

Town of Center Harbor Zoning Board of Adjustment

**MOTION FOR REHEARING**

Petitioner: Mark Sudbey of 27 Old Black Road Turnpike, Fairfield, CT 06824  
("Applicant")

Property: 24 Dew Point Lane; Map 103, Lot 015 ("the Property").

Variance Request: Zoning Ordinance Section 5:3:1

Mark Sudbey, by Springer Law Office, PLLC, hereby moves for a rehearing in the above referenced matter pursuant to RSA 677:2, as follows:

1. On November 5, 2018, the ZBA held the continued public hearing on the above-referenced variance application.

2. At the hearing the ZBA denied the variance request; as shown by the written Notice of Decision dated November 12, 2018, the ZBA found that the variance application failed to meet the "public interest" criteria, the "spirit of the ordinance" criteria and the "unnecessary hardship" criteria.

3. As set forth in the Notice of Decision ("the Decision"), the ZBA found that:

Granting the variance would be contrary to public interest and the spirit of the ordinance because the improvements, both cumulatively on this property and cumulatively around the lake, if they were approved, unduly and in a marked degree violate the basic zoning objective of maintaining the natural condition of the land around the lake.

4. The Decision is in error on those findings because of the following reasons:

A. The Decision is silent on what provision(s) of the ordinance has as its "basic objective" the maintenance of "the natural condition of the land around the lake". The variance application at issue seeks a variance from Section 5:3:1. Nothing in Section 5:3:1-

which is entitled “Structure Setbacks” – states or even implies that the “basic zoning objective” of Section 5:3:1 is to maintain the “natural conditions.” To the contrary, Section 5:3:1, and the entire Section 5:3, expressly contemplate significant changes to the “natural conditions” of a piece of property.

B. Further, Section 5:3:1 is incorporated by reference into Section 10 (entitled “Center Harbor Water Resources Conservation Overlay District”), and in particular, Section 10:6:2, entitled “Permitted Uses within the Protective Buffer.” In other words, Section 10:6:2 expressly allows changes to the “natural condition.”

C. If the ZBA’s position is that purpose of Section 5:3:1 is, in the words of one board member at the hearing, to avoid looking like “Governor’s Island” and to avoid any change to the “natural condition” to a piece of property, the Ordinance is defective on its face and as applied because no person can read that Section 5:3:1 and ascertain that (alleged) purpose. It is well settled that a land use ordinance must provide sufficient detail to enable an applicants to determine their rights thereunder, so that the determination of those rights will not be left to the guesswork or to the arbitrary discretion of a land use board.

D. Further, the Ordinance is defective, on its face and as applied, because at the hearing the Town Code Enforcement Officer (“CEO”) and various board members could not agree on what type of pervious surface, if any, would in fact, be allowed pursuant to Section 5:3:1. During the hearing, the CEO, in response to a question from the Applicant’s attorney, stated that simply planting grass seed would be changing the “natural condition” of the land which would require a variance application to the ZBA. The ZBA chair then stated that planting grass seed would not trigger the need for a variance. Another board member then stated that

putting down grass seed alone would not trigger a variance, but that putting down sod would. In light of these conflicting positions as stated by the CEO and the ZBA members, no applicant can read Section 5:3:1 and ascertain what is permitted and what is not and therefore the section is defective.

E. Further, it is clear that because Section 5:3:1 is incorporated by reference into Section 10:6:2, there is in fact a second objective: allowing some development within the protected buffer (50' to 75' away from the lakeshore) while at the same time, protecting the lake from unwanted stormwater runoff and drainage. Indeed, it was in recognition of this second objective that the ZBA required the Applicant to provide a report from a certified wetlands scientist comparing the current and proposed conditions on the property to a hypothetical situation where no improvements had been made to the property (between the lake front and the home and driveway.) The ZBA also requested information regarding the care and maintenance of the lawn between the house and the lake, to determine what type of fertilizer would be used.

F. The undisputed testimony, and as shown by the submitted report of Nicole Roseberry, is that the variance proposed by the Applicant actually increases storm water management and reduces run-off into the lake. The undisputed testimony was that the lawn maintenance would be organic and nitrogen free. The ZBA specifically requested the Applicant to show that the proposed improvements would be better than the "natural condition", which in fact the Applicant did. The ZBA decision erroneously ignores this undisputed fact as it ignores the entire second purpose.

G. The definition of "Patio" in the Ordinance states that when the natural surface is replaced with "brick, pavement, gravel, stone or any comparable material"; the reference to

“comparable material “ is, the Applicant believes, a reference to impervious materials only. All of the identified materials (brick, pavement, gravel, stone) are, without more, impervious. Because it is impracticable to identify all impervious materials which might be used (ie, wood, metal, plastic, composites) the Ordinance included the phrase “comparable materials”....meaning materials comparable to the impervious materials identified by name. In other words, when one is switching from the natural, pervious surface to the impervious materials then one needs a variance. The Applicant is within the permitted limits of impervious surface and therefore, then the proposed plan meets the definition of “Patio” and is in accordance with the Ordinance.

H. Neither the current owner, the current owner’s immediate predecessor (Battaini), nor Stephen’s Landscaping, had anything to do with the original disturbance of the “natural condition” of the Property. That original disturbance included landscaping, a stone wall, a patio by the lake with stairs going to the house, and a crushed stone sloping to the water. At this time it is impossible to restore the “natural condition” of the Property if by the term “natural conditions” the ZBA means the conditions as they existed before the said original disturbance. The Applicant is thus left with the potential situation of being ordered to restore the “natural condition” of the land, but the only way he could do that would be to take up the existing improvements and (assuming no one wants him to leave raw dirt) plant some sort of vegetation, which plantings, according to the CEO and at least certain ZBA members, would also require a variance. That variance would also run afoul of the ZBA’s interpretation of the “sole purpose” of the ordinance. Further, assuming that the second purpose of the ordinance (avoiding run off) exists, the only way the Applicant could meet that purpose in restoring the natural conditions would be to

introduce the same type of plantings and swales the ZBA has now stated are impermissible even with a variance.

I. Regarding the issue of the definition of a “Patio”, the proposed variance seeks to replace and remove many of the existing improvements, and if the proposed plan is accepted, will result in only 51 sq. ft of impervious surface within the 50 to 75 foot area of the shoreline. That amount of impervious surface is well within the maximum 150 sq. ft. of the patio (allowed by Section 5:3:1).

5. Regarding the “special conditions”, the ZBA found as follows: “there are no special conditions unique to the property that warrants a variance of this magnitude because the slope is both gentle and shared by neighboring properties and the shape does not make the ordinance affect the property differently.”

6. This finding is in error for the following reasons:

A. The “special condition” which exist are not just the grade and shape of the property, but also the fact that the “natural conditions” of the Property were disturbed long before the current Applicant (or his immediate predecessor in title) or Stephen’s Landscaping were ever involved with this property. Further there would be no way to restore the “natural conditions” of the Property without obtaining a variance, as stated above.

B. The ZBA decision speaks of a variance “of this magnitude”, but this variance seeks to add 51 sq. ft. of impervious surface within the 50 to 75 foot zone from the lakeshore, which is almost two-thirds less than permitted under the ordinance. In addition, the “magnitude” of the property includes improvements which reduce storm was run-off into the lake as opposed to the “natural conditions.” These facts are undisputed, yet ignored by the ZBA in its decision.

C. Any restoration of the “natural conditions” will provide less protection to the lake, and, according to the CEO’s interpretation, would require a variance. If the Board is not willing to look at the “special conditions” of the property as they exist now, then the Applicant has no hope of meeting the “special conditions” criteria for his “new” variance application to restore the land to the “natural conditions.”

7. The Board also found that “the requested improvements could have been constructed in compliance with the ordinance on other portions of the property.” This finding is in error because the Applicant is attempting to place a patio, pursuant to Section 5:3:1 within 50 to 75 feet of the shoreline. In other words, the Ordinance allows a homeowner to seek a shoreline patio (being within the 50 to 75 feet). With all due respect to the ZBA, it is no answer to someone seeking a shoreline patio, to say in effect, you could put the patio in your front yard on the other side of your house.


8. The Notice of Decision does not identify a single fact to support the statement that the variance would be contrary to public interest and the spirit of the ordinance.

WHEREFORE, the Applicant respectfully requests a rehearing by the ZBA in this matter, and upon rehearing, grant the variance request and grant such additional relief as may be just and appropriate.

Respectfully submitted,

Mark Sudbey  
By His Attorney,  
Springer Law Office, PLLC

Dated: November 29, 2018

By:   
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