

TOWN OF CENTER HARBOR
ZONING BOARD OF ADJUSTMENT
Hearing
Thursday, April 19, 2018

Chairman Bernie Volz called the hearing to order at 7:00 p.m. Present were Members Chris Williams, Jean Meloney, Alternate Members Anthony Avrutine, Karen Ponton and Clerk Aimee Manfredi-Sanschagrin. In the audience Attorney William Philpot, Jr., Joseph Battaini, John Stephens and Mark Stephens of Stephens Landscaping, Brie Stephens, Harry Viens, Bill Ricciardi, Jill Weed, Mehmet Duymazler, Ben Bare, Sheila Mohan, David Reilly, Code Enforcement Officer Ken Ballance and Attorney to the Board Laura Specter.

I. MINUTES (April 9, 2018 and April 16, 2018)

Jean Meloney motioned to accept the April 9, 2018, minutes as corrected. Seconded by Chris Williams. All were in favor minutes pass. Chris Williams motions to accept the minutes of April 16, 2018 for the site walk at 24 Dew Point Lane. Seconded by Bernie Volz. All were in favor minutes pass.

Voting Members: Bernie Volz, Chris Williams, Jean Meloney, Anthony Avrutine and Karen Ponton.

II. HEARING: VARIANCE 5:3:1 FOR BATTAINI 24 DEW POINT LANE 103-015 RECONVENE FROM APRIL 9, 2018

Chair provides rules of protocol to all of those in attendance, stating if there is dialogue with the Board it is to go through the Chair.

Chair asks if there are any comments or questions from the site visit that anyone would like to discuss.

Attorney Philpot, Jr.: I would just like to comment on the site walk. The Board was able to observe the conditions, I think the Boards decision to conduct the site walk was a very smart decision. The property has been terraced and drainage has been provided to assist with water runoff. The work done is aesthetically pleasing and environmentally sound.

Chairman: Anyone else?

Ben Bare: I worked for OSHA for many years and it's common on construction sites for owners to defer the safety and health responsibilities to subcontractors in a written contract. Subcontractors then state they have no authority to take any action except for what I'm contracted to do. OSHA solved this finger pointing by citing both the owner and contractors for safety health violations otherwise there is no compliance with the safety and health rules. Likewise in this case, if there are no consequences there is no compliance with the shoreline protection regulations. It's the civic, moral and legal duty for property owners and contractors to know the regulations. Finally, Center Harbor must send a strong message to the homeowner and landscaper that violating the shoreline regulations will not be tolerated. The shoreline must be returned back to its original state and I suggest that homeowner receive a penalty to deter any similar action by present home owners. The landscaper must be prohibited from receiving any city contracts for three years and any current contracts must be terminated. In addition, I strongly recommend the zoning committee and other committees prepare a joint press release posting in city hall and town publications such as the Meredith News and Granite State Newspaper identifying the violating parties in sanctions taken by the committee. It's only through public awareness and strong fair enforcement compliance to protect our lake as a valuable resource will be achieved.

Chairman: I want to clarify one thing, the Zoning Board of Appeal only has certain powers and some of the things you stated are not within our purview. We review the zoning ordinances and provide a variance if we so deem is applicable and that's it. We cannot impose fines, those responsibilities are held by another Board.

Ben Bare: If I may respond to that, I would like to suggest this committee refer it to the other committees for action if you don't have the authority.

Chairman: Anyone else?

Sheila Mohan: 79 Bean Road. I was not at the first meeting, but why does this have to be so large? Is there a reason why this has to be so large that it cannot fit within the zoning ordinance?

Chairman: That is something we will have to discuss and take a look at.

Sheila Mohan: Ok, is it going to be a structure of wood or ground work?

Chairman: It's just patio I believe.

Attorney Philpot, Jr.: It's just patio no wood involved.

Chairman: And just so you know, you make it sound like it's to be but it already is. It's already in existence because a building permit was not obtained.

Sheila Mohan: Ok well then that brings me to another question, if you don't approve this variance does it have to go back to what Mr. Bare said its natural state?

Chairman: What is allowed by the ordinance is all that could be done and so changes would have to be made to stay within the compliance of what is allowed by the Town. There was some preexisting work there, what that was I cannot say but that is something we have to factor in. There are pictures of the property before the work was started which were part of the shoreland application.

Chairman: Anyone else?

Jill Weed: 217 Whittier Highway. I have a concern that if this is granted what that sets for precedent for all of the other properties that line the shore.

Chairman: Yes, the Zoning Board deals with specific properties and the specific conditions on that property it should not be precedent setting in that respect, just because we decide something is allowed on one property does not mean it's allowed on another. Again, if people don't follow the procedures and rules they end up in a situation like we have here and that obviously is not where anybody wants to be.

Joseph Battaini: I just have a few rebuttal statements, they are just speaking in generalities and the Board knows from the Office of Strategic Initiatives which is the handbook that all of you go by. Mr. Battaini provides a definition of a variance to the audience. I just want to remind some of the people that Monday morning quarterbacking you can do all you want it just doesn't solve the issue and the purpose of the Zoning Board of Adjustment is to look at variance and the five criteria that needs to be met. I just want to remind people of that.

Chairman: Yes and we also just want to remind people generally we want to do that before something happens rather than after.

Joseph Battaini: I agree, I agree.

Attorney Philpot, Jr.: One observation if I may, for the record of course, I think it's probably generally known by the Board, the applicant and its agent pursued and obtained permits with the State of NH, the shoreland protection act was complied with and as everyone in this room should know NH DES has perhaps the highest capture rate, preservation rate in the Country for wetlands and other water quality aspects. To say this presents an environmental concern is not really apropos to the situation in, fact there has been ample review by the State.

Sheila Mohan: When you made your site visit, did you find a hardship in the land.

Chairman: That is something we still have to discuss. The site visit was informational only there was no deliberation.

Chairman: We are going to start our discussion, we are not closing the meeting in case there are questions. Before discussion starts, Jean Meloney asks for someone to go over the hardship again. Attorney Philpot, Jr. offers to read criteria 5 from the application.

Chris Williams asks about run off from Route 25. John Stephens states that water does run down from Route 25 and is handled by swales that were installed by the State. Mehmet Duymazler states the drainage doesn't all go towards the lake in Joe's area it actually goes into the field and into a culvert and towards other houses that are further south on Dew Point Lane.

Chairman: I may need Ken Ballance to speak to this but what we are talking about in terms of change of what were the existing conditions based on the drawings. We are only concerned with what is in the 75' setback based on the restriction in 5:3:1 and in that section it must not exceed 150 sf in footprint. So comparing the existing and proposed we had 175 sf of stepping stones in the lawn and was reduced to 90 sf. We are not too concerned with the stepping stones but want to confirm with Ken.

Ken Ballance: The Town has taken the stand that even though we are very restrictive from the waterfront to the 75' setback, we are certainly not going to deny safe and reasonable access from where your structure is to the waterfront. So we do not take anything less than 6' in width as part of any patio structure, a non-calculation.

Chairman: That's what we thought so we can ignore that item. Item number 2 refers to the irregular blue stone. There was in the 50' set back to the lake a total of 165sf and the new patio which includes the kitchen area is 225 sf. That increased by 50 sf both the old and new exceed the 150 sf we allow.

Ken Ballance: Plus the vertical for the kitchen.

Chairman: I haven't gotten to that yet but yes. Number 3 irregular blue stone patio from behind the 50' set back not sure how much of that is beyond the 75' if any, but it was 50 sf and it's now the irregular blue stone patio and bar behind the 50' setback is 879 sf. Again, there is no 75' line on the plan it could all be within the 50-75' setback. That increased significantly because what was a 50 sf section is now 879 sf. We are looking at an 879 sf increase of what was there and that far exceeds 150 sf that the town allows.

John Stephens: Out of the calculation which was not thought through when we submitted the variance application, if we had to carve that 6' wide space would technically be carved off of that. Just in consideration as it is being used as a walkway to their water dependent structures.

Jean Meloney: 6' x 20'?

John Stephens: My best guess would be 6' x 30-35'.

Jean Meloney: So we are talking 180 sf

Ken Ballance: The stepping stones are a different issue than the actual patio itself. All of the patio is used whether or not you are taking it as a path it's all usable space whereas the stepping stones and 6' stair case have a specific purpose. So there is a difference.

Chairman: That's how I would see it too.

Jean Meloney: So we are basically looking at it exceeds our ordinance by 700 sf.

Ken Ballance: At a minimum.

Chairman: I just wanted to go through the numbers to show the magnitude of this project based on what the zoning ordinance allows without a variance.

Jean Meloney: So we have approximately 750 +/- over what is allowed.

Chris Williams: Is the wall, bench and kitchen area represented in the calculation of sf?

John Stephens: We did represent the space with boulders that were already there.

The Board reviews some photos, Attorney Philpot, Jr. asks where the photos were obtained from the Chairman responds the photos were part of the shoreland permit application. Date referenced on the photos is later winter 2016.

Discussion:

Chairman: Criteria 1 and 2, certainly I think the spirit of the ordinance is hard to achieve since it's such a large square footage. Both Anthony Avrutine and Jean Meloney agree it's clearly excessive.

Attorney to the Board Laura Spector: Mr. Chairman, if I could just point out how the Supreme Court has defined these criteria so that you can focus your discussion. They've said that you should look at whether the variance would unduly and in a marked degree conflict with the ordinance such that it violates the ordinances basic zoning objectives which is what you are speaking of right now which is speaking of its magnitude.

Chairman: Yes that is correct. While we don't have all the other setbacks on the plan, I think there were certainly other places where some of this patio could have been put. It's not as if this is the only land on that parcel therefore, this would not be the only location for this work to be done.

Jean Meloney: I agree

John Stephen's provides a color copy of the plan to the Board. Board reviews the additional plan.

Chairman: Let's move on to criteria 3 which is substantial justice is done if we grant the variance.

Attorney Spector: And again on this criteria, you are weighing the gain to the public from denying the variance vs. the loss to the individual from that denial.

Chairman: I'm not having as much of an issue with this one.

Karen Ponton: Can you tell me that again. (Referring to the clarification from Attorney Spector)

Attorney Spector: So when you are looking at substantial justice, is the gain to the public from denying the

variance vs. the loss to the individual from that denial or the loss to the public and the gain to the individual from granting the variance. It's a balancing act between the two interests.

Karen Ponton: So we are looking at how granting this variance would be a substantial gain to the public.

Attorney Spector: If you grant the variance, what would be the loss to the public and the gain to the individual or if you deny the variance what is the gain to the public and the loss to the individual. Substantial justice is not as related to the property as for example, unnecessary hardship is.

Chairman: Any thoughts.

Karen Ponton: I'm still trying to figure out what the gain to the individual is vs. the loss to the public.

Chairman: Well we know the gain to the individual is they get what they want

Jean Meloney: And the loss to the public providing that this is has not gone in yet, in my mind would be disrupting the soils and what goes into the lake.

Chairman: And even if it is there, the after effects of it being there.

Attorney Spector: For example, if you think the improvements make the water quality better, that's a gain to the public.

Jean Meloney: And we don't know that.

Joseph Battaini: Regarding substantial justice, out of the handbook for directional guide in looking at criteria 1 and 2 which are taken together, in the case of ferrar vs. keene 2009 there are two methods in which to answer this question. Consider whether granting the variance would alter the essential character of the neighborhood, I suggest that it doesn't, and examine whether granting the variance would threaten health and safety or welfare. In this case that is how they decided. Where substantial justice is done, the guiding rule is that any loss to the individual which is not outweighed by a gain to the public is an injustice.

Chairman: Ok, anyone else? Let's move to number 4, the value of surrounding properties are not diminished.

Jean Meloney: that's not an issue

Other members agree no impact on properties values.

Chairman: On to number 5.

Attorney Spector: I would suggest breaking it down into two separate discussions.

Chairman: So on number 1 (chairman reads from the application)

Ken Ballance: Mr. Chairman, is this still open for a discussion.

Chairman: yes

Ken Ballance: That is what is getting to me. The ordinance was put in because it's a well-known fact that if it wasn't there, there would be no comprehensive shoreland act. We put our own ordinance in stricter than the State because we wanted more natural ground cover less surface no matter what it was decks, bricks, blocks etc. The comprehensive shoreline protection act was put in for that purpose. They knew they had to give some in order to keep everybody happy but in general there is a percentage of undisturbed areas of property on each shorefront. The reason for that is to remain in its vegetative state because obviously, mother nature does a far better job of removing silt from water than anything that we have come up with. That is why we put straw in front of a fence at the edge of a lake to catch silt, even that works. Again, I just want to make it clear our ordinance is more restrictive and we allowed nothing at one point but now we allow 150 sf and that's to keep that vegetative surface there and that was the purpose of the people when they voted for that ordinance.

Attorney Spector: But all variances violate your ordinance in some way or another that's why they are a variance.

Jean Meloney: Yes but it's by how much.

Chairman: Right I think it's the scope and I think we found it to be 750 sf in excess of what is allowed by the ordinance within the 75' set back. The second item in the hardship clause, the proposed use is a reasonable one, I think to that I would say to make use of the property for stuff is reasonable, but again, the scope is where we have an issue. And with 5b (chairman reads aloud from the application)

Attorney Spector: So this is the old unnecessary hardship clause the gray rock standard years and years ago which basically said if you can't do anything else with your property you can have a variance. When the legislation reworked this in 2010 they brought that standard back in but truth be told most applicants proceed under the first standard and I believe that is what this applicant is doing as well.

Chairman: I don't think this applies here.

Attorney Philpot, Jr.: This is in fact how we are proceeding, under the first criteria a) and b) if you will.

Attorney Spector: I would encourage the Board to have a conversation about the special conditions of the property whether or not you think there are special conditions which lead the ordinance to affect this property differently than surrounding properties. I think that is an important conversation for the Board to have.

Attorney Philpot, Jr.: I would like to comment also, on the comment made on natural vegetation and there was opportunity on the site visit to observe and through John's testimony as to how he did the under structure of his improvements of gravel and proper material for drainage to enhance the drainage into the earth rather than the lake.

Chairman: Let's discuss special conditions of this property that could apply to the variance.

Chris Williams: The slope of the lot.

Jean Meloney: Which all of the surrounding properties have.

Chairman: There is a slope but it's not steep.

Anthony Avrutine: No it's pretty gradual

Chairman: The final drop to the lake is a couple of feet and the area we are dealing with where the work was done I don't think was really a factor. It was a gentle slope.

Jean Meloney: Do you know what the slope is John?

John Stephens: My best guess would be approximately 8' over 75'.

Chairman: Any other circumstances? The shape? I don't see that as an issue.

Jean Meloney: I don't see that has an issue either, the surrounding lots have different shapes.

Chairman: There is certainly other room to have worked outside of the property lines and setbacks.

Chris Williams: I think the issue really lies with does it need to be this big.

Jean Meloney: I agree, it comes back to 1 and 2 and the violation of the ordinance.

Karen Ponton: I just have a hard time thinking that had this come to us before it was built and we were asked to look at a variance for this much additional square footage, I would have a hard time approving that. Chairman and Jean Meloney agree with Karen's statement.

John Stephens: If you don't mind I would just like to again reiterate where I was when I did this seeing as I am the one who put everyone in this predicament. I know ignorance is not something that matters here but the rule and the stricter rule was brought to my attention two years after this project was already done. There was obviously no understanding of the Town rules, I thought all town's adopted the State regulations and I educated myself on the state regulations and went ahead and submitted the applications for the state permitting. I think we have all made mistakes and learned from them and I'm not saying that is a reason to grant a variance or not I just wanted to make that statement. Secondly, this was not required to be a permeable patio by state standards based on state standards. We added more vegetation and pulled the patio back, so I would like to offer a solution so that we don't have to go in and disturb the earth. By simply removing the polymeric sand which is used through the joints of the patio and is not permeable and replace that with pea stone to allow all storm water on the patio to allow the storm water to be absorbed through the patio. The base underneath the patio is already crushed stone and sand which is a permeable material. So if we do this it would then make this patio space essentially all permeable which would create that same scenario as the lawn space next to it. I just wanted to offer that as a solution that would improve the drainage.

Jean Meloney: If this were to come before us brand new I would restrict the size they would be asking for, reducing it more in line with the ordinance.

Sheila Mohan: If you are considering this as it has not happened and the person who bought the property bought it as it was of their own free will. The ordinance allows certain things by special exception otherwise you need a variance so if this proposed came before you, I don't believe this number of square footage would have been allowed. The ordinance is very specific, you can have chairs and rails that's all that is allowed which means the kitchen is a separate issue and would need its own variance because that's not allowed for in the ordinance. These ordinances are available on line for people to review and just my personal experience in 20 years I have done this, each time somebody comes before you before they do it, it gives you the chance to easily say yes or no. The fact that this is already here makes it more difficult. Somebody on a Board told me one time, you are not here for the easy decisions you're here sometimes to say no.

Chairman closes the public hearing at 8:02 p.m.

Board reviews the criteria. Board is not voting at this time continues to discuss criteria.

Chairman reviews criteria 1 and 2 with the Board. Board previously decided they could not say yes to those, Chairman asks if that has changed. Board members have not changed their position on those two criteria. Criteria 3, Chairman asks what members think. Jean Meloney states we don't know the water quality if it will be better than it was previously. Because it was not tested before the changes, having a test done now is meaningless. Chairman, we don't know if the water quality there now is better than it was before. DES gave them a permit to do the work but that can't tell us if it's better or worse, so we can't say. Chairman, so to answer this we either take our layman's position and answer we don't know or we have to get a third party and again that won't give us definitive answers because the water quality was not tested before the work was done. Criteria 4, I think we can agree there is no issue there. Criteria 5, using the a) clause, (chairman reads aloud again) Jean Meloney, speaking to "reasonable" I think it goes back to criteria 2 which is beyond reasonable because that patio is far larger than we allow. Chairman, I don't think there are enough special conditions on the property to warrant overriding the ordinance by the degree they are requesting.

Board agrees they are ready to draft a motion. Board decides to meet with their Attorney and reconvene when the motion is drafted.

Motion:

I, Anthony Avrutine, motion to deny the variance because granting the Variance would be contrary to the public interest and the spirit of the ordinance because the requested amount of impervious surface is five (5) to six (6) times in excess of the permitted area and therefore, unduly and in a marked degree, violates the basic zoning objective.

Also, the Board finds 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.

Finally, the Board notes that the requested improvements could have been constructed in compliance with the ordinance on other portions of the property.

Seconded by Jean Meloney.

The following members voted for denying the variance: Bernie Volz, Jean Meloney, Anthony Avrutine and Karen Ponton. Chris Williams abstained from the vote. The motion passes and the variance is denied. The Chairman announces the applicant has 30 days to file a motion for rehearing.

IV. OTHER

Chairman announces Anthony Avrutine will be the new ZBA Member.

Clerk provides the Board with the final copy of the by-laws per changes made at their last meeting. Chairman initialed a copy that is to be kept in the Town Office Planning/Zoning Department.

ADJOURNMENT

Chairman adjourned that meeting at 8:44 p.m. seconded by Karen Ponton all were in favor.

Respectfully submitted by Aimee Manfredi-Sanschagrin.