

Approved – Zoning Board of Appeals Minutes

Monday, July 29, 2002
7:00 P .M. at the Town Office

MEMBERS PRESENT: Michael Higgins, Chairman; Aurel Gagne; Robert Fey, Peter Leavitt

STAFF PRESENT: Jack Cooper, Code Enforcement Officer; Amanda L. Simpson, Recording Clerk

M. Higgins called the meeting to order at approximately 7:00 pm.

M. Higgins called for a motion to approve the minutes of June 24, 2002. A. Gagne moved to approve the minutes of June 24, 2002 as written with a second by P. Leavitt. Motion carried unanimously.

Hearings:

1) Map 24, Lot 35 -110 Swans Road –LRR1

Ryan Greene

Request for Setback Reduction to 12 feet on the side property line.

M. Higgins requested the appellant to identify himself and give a brief explanation of his request.

R. Greene explained that he is constructing a garage and covered storage area. The garage's location was determined by the location of the septic system and the driveway location. He is seeking to construct an attached 8 foot wide covered storage area to the left of the garage. In order to achieve that width the overhang will encroach into the required side yard a total of eight feet, leaving a twelve-foot setback.

J. Cooper, CO, indicated that the applicant had a current building permit for the garage. M. Higgins indicated that the issue then was strictly the overhang. R. Greene confirmed that.

Public input in favor: Paul White indicated that he worked on the adjacent property and knew that Mr. Greene was using the overhang to store equipment for his home occupation. The adjacent lot is owned by Tom & Lisa Jones and is vacant. They have no objection to the application.

Public input in opposition: none

M. Higgins closed the public hearing and asked if any board members had any questions or Comments. P. Leavitt asked if the home occupation, metal fabrication, was approved in that district.

J. Cooper confirmed that it is permitted and the permit is in place. P. Leavitt inquired as to whether or not the current permit would be amended. P. White indicated that the force main and pump system is in the way So that the garage could not be moved toward the interior of the lot. P. Leavitt indicated that the Concern was the views and the use of the lakes and indicated that the adjacent vacant lot leaves flexibility for future development.

M. Higgins indicated that the setbacks can be reduced to 10' without proving hardship. R. Fey moved that the setback reduction to 12' be approved with a second by A. Gagne. No discussion. Motion passed unanimously.

2) Map 24, Lot 74 -41 Swans Road -RR/Shoreland, Leonard & Terri Roy

1. Administrative Appeal: to reverse Notice of Violation for erecting a deck less than the required setback from the sideline and erecting a deck without a building permit.

M. Higgins opened the hearing at 7:12 p.m. and asked the appellant to describe the request. Mike Pierce introduced himself and indicated that he was an attorney representing the appellants, who were present. He indicated that the Board had received a comprehensive packet on the appeal and he would be referring to items within the packet. He had reviewed the file with J. Cooper, CO and indicated that Jack had been excellent to work with and they were in agreement with all of information submitted. The only discrepancy found in the record was that the town's assessing card for the property had a picture of an adjacent camp that did not have the stairs and deck that the subject lot does. He acknowledged that this fact was most likely the reason for J. Cooper's Notice of Violation regarding the removal of the entire deck.

M. Pierce indicated that the Roys purchased the property in 1996 and the packet contains the listing as Exhibit B. He passed out pictures to the Board of the camp in question. He indicated that the door to the camp is 4 to 5 feet above the ground and has always been served with the stairs and deck as Shown in the listing picture. There was no permit found for the stairs or deck and believes that they were constructed at the time the camp

was constructed in 1965, prior to zoning. He also indicated that there was no permit pulled for the expansion of the deck as currently constructed.

M. Pierce went on to indicate that there is a ROW adjacent to the lot and it is overgrown and unused. The deck as originally constructed and as currently altered does not interfere with the use of the ROW. The reason for the deck replacement was that the original deck was rotting and needed to be rehabbed. It was expanded in width by five feet without a permit. He questioned whether or not a permit was required under the Shoreland Protection Act, Section 12B2, for rehabilitation of a non-conforming use. J. Cooper, by the Notice of Violation, made the owners aware that a permit was required. He indicated that if no relief was approved for the deck as currently constructed the Roys are willing to reduce it to its original size. Mr. Pierce asked the Chairman if he should continue or if the Board wished to address each request separately. M. Higgins, Chairman, indicated that the overview was helpful and that he should continue. M. Pierce stated that the next request was for a setback reduction for the current deck, but upon further examination, discovered that the deck is already beyond the ten-foot limitation and therefore, withdrew the second request.

The third request is for a variance to the side yard requirement to allow the existing deck to remain. Under VI, B. c. of the Land Use Ordinance, the variance standard has been relaxed and is based on "demonstrated need" rather than "reasonable return." He reviewed the variance criteria under this section:

- 1) Unique circumstances: There are few properties in the neighborhood that have no deck. The subdivision plan submitted shows that few lots have a ROW abutting it and the abutters, the Nickersons, have no problem with the deck. The properties across the street are of a different size. The door to the camp is 4 to 5 feet above ground, which is somewhat unique. The deck has been in place since 1965 and the Roys are interested in retaining it.
- 2) Alter character of the community: Most cottages are similar to this one. The deck encroaches into an area full of boulders and overgrown bushes. It is hard to imagine the character would change. There are large (18-24") trees, which grow fast; this indicates that the deck has been there for a long time.
- 3) Hardship not a result of action by the applicant or previous owner: The Roys purchased the property in 1996. In 1965, the date of Construction, there was no zoning in place; therefore there was no violation at the time.
- 4) Would not impair the use of abutting property: The applicant understands that the Nickersons (abutters) support the request.
- 5) Demonstrated Need: The door is the access for the camp and the deck and stairs provide the ability to get out of the camp. Regarding the Administrative Appeal, the appellant should be entitled to maintain the deck and stairs in their original size and location as a non-conforming use. The second request, setback reduction, is withdrawn, and the third request, variance to allow the current deck and stairs configuration is warranted based on the variance criteria as reviewed. M. Pierce indicated that the Roys are present to answer any questions.

M Higgins asked if Board members had any questions for M. Pierce or the Roys. There was none.

Public input in favor: none

Public input in opposition: Fred Williams, attorney for Theresa Murphy Estate 00t 14) identified himself. He indicated that the use of the ROW was central to the requests and the Raymond Shores Association owns the ROW. P. White added that the ROW was not in everyone's deed.

M. Higgins questioned if other lot owners have rights to the ROW. R. Fey stated that the estate of Lot 14 had rights. The Board, Staff and attorneys reviewed the location of the lots on the subdivision plan and tax map and discovered that the ROW is designated as Lot 16A on the subdivision plan and is off of Hancock Road.

Further testimony was given regarding that the Roys constructed last year and should have known that the deck already encroached in the setback area. M. Pierce noted that the ROW has not been used. F. Williams indicated that his client has used the ROW to access the lake for swimming. M. Schibles (?sp) indicated that the ROW has been violated by the Roys. F. Williams asks that the entire deck be required to be removed within 30 days and that the Roys be fined for any time in excess of the 30 days. S. Sanborn (Lot 12) indicated that the ROW is written in her deed but they do not use it as they have family on the lakeside. It was used in the '70S by the Ruells and Jordans and they pay taxes for the use of the ROW. They are currently trying to sell their home and would have to walk over the stairs and deck to use the ROW. The distance between the deck and the Nickersons home (immediate abutter on the ROW side) is about 30'. Her husband, J. Sanborn, indicated it is probably less than 30'. He believes the Roy's camp is 4' from the ROW line. They need to have clear title to the ROW and cannot afford to wait the time for a 30-day removal period plus the appeal period. The deck expansion

has already been in place at least 60 days.

M. Higgins asked if the Board had any questions for J. Cooper, CO or people in the audience. R. Fey inquired of the Roys regarding the photo from the listing and the width of the deck at 5'; was it encroaching at the time? M. Pierce answered that the title search did not indicate an encroachment and that a professional survey (Class D) was not performed. A. Gagne asked if the Roys purchased in 1996? There could be recourse through nondisclosure of the encroachment from former owners. M. Pierce responded that a new survey could Show a lot of encroachments and big problem. F. Williams indicated that the title search should have shown encroachments. He believes that the Board cannot consider the variance without the ROW issue being resolved. P. Leavitt indicated that the Board's authority does not extend to the legality of ROWs. He asked M. Higgins if it was appropriate to move ahead with the Administrative Appeal. M. Higgins replied, "Yes." P. Leavitt stated that if the ROW has been an issue all this time, why has it not been raised before now. The Sanborns responded by indicating that they do not use it So it was not an issue until they were ready to sell their house. They have been paying taxes since 1973 and are entitled to the use. F. Williams indicated that they a perpetual right to the ROW

J. Cooper, CO stated that he had looked at the property. M. Higgins viewed the property from the road. J. Cooper also stated that the pins are in and the deck is obviously fairly new. He agrees that the approximate distance between the homes is 30 feet.

The Roys indicated that they replaced the old deck. The ROW is filled with big trees, boulders, poison ivy and very sloped.

R. Fey stated that the ROW is there and he could not support the variance. M. Pierce stated that the ROW is very steep, that the variance could be issued within the ROW. He reminded the Board that they do not decide title issues. The Roys are entitled to keep the deck where it was. The mortgage plan did not Show the encroachment; the ROW is referenced in the deed but not physically located on the plan. He cited "Twigg v. Kennebuckport" where it was decided that violations of zoning do not preclude the granting of variances. M. Schibels stated that the ROW was not overgrown with poison ivy, that the appellant is exaggerating the condition. M. Higgins reminded the Board that the ROW issue is not before the Board. F. Williams stated that the ROW was on the town tax map, doesn't the town have a responsibility to protect it. J. Cooper, CO responded no.

P. Leavitt asked J. Cooper to expound on the Admin. Appeal. J. Cooper, CO indicated that a permit was required in the SLPD if any alterations are structural such as joists or posts. Any expansion also requires a permit. M. Higgins stated that the deck reconstruction was both structural and an expansion. P. Leavitt reminded the Roys that issues like this can be resolved by reviewing construction plans with the Code Officer. R. Fey indicated that the Board should vote on the Appeal and order that the deck expansion be removed. J. Cooper said that the Appeal could be modified. M. Higgins responded that the Board could act on the Appeal then address the variance.

P. Leavitt indicated that he was troubled by the Appeal, as there is new evidence that could result in part of the decision being upheld and part being overturned. Do we need to determine the time frame for penalties and removal? R. Fey responded that the Appeal should be addressed first. If the variance is denied the Roys will be left with the right to maintain the deck and stairs as originally constructed.

The Board discussed the structure of a motion at length.

R. Fey moved to uphold that portion of the Administrative Decision regarding the need for a building permit. Further, that portion of the Administrative Decision regarding the removal of the deck is to be modified to include only the configuration of the deck and stairs that was existed prior to the replacement of the deck. Specifically this includes the front stairs (those facing away from the house and the deck in the width of five feet with a length along the house of eight feet. The removal of the remaining three feet of deck and the rear stairs is to occur within 30 days with any penalty to be determined by the Code Officer. Motion seconded by P. Leavitt. Motion carried 3-1.

2. Setback Reduction was withdrawn by the appellant.

3. Variance to the side setback to include the addition to the deck and the rear stairs. It was noted by J. Cooper, CO that the appellant had applied the wrong variance criteria. Section VI B.1. c. applies specifically to new single-family dwellings that serve as primary residences. In this case Section VI B.1.b. applies. R. Fey moved to deny the variance with a second by A. Gagne. P. Zoning Board of Appeals. P. Leavitt stated that the hardship can not be met as there is no compelling need to extend the deck. It has served the previous owners for many years. M. Pierce asked for a vote on each of the variance criteria, citing "Chase v. York" R. Fey moved to amend the motion to indicate that the variance does not meet the first criteria of hardship. P. Leavitt added that if the first

criterion is not met, the remainder is a moot point, as all criteria have to be met.

M. Higgins put the motion to a vote. Motion passed unanimously.

M. Higgins asked if there was any other business.

The Board discussed a site walk on August 18, 2002, with no formal business to be conducted. The next formal meeting of the Board is August 26, 2002 at the Town Hall. R. Fey indicated that he would not be able to attend next month's meeting.

R Fey moved to adjourn the meeting with a second by P. Leavitt. Motion passed unanimously.

Meeting adjourned at 8:20 p.m-

Respectfully submitted,
Amanda L. Simpson
Recording Clerk