed; if granted, it will eliminate the need for a Variance from Article 18.7.2 (septic system setbacks). The property is slightly less than 1.5 acres, and is bordered by Pickering Brook and Great Bay. This is a unique parcel; only a small portion of the property falls outside of the Town's wetland setbacks.

The applicant was granted an Equitable Waiver and Variance relief last year for several small additions to the existing residence within the wetland setbacks. Last year, the engineer at the time and the applicant inadvertently failed to depict the entry ways to the proposed additions; three Variance requests have been submitted to address those issues. The applicant is also proposing to construct a new septic system in a different location on the property; the existing system is antiquated and the location hasn't been identified.

The Building Inspector has determined that a Variance is needed from the 100' tidal wetland setback requirement for the construction of the septic system. The applicant disagrees with the interpretation that the septic system is a structure and filed an Administrative Appeal. Attorney Durbin reviewed the Administrative Appeal (copy on file), requesting the Board grant the Appeal and eliminate the need for a

Variance. Responding to a question from Chair Cummings, Attorney Durbin stated it was his belief that the Ordinance defined what's required for providing a foundation to a structure or basement. The definition of "structure" does not address a septic system; no other area of the Ordinance appears to address it. The State will regulate the location of the septic system. R. Gross stated that the Town has always defined septic systems as a structure. Chair Cummings agreed the definition was very generic and that was the way the citizens in Town wanted it. J. Marchese added that the tanks were located in the 100' setback. The 100' setback was there so that a vegetated buffer could be maintained or established. It's doubtful a vegetated buffer could be established over the tank because the tanks need to maintain access.

Chair Cummings opened the hearing to public comments. Laura Byergo, speaking from the Conservation Commission, stated that the buffers are supposed to be a protection and way for natural vegetation to handle water coming over the surface and ground water. The buffer is needed to handle the water coming out of the septic system. Of particular concern: as water levels are changing, ground water will be changing. That would be an additional reason to be very careful about putting a septic system within the buffer zone of a tidal creek. Attorney Durbin responded this was delving into the criteria for a Variance, and this discussion was for the Administrative Appeal. His comments regarding the vegetated area within the 100' buffer will be reserved for the Variance.

There being no further comments from the public, Chair Cummings closed the public hearing and returned to the Board. Speaking as a member of the Board and not her position as Chairman, L. Cummings explained that the Administrative Appeal is designed to provide an applicant the ability to come before the Zoning Board because they felt a Town official or Board made an error applying the Zoning Ordinance. It's not designed to decide whether the Ordinance itself is flawed. The job of the Town official or Board is to read and apply it. If it's not an appropriate item within the Ordinance, it's the Planning Board's job revise it, and the Town's job to vote on it. She, and the Building Inspector, feel a septic system is a structure, much like a basement or tree house. Members of the Board were in agreement.

MOTION: R. Gross moved to deny the Administrative Appeal; a septic system is considered a structure within the Ordinance and the Building Inspector was appropriate. Second – S. Gerrato; all in favor. MOTION CARRIED

Attorney Durbin reviewed each of the five criteria for a Variance, combining all requests (a total of four, including a Variance for the septic system; a copy is on file). In conclusion, Attorney Durbin stated that the applicant met all of the requirements for a Variance for each application. He included a proposed stipulation in the narrative (page 8 of 8): if the Board were to grant the Variance relief as requested for the septic system, it would be with the condition that the Town Attorney approved the easement between the applicant and the abutter at 55 McShane. Attorney Durbin forwarded the easement document to the Town Attorney for review; a copy of his response approving the easement was given to the Board (a copy is on file). J. Marchese acknowledged he received the same email from the Town Attorney.

S. Gerrato clarified the septic was being changed because they're increasing the size of the residence; Attorney Durbin agreed. He continued, in response to R. Gross, that a lot of this nature couldn't be created under today's Zoning Ordinance. It's a property that pre-dates the Zoning Ordinance. With respect to the hardship, anything additional done to the property would require relief.

Chair Cummings asked J. Marchese about the easement. He had spoken to the Town Attorney earlier in the day and he had approved the wording of the document. However, the document has not been endorsed by either party or recorded. J. Marchese noted those things would need to be done in order for him to sign off on the septic system design. Chair Cummings asked if granting a Variance on a piece of property not owned by the applicant was discussed. J. Marchese stated the leach field will be constructed in an easement area that meets the zoning requirements, and no relief is needed. A legal document was needed that allowed them to build the septic system leach field off the property; R. Gross stated no Variances would be needed.

L. Schwab noted it would be in the 50' right-of-way. It was J. Marchese's opinion that the right-of-way was established to create the lot in question; the right-of-way was created to provide the required frontage. Attorney Durbin and the Town Attorney met to discuss the right-of-way. After research by both attorneys, it was determined the Town had no interest in the right-of-way. The right-of-way is spelled out in the deed.

Chair Cummings asked P. Ostromecky if he had seen the easement paperwork. He stated his intention was to sign the easement after it was reviewed by his attorney. R. Gross stated it could be approved contingent upon a signed easement because it met the requirements. Chair Cummings asked whose property owned the easement; it would be grantor (P. Ostromecky). She pointed out that there is not an easement at this time; without that, the leach field cannot be put on the property. There was a discussion about the location of septic system and easement. Attorney Durbin stated that it was their intention to propose a signed easement as a condition of approval.

There was also a lengthy discussion about the location of the septic system. M. Sievert explained the septic system to the Board. L. Schwab asked where the astronomical high tide came to on the property. M. Sievert responded that the highest observable tide line is around elevation 18 on the plan. D. Katiniotis added it didn't get to the lower driveway. Chair Cummings told the Board they were "out of their bounds"; it was not the Board's job to decide where the applicant places his septic system. The Board looks at the property and the explanation of where he intends to put the septic system to see if the applicant "deserves" a Variance. Chair Cummings explained that hardship has changed, and has become reasonably feasible. Discussion about the location of the septic system continued.

Chair Cummings opened the hearing to public comments. Discussing the proposed stairs, S. Gerrato stated "no pressure treated lumber touching the ground in the wetlands". There being no further comments, Chair Cummings closed the public hearing and returned to the Board. R. Gross asked L. Byergo how the Conservation Commission felt about pressure treated lumber. L. Byergo responded that they would like to avoid pressure treated and any additional chemicals in the wetlands. There wasn't anything in the Ordinance pertaining to pressure treated materials. Responding to a comment from R. Gross, L. Byergo stated that the buffer is there to protect the wetlands and treat water before it gets into the wetlands, including nitrates. The leach field systems are not designed to treat nitrates; that's why land is needed between the leach field system and the wetlands to be able to absorb the nitrates.

Chair Cummings asked for motions dealing with the stairways shown on the plan from MJS Engineering, last revision dated 04.03.2018, Job No. 17-046, showing the septic system and proposed covered entrance steps, as outlined in the Narrative in Support of Zoning Relief. J. Marchese pointed out to the Board that Item (4) should be 4'6" x 10', not 4' x 6" x 10' as stated in the narrative.

MOTION: L. Schwab moved that Variance relief be granted from Article 18, Section 18.7.2 relative to the proposed 36"x48" landing and steps, located within the 75' inland wetland setback; the proposed

36"x36" landing and steps, located within the 75' inland wetland setback; and the proposed 4'6"x10' (45 sq. ft. +/-) covered entrance and steps, located on the northerly side of the proposed 650 sq. ft. building addition, to be located within the 100' tidal wetland setback. Second – L. Franck

Discussion: Chair Cummings asked the applicant if it would cause difficulty if the Board added the stipulation about pressure treated wood. D. Katiniotis explained he had planned to use pressure treated wood. The front entrance will be on a pad and he could do the same with the back.

Chair Cummings stated for the record that the applicant's representative clearly covered the criteria and met the requirements for granting a Variance for Items 2, 3 and 4 on page 2 of 8 of the narrative.

MOTION: L. Schwab moved that Variance relief be granted from Article 18, Section 18.7.2 relative to the proposed 36"x48" landing and steps, located within the 75' inland wetland setback; the proposed 36"x36" landing and steps, located within the 75' inland wetland setback; and the proposed 4'6"x10' (45 sq. ft. +/-) covered entrance and steps, located on the northerly side of the proposed 650 sq. ft. building addition, to be located within the 100' tidal wetland setback. Second – L. Franck; all in favor. MOTION CARRIED

Chair Cummings reminded the applicant that under Section 18.7.1 septic systems must be 75' away from the Jurisdictional Wetland. Chair Cummings asked for a motion on Item 1 to grant a Variance from Article 18.7.2 to allow the proposed septic system to encroach in the 75' inland wetland setback as shown on the plan from MJS Engineering, last revision dated 04.03.2018, Job No. 17-046.

MOTION: Chair Cummings moved to grant the Variance from Article 18.7.2 to allow the proposed septic system to encroach into the 75' wetland setback with the condition that an easement from the property owner at 55 McShane and the applicant at 57 McShane, as identified on the plans, be reviewed and approved by Town Counsel. Second for discussion – R. Gross

DISCUSSION: R. Gross disagreed with Chair Cummings. For a Variance to be contrary to public interest, it must unduly, and to a marked degree, violate the basic zoning objectives. He continued that this is a wetlands area. To grant this would allow more septic system to be put into the wetlands. That is definitely against the spirit of the ordinance. Chair Cummings noted it was in the wetlands setback; she wouldn't have made the motion if it was in the wetlands. R. Gross continued that the buffers are still part of the wetlands; there would be very little protection if that fails. There are potentially other options. Chair Cummings reminded the Board if they denied this Variance, the applicant would be done. R. Gross stated that it wasn't appropriate for the Board to tell the applicant where to put the septic system, but felt there were other options. The Board was in agreement. Chair Cummings told the applicant that in order for this to pass, something significant had to change. She gave Attorney Durbin the opportunity to take a break and speak to his client.

Recess from 8:35 p.m. to 8:48 p.m.

Chair Cummings opened the meeting to comments from Attorney Durbin. The applicant respectfully requested a continuance of the Variance of the septic system setback in order to review some of the other details associated with the existing system and better clarify and/or withdraw the application. They would like to find an alternative to what was proposed that was reasonably feasible. In addition, they requested that the Board and Building Inspector do a site walk of the property with the applicant and engineer before the next public hearing. R. Gross noted that if a majority of Board members were present, the walk would need to be noticed and recorded. Attorney Durbin added there is information

that needs to be clarified. They will be exploring alternatives over the next few weeks. Chair Cummings closed the public hearing and returned to the Board.

MOTION WITHDRAWN: Chair Cummings moved to withdraw the motion to grant the Variance from Article 18.7.2 to allow the proposed septic system to encroach in the 75' wetland setback. Second – R. Gross; all in favor. MOTION CARRIED

MOTION: Chair Cummings moved to grant the continuance as requested to continue the application for the Variance for the septic system in the wetlands setback, and if possible, consider a site walk. Second – R. Gross

DISCUSSION: L. Byergo requested that the Conservation Commission also be part of the site walk. Chair Cummings responded that a site walk would be open to the public at the applicant's pleasure. The applicant agreed it would be okay.

MOTION: Chair Cummings moved to grant the continuance as requested to continue the application for the Variance for the septic system in the wetlands setback, and if possible, consider a site walk. Second – R. Gross; all in favor. MOTION CARRIED

4. Approval of Minutes

MOTION: R. Gross moved to approve the minutes of Tuesday, April 17, 2018. Second – L. Franck; four in favor, one abstain (L. Schwab). MOTION CARRIED

5. Review of ZBA Guidelines

Continued to the next meeting.

6. Other Business

L. Schwab asked that the Planning Board consider further clarifying the definition of "structure". R. Gross stated that at one time septic systems were included in the definition of "structure". Chair Cummings suggested a joint meeting during a work session. A list of items for the Planning Board to consider will be started.

There are currently no alternatives for the ZBA.

7. Adjournment

MOTION: S. Gerrato moved to adjourn at 9:00 p.m. Second – R. Gross; all in favor. MOTION CARRIED

NEXT MEETING

Tuesday, June 19, 2018 – 7 p.m., Town Hall Conference Room

Respectfully Submitted: Charlotte Hussey, Secretary to the Boards

Approved: Tuesday, June 19, 2018