



Town of New London
Zoning Board of Adjustment

P.O. Box 240
375 Main Street
New London, NH 03257

NOTICE OF DECISION

The Board is not unfamiliar with the facts of this case or the applicable law, as it has held several hearings on this matter over the years which, to date, have resulted in two (2) appeals to the Superior Court. In an effort to ensure that the Board received all relevant information, the parties were requested to submit detailed memoranda and all supporting documents prior to the hearing. In addition, there was an opportunity for rebuttal memoranda. Each member received a set of these documents for review in anticipation of the hearing. The Board wishes to extend its appreciation to the parties for their cooperation in providing extensive documentation to the Board. A hearing was held at which all interested parties were afforded a full opportunity to testify.

The Board understands that Lakeside Lodge, Inc. ("Lakeside") bears the burden of proof relative to its claim that it has a nonconforming use. It appears that there is agreement that the relevant date from which to measure the nature and extent of the nonconforming use is 1991, the date when the Town first posted Article XVI, the Shoreland Overlay District (subsequently adopted in March of 1992). Under the terms of the ordinance, shorefront lots may not be used as common areas for access to waterfront by three (3) or more unrelated persons, except as set forth in the ordinance.

The matter comes before the Board on an administrative appeal from the Board of Selectmen. Before the Selectmen, Lakeside argued that the use of its property was nonconforming in that the dock located thereon was used by multiple users with multiple boats, and predated the posting of the shoreland ordinance in December of 1991. Lakeside urged the position that there were eleven (11) different users, with fifteen (15) different boats. On

November 7, 2002, the Selectmen issued a written decision which found that the weight of the evidence did not support Lakeside's claim, and ultimately the Selectmen found that no more than four (4) users were permitted. The Board of Selectmen, as the enforcing authority of the zoning ordinance, has the right, in the first instance to interpret and apply the ordinance's terms.

However, the Zoning Board of Adjustment is the ultimate arbiter of the construction and application of the ordinance. Given the procedural history of this case, the Board believes it is necessary to establish the extent of the nonconforming use by making a determination of how many users are entitled to use the dock.

Lakeside's dock was originally used as a steamboat landing. But as already stated, the key date for the Zoning Board of Adjustment is 1991, when the ordinance came into effect. In 1990, Lakeside's property was subdivided and sold, leaving the small waterfront parcel and dock in the ownership of Lakeside.

The 1990 minutes of the Planning Board hearings concerning the subdivision of the Lakeside property indicate that the Planning Board was very concerned about the future use of the Lakeside lot. Additional minutes indicate "a letter from Perry Wheaton of Lakeside Lodge, Inc., dated April 6, 1990 has been added to the file. It states that Lakeside lots will remain in the ownership of the three (3) men who are Lakeside Lodge, Inc. for their personal use and will not be for use of the owners in the cluster development." The Planning Board and this Board have the right to rely upon the representations of Lakeside.

Lakeside places substantial reliance upon the affidavits submitted into the record. These affidavits, however, do not indicate the extent of the use by any of the affiants, whether for an

afternoon, a day, a week or a season. This was pointed out by the Board of Selectmen and again at the hearing. Nevertheless, Lakeside did not provide any further clarification.

The Board must also consider the credibility of the affidavits in light of all of the evidence and attach such weight as it believes is warranted. In this regard, the Board notes the representation of Lakeside's former attorney in August of 1999 that Lakeside was not renting any slips on a commercial basis. Yet in May of 2001, Mr. Frederick Ray indicated that he had paid \$1,600 in the year 2000 to rent space at the dock. Lakeside now contends that it does not rent space, the individual owners do. More than one person at the hearing questioned the subtlety of this position. If Lakeside's owners believe they have the unlimited right to lease out space as "personal use," it would be totally inconsistent with the representation to the Planning Board in April of 1990.

Thus, the Board has a series of options to choose from in determining the extent of the nonconforming use. Lakeside argues eleven (11) users and fifteen (15) boats are permitted. The Board of Selectmen concluded only four (4) users were permitted. The abutters seem to agree, but also seem to argue that only three (3) users are permitted. And this Board previously accepted eleven (11) users. We reject all of these formulations because they fail to consider all of the facts and circumstances of this case.

The Board, whose members have lived in New London for many years, is familiar with the use of properties along the Town's lakefronts. There are many extensive docks which could accommodate many more boats than the owner actually owns or uses. Also, it is not uncommon for owners to invite a guest who may make use of the dock. The presence or control of the owner exerts a moderating force on the use of these docks. The result being a natural limit on

the number of boats and guests using the dock at any given time. When the owner is not present or in control, or financial gain becomes a controlling factor, this moderating force is lost.

The Board heard many complaints from neighbors who characterized the use as a commercial marina, and there is some support for that observation. The testimony was traffic has increased substantially in Herrick Cove, which is a small cove of the lake. Garbage is collecting on its shores. The increased use has increased the conflicts among the users of the cove. Route 103 has become congested, and parking has become an issue. There was no indication that there were bathroom facilities available to the many users of the dock. Simply put, the use is excessive. The owners, though not technically Lakeside Lodge, Inc., have been renting space on this dock, including to a commercial dock construction and repair company. These are the very concerns the Planning Board had in 1990 when it inquired of the owners how they intended to use the dock. And it is the very reason for the Town's ordinance here at issue.

Lake Sunapee is a fragile and limited resource. Overuse damages the beauty of the lake, increases the potential for pollution and degradation of the ecosystem and results in congestion and unsafe conditions. In response to these very real threats, the Town has adopted zoning ordinances which regulate the subdivision of lots on the lake, including frontage, lot size and setback requirements. The ordinance at issue here is the logical extension of the authority of the Town to regulate density and use within given districts. These purposes are not served by ignoring the expansion of a nonconforming use, such as that owned by Lakeside.

The Board rejects the Board of Selectmen's position that there are four (4) valid users. Apparently, the Board accepted Mr. Ray's presence as a renter of a space, and a separate individual user, rather than part of the inherent rights of the three (3) owners to personal use of

the dock. The Board relies upon the representation of the three (3) owners of Lakeside before the Planning Board that the dock would be used for personal use. Further, the Board of Selectmen's decision fails to consider what is common personal use on New London's lakes.

The Board, for similar reasons, rejects Lakeside's claim to eleven (11) users and fifteen boats. This is nothing less than a claim of right to operate a commercial marina. Such is not "personal use."

The Board rules that there may be no more than six (6) users and six (6) boats at the dock at any one time. There can be no dispute that there were and are three (3) owners who have the right to use the dock for personal use. There also can be no dispute among people who are familiar with the use of lakefront properties in New London that owners will invite guests. Each owner of Lakeside is entitled to the same right to invite a guest. Thus, six (6) users and six (6) boats. Regardless of the size of the dock (which was substantially improved in 1993-1994), personal use is the touchstone, and if an owner chooses to have two (2) boats, he has used up his "capacity" to invite a guest.

The Board will not examine who occupies these six (6) "slots," how long they are occupied by a given individual, or whether rent is paid. It is not uncommon for lakefront owners to rent out their property in the summer or to have several guests over the season. The limits established in this decision are based on the evidence and the familiarity of the Board with uses on the lake. It precludes turning the dock into what is now for all intents and purposes a marina, and will facilitate enforcement. The Board does not wish to interfere with the rights of the owners of Lakeside, but holds those individuals to the terms of their commitment to the Planning Board in 1990.

Rulings on Requests

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| 1. Granted | 11. Granted |
| 2. Granted | 12. Denied; see decision |
| 3. Granted | 13. Denied; see decision |
| 4. Granted | 14. Granted |
| 5. Granted | 15. Denied |
| 6. Neither granted nor denied;
see decision | 16. Granted |
| 7. Granted | 17. Granted |
| 8. Granted, but see decision | 18. Granted |
| 9. Granted | 19. Granted; but see decision |
| 10. Denied | 20. Granted; but see decision |

The final paragraph is denied; see decision.

Vote on the decision: 5 in favor 0 against

ZONING BOARD OF ADJUSTMENT



Larry Ballin, Chairman








