

**MINUTES
ZONING BOARD OF ADJUSTMENT
TOWN OF PETERBOROUGH**

Monday, April 6, 2020 – 6:30 p.m.
Peterborough, New Hampshire

Present: Sharon Monahan, Loretta Laurenitis, Peter LaRoche, Peggy Leedberg, Don Selby and Kevin Brace

Staff Present: Peter Throop and Laura Norton, Office of Community Development and Tim Herlihy, Code Officer and ZBA Liaison

Chair Monahan called the meeting to order at 6:35 p.m. and read a checklist to ensure meetings are compliant with the right-to-Know Law during the State of Emergency declared by Governor Sununu (Emergency Order #12, pursuant to Executive Order 2020-04) “which authorizes this public body to meet electronically.” It was noted the “Zoom” platform was being used for the meeting which would allow all individuals to communicate contemporaneously throughout the meeting by using the assigned meeting identification.

Chair Monahan noted Office of Community Development Director Peter Throop was the Facilitator and Moderator for the evening. Mr. Throop briefly reviewed instructions to both the Members and the audience regarding recognition for questions, comments and concerns during the meeting.

Chair Monahan introduced Administrative Assistant Laura Norton who would be taking meeting Minutes and Code Officer and ZBA Liaison Tim Herlihy. She also noted Conservation Commission Member and Representative Matt Lundsted was present to answer any questions about the Variance application.

Chair Monahan then requested a roll call asking each Member to introduce themselves and state whether or not they were in a room individually or with other people. Each Member then introduced themselves, each affirming they were the only individual in the room they were in.

Minutes: A motion was made/seconded (Leedberg/Selby) to approve the Minutes of September 4, 2019 with all in favor.

Chair Monahan noted the next order of Business was to fill the vacancy created by Mr. Carrara. "I would like to appoint Kevin Brace to fill that spot tonight" she said.

Noting two cases for the evening Chair Monahan then read the first application request:

Case No. 1259 Davis Construction Co.: A request for an Equitable Waiver of Dimensional Requirements for building setbacks as regulated by the zoning ordinance in Article II, Section 245-8.D.12. The property is located at 70 Monadnock Lane, Parcel No. R011-057-027, in the Rural District.

Mr. Herlihy noted a correction to the Notice stating the Section reference was incorrect and should be "Section 245-8 D.2"

Brad Davis introduced himself and began with a brief history of the lot he was developing on Monadnock Lane. He noted that back in 2019 the town had been provided a site plan showing the purposed house and septic plan and a Building Permit was issued. He went on to say the construction project had several inspections without any notice of a front setback encroachment. "Only after an *as built* drawing was requested in December 2019 and completed in January 2019 was it discovered that the structure (then substantially completed with conveyances fulfilled) was indeed out of compliance with the setback requirements.

Mr. Davis went on to emphasize the violation was by no means an ignorance of the regulations or any bad faith, but in fact a *good faith* error in calculations and measurements. He told the Members the encroachment was 4 or 5 feet adding it did not constitute a public or private nuisance, affect any easements or property rights and did not affect any surrounding properties. “That is why we are requesting an Equitable Waiver from the front setback encroachment” he said.

Chair Monahan noted there were four criteria for the Equitable Waiver request. It was noted that Mr. Davis could give a brief summary of the written criteria he had submitted with his application (which had been forwarded to the Members). “Just choose one sentence to address each one” suggested Chair Monahan. Mr. Davis replied “alright.”

Findings:

The violation was not discovered until after the structure in violation was substantially complete or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchase for value. *Mr. Davis noted this was in fact exactly the case.*

The violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith but was instead either a good faith error in measurement or calculation by the owner or owner’s agent or by a municipal official in the process of issuing a permit of which he has authority. *Mr. Davis contended “this was a good faith error on my part.”*

The physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area and does not interfere or adversely affect any present or possible future uses of any such property. *Mr. Davis noted that he did not have exact measurement of the distance to the front setback with updated plans but the entirety of the remainder of the structure was well within the other setbacks and consistent with the neighborhood.*

The degree of construction and the investment made in ignorance of the facts constituting the violation has a cost of correction that would far outweigh any public benefit to be gained and it would be inequitable to require the violation be corrected. *Mr. Davis gave a brief description of the cost of correcting this mistake especially the cost of cutting the pre-engineered trusses of the roof on the front portion of the garage.*

When Chair Monahan asked the Members if they had any questions Ms. Laurenitis asked about the dimensions of the setback to 50 feet in an area where the front setback is normally 100 feet. Mr. Davis noted an agreement prior to purchase that would allow the front setback to be reduced to 50 feet in agreement with the neighborhood conveyance. "There are several other homes in the development that have this reduction due to site conditions" he said. Mr. Davis then reiterated the encroachment was 4 or 5 feet with Mr. Herlihy in agreement.

Ms. Leedberg asked about the wetlands in the back of the property with Mr. Davis noting he would address that issue at the Variance hearing. Chair Monahan agreed and noted she would like to maintain the two separate applications as *separate*. Ms. Leedberg replied, "well I am not sure how you were not aware of the wetlands at the time, I don't know how you can make that mistake like that but I guess it happens." Mr. Davis noted the constraints on the lot "made it clear that the only developable are was the dead center of the lot." He went on to reiterate the calculations were wrong, thinking the center of the lot was 59 feet from the edge of the pavement. As Mr. David went on to tell the Members the wetlands were not as clearly marked as they could have been Chair Monahan reiterated the wetland issue would be taken up at the Variance hearing. Chair Monahan also asked if the 5-foot encroachment was limited to the garage with Mr. Davis replying "yes." Mr. LaRoche asked if the front property line was set and bound with Mr. Davis replying, "yes granite markers are in place." Mr. Davis also noted that no construction had been started without a greenlight from the Town. Mr. Herlihy cited the location of the original septic plan and building construction adding "it is not uncommon for builders to adjust the lot after the go-ahead and this plan had been redone a few times to

make the house fit the lot. There was a gap in the oversight and that is why we are here today.”

Ms. Laurenitis asked about the conveyance on the development. Mr. Davis noted the construction was to be single level, be 2000 square feet in size and have a two-car garage (attached or not attached). “Those are the requirements” he said.

With no additional questions from the Board Chair Monahan opened the hearing to the public. It was noted Lloyd and Karen Durling and Denise Whitney were in attendance. Neither has any question for the applicant.

Before closing the public hearing, Chair Monahan did read a correspondence from Lloyd and Karen Durling, abutters. “This letter is for the Variance but it does address one of the criteria we are concerned with here” she said. When done Chair Monahan closed the public hearing and read the deliberative statement.

Deliberation:

Chair Monahan noted the Members would review and discuss the four criteria for the request for an Equitable Waiver of Dimensional Requirements. She noted she would read each criterion and ask for individual comments and findings of fact for their decision from each Member.

(The criteria below are abridged)

Criteria 1: The violation was only discovered after substantial completeness had been obtained.

Ms. Leedberg: “I do believe this was an error in judgement that was not found prior to the beginning of construction.”

Mr. LaRoche: “I agree”

Ms. Laurenitis: “I agree”

Mr. Brace: “I agree, this was an honest mistake.”

Chair Monahan: “I also agree this violation was recognized after the fact and the structure was substantially completed.”

Criteria 2: The violation was not a result of bad faith but instead of good faith error in measurement or calculation on either or both the builder and the Code Officer.

Ms. Leedberg: “Again, I believe this was an error.”

Mr. LaRoche: “I agree, these things can occur when the setbacks are so tight.”

Ms. Laurenitis: “I agree as well and I think we understand this was a good faith error with no bad intent from the builder or the Code Officer. It was a shared mistake.”

Mr. Brace: I agree too, both the builder and the Code Officer did the best they could but unfortunately these things happen

Chair Monahan: “I agree. I think there was confusion over the original plan and the setbacks were not clarified before construction began. I also recognize the encroachment is for the garage only.”

Criteria 3: The violation does not constitute a public or private nuisance or diminish the value of the neighboring properties.

Ms. Leedberg: “I believe this is true but would like to see a note added that states any future changes to the property must take this into consideration.”

Mr. LaRoche: “I agree, most of the houses are 50 to 100 feet back depending on their site conditions, I do not believe this constitutes any nuisance.”

Ms. Laurenitis: “I agree, I initially thought the encroachment was about 10 feet but it is only 4 or 5 feet. Given that I don’t think the encroachment is that significant. The neighbors that are most affected are here and had no objections and do not believe there is a negative impact on them or their property.”

Mr. Brace: “I agree with Loretta”

Chair Monahan: “I agree with all of you, especially the confirmation from the closest abutters that there is no negative impacts.”

Criteria 4: Because of the investment made and the cost of mitigating this violation far outweighs any public benefit to be gained it would be inequitable to require the violation be corrected.

Ms. Leedberg: I agree, the cost of correcting the encroachment would be outrageous

Mr. LaRoche: I concur with Peggy, that is a cost that is not beneficial to anyone

Ms. Laurenitis: I agree and I think there is no real public benefits or gain t outweigh the cost of this mistake

Mr. Brace: I concur, that would be five *really* expensive feet to fix

Chair Monahan: I also agree, there is no public benefit that can outweigh the cost of a correction.

A Motion was made/seconded (Leedberg/Laurenitis) to approve the request for an Equitable Waiver of Dimensional Requirements for building setbacks as regulated by the zoning ordinance in Article II, Section 245-8.D.12. The property is located at 70 Monadnock Lane, Parcel No. R011-057-027, in the Rural District.

Due to the nature of the electronic meeting Chair Monahan requested a roll call for their vote:

Ms. Leedberg: yes; Mr. LaRoche: yes; Ms. Laurenitis: yes; Mr. Brace: yes and Chair Monahan: yes, with all in favor.

After this vote the Members realized a Condition of Approval (that there be no further encroachment into the front setback in the future) was not included in the Motion. The Members established that condition and with a roll call showed all in favor.

NOTICE OF DECISION

Case Number 1259

April 6, 2020

You are hereby notified that the request of Davis Construction Co., for an **Equitable Waiver of Dimensional Requirements** for building setbacks as regulated by the zoning ordinance in Article II, Section 245-8.D.2., is hereby **GRANTED**.

The property is located at 70 Monadnock Lane, Parcel No. R011-057-027, in the Rural District.

In granting this equitable waiver, the Board imposes the following condition:

- There shall be no further encroachment into the front setback.

Signed,

Sharon Monahan, Chair

Chair Monahan read the second application request:

Case No. 1260 Davis Construction Co.: A request for a Variance for construction within wetland buffer setbacks as regulated by zoning ordinance in Article II, Section 245-15.H.1. The property is located at 70 Monadnock Lane, Parcel No. R011-057-027, in the Rural District.

Once again Brad Davis introduced himself and gave the Members additional history of the lot involved in this request. "It is a bit more involved" he said adding the wetland areas in question were recorded on the original site plan provided by Meridian Land Services, Inc. and at the time of purchase labeled "Non- Jurisdictional Drainage Ditches" on the State approved site plan and septic design. "They remain Non-Jurisdictional Drainage Ditches on the most recent State approved septic plan" he said.

Mr. Davis went on to note he had been warned about the site conditions of this particular lot (being the last developable lot it had become a “dump lot” where tree stumps and large boulders were buried, a “Lemon Lot” so to speak). He noted he had done some exploratory test pits and did find 2 to 3 piles of loam, buried stumps and large boulders on site. “It was a problematic site that in hind-sight should have been surveyed but back then it did not present itself as an issue” he said.

Mr. Davis went on to explain that because of the wetland buffer encroachment in the rear he was requested to produce and as built in January or 2020. That graphic was cited as a visual presented by Mr. Herlihy.

Chair Monahan asked Mr. Davis to review the Variance Criteria which he did, one criterion at a time.

When finished Chair Monahan asked Conservation Commission Representative Matt Lundsted to speak about their Site Visit April 1, 2020 and the encroachment into the Wetland Protection Overlay Zone.

Mr. Lundsted summarized a site visit that occurred on April 1st where members of the Conservation Commission as well as Mr. Davis, and a Wetland Scientist for Meridian Land Services were present. “We believe we’ve come up with a remedy” he said. Mr. Lundsted then noted the plan being shown the Members that evening had been enhanced and was not the original plan.

Mr. Lundsted confirmed that a portion of the building did encroach the Wetland Protection Overlay Zone (WPOZ) and the no wetland flagging or siltation fencing had been placed along the WPOZ boundary prior to construction. He confirmed the lot had been used as a dumping ground for other construction projects in the development and that Code Officer Tim Herlihy had taken responsibility for signing off on the plan.

Mr. Lundsted told the Members, “the encroachment is within the 50-foot wetland buffer, but we prefer to say it is in the first 50-feet of the wetlands as it is *all* a wetland zone.” He noted the difficult topography, drainage issues and the fact it had been used as a dumping lot. He noted the

Conservation Commission Members agreed that a “boulder” wall be constructed at the back southwestern portion of the house and the existing WPOZ beyond that wall be planted with shrubs and seeded with conservation mix. “This will be visually pleasing and decrease the chances of any future landowners removing them (mow-down) to expand their lawn” he said. He concluded by suggesting a covenant citing the WPOZ be included in the deed and that the boulder will be documented (noting) the area beyond the wall is to remain vegetated with native, wetland buffer-friendly plants and any other natural revegetation.

Mr. Lundsted concluded by noting the suggested plan was an improvement over what was originally proposed and adequate mitigation for what was lost.

As Chair Monahan asked the Members for their questions Ms. Laurenitis interjected her thanks to the Conservation Commission and their input. “It is very helpful to have their information” she said adding “and Mr. Davis did a good job on the Variance application.” Ms. Leedberg inquired as to the size of the boulders (very big and not moved easily) and both Mr. LaRoche and Mr. Brace, while they had no questions noted the applicant was very thorough in his presentation.

Chair Monahan then opened the hearing to the public and specifically asked the three attendees (Lloyd and Karen Durling-Terry and Denise Whitney) if they had anything to say.

Mrs. Durling-Terry told the Members they had no objection to the Variance and that with this being the last lot in the development they were excited to see completion. Mr. Durling-Terry commented on the aforementioned size of the boulders on the lot noting “no one is going to be moving them.”

Ms. Whitney noted she also had no objection. Mr. Selby asked about the height of the lot where the building is closest to the wetland.

Chair Monahan then closed the public hearing and read the deliberative statement.

Deliberation:

Chair Monahan reiterated the instructions for reading each of the Criteria and requesting each individual Member for comments and findings of fact in their decision. She noted the criteria had been discussed in full and that opinions should be kept to a minimum.

Criteria 1: *Granting the Variance would not be contrary to the public interest because....*

The home is built in accordance with the other home standards established in the Rural Zone, the Petersfield Development and the Petersfield Development Covenants; the wetland areas were initially recorded as “non-jurisdictional drainage ditches” and labeled as such on the state approved site plan/septic design; the Variance of the setbacks requirements does not affect any public right and the dwelling setback does not interfere with any public right to any surrounding property; the Variance will not diminish the value of the properties or interfere with or adversely affect any present permissible future uses for the subject property.

Ms. Leedberg: “I agree, it would be contrary not to grant it.”

Mr. LaRoche: “I agree”

Ms. Laurenitis: “I agree as well”

Mr. Brace: “I agree”

Chair Monahan: Reiterating the plan was done at a time when delineation of the wetlands was not required in the first place, Chair Monahan agreed.

Criteria 2: *The spirit of the ordinance is observed because....*

The home is a permitted structure in the zone and consistent with the other uses and structures, keeping aesthetics, size and character (and) the applicant is offering mitigation to the buffer encroachment elsewhere on the site as approved by the Peterborough Conservation Commission.

Ms. Leedberg: “I agree”

Mr. LaRoche: As Mr. LaRoche commented on the good work of the Conservation Commission he noted “I agree.”

Ms. Laurenitis: “I agree as well and would like to say the mitigation to the buffer is an enhancement to the property.”

Mr. Brace: “I agree as well”

Char Monahan: “I agree”

Criteria 3: *Substantial justice is done because....*

Substantial justice is done because the public will not realize any appreciable gain from the denial of the request for a Variance while the applicant will realize significant loss for a denial.

Ms. Leedberg: “I agree”

Mr. LaRoche: “I agree, this has taken a bad lot and made it a good situation.”

Ms. Laurenitis: “I do agree, the applicant would have a substantial loss here.”

Mr. Brace: “I agree”

Chair Monahan: “I agree as well”

Criteria 4: *The values of surrounding properties are not diminished because....*

Values of surrounding properties are not diminished because the home is consistent in style and size of the neighborhood and is in compliance with the Petersfield Development Covenant.

Ms. Leedberg: “I agree, the lot now enhances not diminishes the neighborhood and the wetland mitigation is an attractive protection.”

Mr. LaRoche: “I agree”

Ms. Laurenitis: “I agree and the mitigation enhances the value of property.”

Mr. Brace: "I agree and the neighbors have no issues, this is a good plan."

Chair Monahan: "We agree all around."

Criteria 5: *Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because of the following special conditions....*

Ms. Leedberg: "I am amazed you found the space to build given this layout" I think the special conditions enhance this project and I agree."

Mr. LaRoche: "It is an odd shaped lot with a small area for construction, I agree."

Ms. Laurenitis: "I agree" adding constraints such as elevations, topography and wetland made the site a difficult one.

Mr. Brace: "I agree, there have been some good points made here."

Chair Monahan: "I also agree, it is a unique lot, a lemon lot constrained (by the geography but also the restrictive covenants) that may have remained undevelopable without the special conditions. It was a substantial task getting this into place."

Finally Chair Monahan recommended they read aloud the conditions cited by the Conservation Commission.

A motion was made/seconded (LaRoche/Laurenitis) to approve the request for a Variance for construction within wetland buffer setbacks as regulated by zoning ordinance in Article II, Section 245-15.H.1. The property is located at 70 Monadnock Lane, Parcel No. R011-057-027, in the Rural District with the following Conditions:

- A deed covenant be placed depicting the Wetland Protection Overlay Zone enhancement area.

- The requirement of inspections by the Peterborough Conservation Commission of the enhancement area before the Certificate of Occupancy (CO) is signed.

- The requirement that vegetative plantings (all native, wetland buffer-friendly plants as well as other plants that vegetate naturally) be inspected for a period of two years following the CO to ensure that they remain in good health with and any dead plants encountered to be replaced.

This approval is dedicated to the Plan entitled “Buffer Enhancement Plan” dated April 4, 2020, for 70 Monadnock Lane, Peterborough, New Hampshire 03458 by Meridian Land Services, Inc., Parcel No. R011-057-027. Original Plan prepared January 29, 2020 for Alan J. Columbus, c/o David Construction Co.

Due to the nature of the electronic meeting Chair Monahan requested a roll call for their vote:

Ms. Leedberg: yes; Mr. LaRoche: yes; Ms. Laurenitis: yes; Mr. Brace: yes and Chair Monahan: yes, with all in favor.

Ms. Laurenitis concluded the hearing by again thanking the Conservation Commission for the integral contributions to the application.

The meeting adjourned at 8:20 p.m.

Respectfully submitted,

Laura Norton

Administrative Assistant

NOTICE OF DECISION

Case Number 1260

April 6, 2020

You are hereby notified that the request of Davis Construction Co., for a **Variance** for construction within wetland buffer setbacks as regulated by zoning ordinance in Article II, Section 245-15.H.1, is hereby **GRANTED**.

The property is located at 70 Monadnock Lane, Parcel No. R011-057-027, in the Rural District.

In granting this **Variance**, the Board imposes the following conditions by request of the Peterborough Conservation Commission's Report and approved Wetland Buffer Enhancement Plan for Lot R11-57-27, dated April 1, 2020

1. Erosion controls in the form of Filtrexx Siltsoxx 8" (or equal) be staked in place at the edge of the disturbed area just above the stone toe of slope before planting work takes place and be maintained in good condition until the proposed "Buffer Enhancement Area" is planted and stabilized.
2. Construct a boulder wall in an arch 40' from the center point of the rear foundation wall with a monument mounted to the boulders.
3. The monument should state that the area beyond the wall is to remain vegetated. (with the proposed native plantings, and whatever other plants revegetate naturally.)
4. Between the boulder wall and the above noted erosion controls create an enhanced buffer area to help mitigate the construction/disturbance within the WPOZ, in accordance with the approved Wetland Buffer Enhancement Plan.
5. Mitigation: The WPOZ as depicted on the Meridian plan, be planted with shrubs and seeded with a conservation mix. Shrubs to include red osier dogwood, meadowsweet, winterberry holly and sheep laurel. The intent of these plantings is to address lost function by establishing aesthetically pleasing natural vegetation that enhances wildlife habitat, food source, cover and mature screening for the WPOZ.
6. A deed covenant be placed depicting the WPOZ enhancement area.
7. The WPOZ Enhancement Area is to be inspected by the Peterborough Conservation Commission before the Certificate of Occupancy is signed by the Town.
8. The plantings be inspected for a period of two years following CO to ensure that the plantings remain in good health and that dead plants encountered during that time be replaced. This inspection will be performed by the Peterborough Conservation Commission.

Signed,

Sharon Monahan, Chair