



# TOWN OF NEW LONDON, NEW HAMPSHIRE

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## TOWN OF NEW LONDON ZONING BOARD OF ADJUSTMENT JULY 21, 2008

**PRESENT:** Bill Green (Chairman), Laurie DiClerico, Courtland Cross, Doug Lyon, Michael Todd.

Bill Green called the meeting to order at 7:30 p.m. The Board heard one petition for an area variance during tonight's meeting.

### **PUBLIC HEARING**

Jane and Jerry Barnes requested an area variance to the terms of Article XVI, Section C-2 of the New London Zoning Ordinance in order to construct an addition to their existing home at 800 Lakeshore Drive, within the 50-foot setback from Pleasant Lake. The property is in the R2 zone.

Bill Green called the roll, read the Notice of Hearing as posted, and announced that the hearing would be recorded.

Applicants Jane and Jerry Barnes, and Zoning Administrator Peter Stanley attended the hearing. No abutters or other interested parties were present.

### Applicant's Presentation

Jerry Barnes referred to the photographs and scale-drawings of the current structure and the proposed addition, in relation to the fifty-foot setback line. He explained that what they are trying to achieve is an increase in kitchen, dining and living space for their expanding family, with the least amount of impact to the lake.

He informed the Board that some years ago, they did obtain an architect's plan for accomplishing this goal outside of the fifty-foot setback. Peter Stanley explained that that first plan constituted a Substantial Improvement (cost would have exceeded 50% of the market value of existing structure), and per regulation at that time, they obtained a special exception from the ZBA. At that point, the building permit for that original plan was approved. They did not go forward with the plan, however, and the permit has since expired.

Jerry Barnes went on to say that since that time, they have talked with more architects as well as kitchen designers, in an effort to come up with a better plan that would eliminate having to completely relocate the kitchen, plumbing etc, and that would reduce overall impact on the lake.

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Board of Selectmen P: 603-526-4821 x 10 F: 603-526-9494	Town Administrator P: 603-526-4821 x 13 F: 603-526-9494	Town Clerk-Tax Collector P: 603-526-4821 x 11 F: 603-526-9494	Finance P: 603-526-4821 x 21 F: 603-526-9494	Assessing P: 603-526-4821 x 20 F: 603-526-9494
Planning/Zoning P: 603-526-4821 x 16 F: 603-526-9494	Fire Department P: 603-526-6073 F: 603-526-6079	Police Department P: 603-526-2626 F: 603-526-2782	Public Works P: 603-526-6337 F: 603-526-9662	Recreation P: 603-526-4821 x 14 F: 603-526-9494

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Referring to the site plan, he pointed out the location of the 50-foot setback that takes an angle at the northwest/west corner of the structure so that the southeasterly leg of that angle does pass through part of the current deck, sitting and living area. The new proposal does call for extending the kitchen in a westerly and southeasterly direction over the space now occupied by deck, and extending a pass-by or catwalk around the whole. The new proposal would add to the encroachment over the 50-foot line, resulting in a total encroachment of 3' x 14' for the structure, and 4' x 18' for the catwalk. In response to Bill Green's question, he said the current (pre-existing) encroachment over that 50-foot setback is about 2½-feet.

The Barnes' position is that although this new proposal does increase the nonconformity, it would result in less overall impact to the lake than the original plan would have. There will be 24.4% less square footage (than the original planned addition) for the new structure itself, 43.8% less square footage for the proposed basement, 4.3 % less square footage for the proposed deck.

He noted also, that the original plan that called for the 43.8% larger basement would have required some blasting as the site is on ledge. They have no basement now. The proposed partial basement would not require blasting. If they find that is not possible, they will not go forward with the basement portion of the plan, but will just put up a wall in that place.

In addition, under the new plan they would catch all run off from the new roof, and as that new roof will meld with about half of the current roof, they will be catching runoff that is not now being caught, and which is going into Pleasant Lake. He suggested that they will catch that run off with either a dry well, or preferably a tank. The latter method would allow them to use that rainwater for watering the lawn on the opposite side of the house.

He added that it is his understanding that the new regulations call for not more than 20% impervious surface within 250-feet of the high water mark, and he pointed out that this new plan would have only an 8.1% impervious surface (total old and new structure) within that 250-foot buffer.

Doug Lyon asked how this relates to the new Shoreland Protection Act, pointing out that the ZBA does not have the authority to waive that. Peter Stanley said the State will permit this as long as it does not exceed the 20% impervious surface. He pointed out that this is a large lot—3 acres. The issues that would typically prevent the State from permitting this do not exist here. He confirmed that applicants will need State approval, and ZBA members indicated that if they approve this area variance, it would be on condition that State approval is obtained.

Bill Green asked if they discussed with the architects the possibility of finding some way to obtain this additional living space while staying within the regulations. Jerry Barnes said that was what they did with the first proposal, but he noted this new proposal is smaller and will have less overall impact. The kitchen will stay where it is, and not need to be relocated. The addition will be located where there is already deck space.

Bill Green asked the applicants to go through the five criteria that must be found in order for the Board to grant an area variance.

1. *The proposed use would not diminish surrounding property values.* Jerry Barnes pointed out that they would be enhancing the value of the property.

2. *Granting the variance would not be contrary to the public interest.* The plan proposed tonight would result in less impact to the lake than there is now. He said that as past President of the PLPA, he understands the importance of reducing impact on Pleasant Lake. He pointed out that if this proposal is denied, they will have to return to the original proposal that would result in their having more house than they need, and spending more money than they need to spend.

3. *Denial of the variance would result in unnecessary hardship to the owner because*

*(a) Special conditions exist on the property that make an area variance necessary in order to allow the development as designed.* He did not answer this question at this time.

*(b) The same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden.* He acknowledged that they may achieve the same benefit by returning to the original plan, but he pointed out that they have already spent \$12,000 to \$15,000 on architects' and designers' fees, and the original plan would require a larger addition than they need, as well as complete relocation of the kitchen.

4. *Granting the variance would do substantial justice.* He said he feels that allowing a plan that would have less impact on the lake is more important than strict adherence to the fifty-foot setback.

5. *The use is not contrary to the spirit of the ordinance.* He reiterated that the proposed plan will have less impact than the original plan that was approved, and they believe that through a storm water management plan, they will even see impact reduced from what it is currently.

Jane Barnes added that the encroachment is so slight, and there is already a screen porch with roof in that space anyway. That has always been there. Jerry Barnes said the difference with the new plan is that with that they will be catching all the runoff from the roof.

Hearing no further comments or questions, Doug Lyon moved to close the public hearing and open deliberations. Court Cross seconded. No further discussion. Motion unanimously approved.

### Deliberations

Bill Green explained that the criteria are pretty well set for the Board. The majority of the Board must agree that each of the five criteria exist in order to grant the variance.

1. *The proposed use would not diminish surrounding property values.*

Courtland Cross said he has not seen anything here that would indicate that the surrounding property values would be reduced if this variance is granted.

Doug Lyon said that at times, the Board has discussed whether or not it wants to ask applicants to provide specific information about the impact of these kinds of things on surrounding property values, but in this case, given the nature of the surrounding properties in this area and the size of this lot, it is very hard for him to see how there could be any diminution of surrounding property values.

Bill Green agreed with both those comments.

Michael Todd referred to case law, specifically Bacon v. Enfield 2004. He said there are many similarities with this case. That case involved a preexisting non conforming use on a lake. Property owner built an exterior structure within the setback, and the ZBA denied a variance. The owner appealed to Supreme Court, and that Court upheld the denial.

He said that in that case, the Enfield ZBA also found that the use would have no diminution on surrounding property values, but even given that, the ZBA felt the variance could have some effect on the public rights of others in that it would set the stage for increasing congestion on the lake. As in this situation, there were many other houses on the lake—some may have been preexisting non-conforming uses; others may not have been.

He said the Board needs to be careful about approving additions to non-conforming properties on the lake. He said he does not think this is a materiality issue; that is, he does not think it is a question of 2½ feet versus 5 feet. He said he feels it is increasingly important to enforce the dimensional requirements that the Town has in place. He pointed out that like Enfield, New London has a lot of pristine water bodies, and the Master Plan stresses the importance of protecting those.

Bill Green asked him how he feels about the property value issue. Michael Todd said he does not think that is a make or break issue. He said there is not sufficient evidence to support that there would or would not be a diminution of surrounding property values. The issue is the potential cumulative effect on the lake of many such projects. That would have an adverse effect by contributing to the overdevelopment of the lake, and thus would be contrary to the letter and spirit of the ordinance.

Laurie DiClerico said she does not think the variance would result in a diminution of surrounding property values.

## *2. Granting the variance would or would not be contrary to the public interest.*

Laurie DiClerico said she felt it could be contrary to the public interest. The New London zoning ordinance says that there is to be no disturbance whatsoever within the fifty foot setback. She said she feels this could set a precedent.

Michael Todd agreed. He said the Board must think about the cumulative effect.

Bill Green pointed out that each of the cases the Board hears is different, with individual circumstances differing in each. He said he is not sure if this would be contrary to the public interest. He said he will be more concerned with the next criteria.

Doug Lyon referred to the overarching issue of the purpose of the 50-foot setback and all the shore land protection regulations—they are to protect the quality of the lake. He pointed out that this plan with the storm water management referred to, would actually result in less impact on the lake than the current site has. He said he agreed with Michael Todd that there must be concern about cumulative impact on the lake, but he pointed out that if each applicant who came before the Board with a proposal for a small encroachment on the setback, but with a reduced impact on the lake, the cumulative effect would be an improvement to overall quality of the lake. He proposed a condition of approval that would require a storm water management plan.

Courtland Cross agreed that it would not be contrary to the public interest. He said that every applicant has to make his own argument to support the variance. He's not really concerned about setting a precedent because each case is different, and the Board deals with them on their merits. The Board must look at the overall picture in terms of the overall impact on the water body and environment of the area.

*3. Denial of the variance would or would not result in unnecessary hardship to the owner because*

*(a) Special conditions exist on the property that would make an area variance necessary in order to allow the development as designed.*

Michael Todd said he does not think there is any significant hardship here. He said that ordinance by its very nature applies hardship to everyone that falls within its jurisdiction, and as long as that is borne equally by all members of the jurisdiction, there is no basis for a variance from it.

He asked to go back to an earlier point about the storm water runoff. He pointed out that the Board does not have any evidence that there is going to be a better effect on the storm water runoff. There is no expert to testify whether the impact will be adverse or non-adverse.

Jerry Barnes said his common sense tells him that if they are catching none of the roof runoff now, but under the new plan will be catching the runoff in a dry well or tank from not only the new roof but also about half the current roof, there will be less going into the lake. Bill Green said intuitively, he would agree with that. Jerry Barnes said if that is the only thing holding up approval, he would be happy to pay for an environmental study to that effect.

Bill Green returned to a discussion of criteria 3a regarding special conditions of the property, pointing out that this is usually the hardest hurdle to cross. He said that generally a special condition of the property is a site condition. He said he does not see anything like that that exists with this lot, and that would prohibit applicants from being able to adhere to the 50-foot setback. Jerry Barnes said he agrees with that, pointing out that they do have a previous permit (though it has expired and would have to be renewed), that does adhere to the setback.

Doug Lyon further clarified that it seems that the only thing preventing applicants from going forward with this proposal is the 50-foot setback, and that is not a special condition of the property. Michael Todd agreed with that, pointing out that the owners still have plenty of reasonable use on this lot.

Doug Lyon said the other consideration is that though the previous plan did adhere to the setback and was approved, and presumably would be approved again, it would be more expensive. But the Board cannot consider the setback requirement as a special condition of the property.

Bill Green added that with the revised Shore Land Protection Act, and the increased focus the State has, this Board will probably see more variances regarding these issues. It is critical that the Board be consistent in addressing all of these applications on a case by case basis.

He asked again, did the architect take a look at trying to accomplish what the applicants want to do in a way that would still keep the 50-foot buffer. He suggested that if this addition were just jogged back a few feet—that probably would not take too much—that would avoid the need for a variance. Jerry Barnes said they have had designs made that do comply. If this plan is denied, they will go ahead with that original plan. He asked again, what is more important—impact on the lake, or the letter of the law. Michael Todd said it is not a letter of the law issue. It's the cumulative effect of many such projects that goes against the letter and spirit of the ordinance.

Court Cross agreed that the Board does get torn between the need to uphold the letter of the law and the spirit of the individual circumstance. He said they could argue either side of that. He said he would probably come down on the side of practicality more often than not, as long as there is no danger of setting a precedent that the Board would be bound by later on. He repeated that the Board must judge all these cases on their merits, and each one has to stand on its own.

Laurie DiClerico said she appreciates what the applicants have been through, but agreed that there may be another alternative—less deck space perhaps or relocation of the kitchen. She said she agreed that they do not really have proof yet that the plan would result in reduction of storm water runoff. She said there should be proof that the total post-project runoff would not be a net increase. Jerry Barnes repeated his description of where the new roof line will be in combination with the current roof, the hard deck, then ledge or impervious surface, and said the storm water management system would capture that runoff. Jane Barnes also spoke to the direction of runoff from the house.

*(b)The same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden.*

#### *4. Granting the variance would or would not do substantial justice.*

Doug Lyon agreed with Michael Todd that the Board does not at this point have a storm water plan here of what is proposed, though as discussed, it has a certain common sense ring to it, and he suggested that the Board could approve this conditional upon receipt of a storm water management plan that would demonstrate that there would be less overall impact on the site. He

said he keeps coming back to the fact that the purpose of New London's ordinance is protection of the lake. He agrees that this plan encroaches little bit more on the 50-foot setback, but he feels that is a less critical issue than impact on the lake. He said if the Board continues to see these kinds of proposals and each one has less impact on the lake than the existing sites, they would be doing substantial justice. Bill Green asked to confirm then that Doug Lyon feels substantial justice would be done if it can be proven that the plan would reduce impact to the lake. Doug Lyon confirmed.

Court Cross agreed that the applicants have pointed out the existing impervious surface, so the plan as presented would actually be reducing the runoff into the lake, rather than leaving it the same or increasing it. He said from the point of view of good property management, that's a good thing. He said he feels this would be a positive move to make in terms of overall water quality of the lake.

Laurie DiClerico said she would be a lot more comfortable if she could see that.

Michael Todd suggested the possibility that the applicant withdraw the application tonight, and come back with a storm water management plan. He pointed out that if the hearing continues, and the Board denies it, the applicant cannot bring the plan back in later. Withdrawing it now would preserve the footprint of the plan.

Bill Green asked if applicants have worked on the idea of a storm water plan at all. He asked if they have any idea how long that would take. Jerry Barnes said he could get an environmental engineer to put a plan together; however, he wants to leave this hearing with the understanding that if he does all that, the Board would not then find another problem to hold up the plan.

Doug Lyon said there still remains the problem with criteria 3a. He said that's the real stumbling block. The ordinance requires that the Board find that there is a special condition of the property that makes it impossible to develop as planned. He reiterated that if the 50-foot setback is the only thing preventing applicants from going ahead with the plan, that is not considered a "special condition."

Bill Green said that is really his biggest concern as well. He asked Jerry Barnes if he knows of any special condition of the property, and he offered some examples that have been found in other applications in the past. Jerry Barnes said he is approaching this from the position that the purpose of the Shore Land Protection Act is to reduce impact to the lake. Everything should be in the spirit of protecting the lake. He said they can do the previously approved plan, but that would have a bigger impact on the lake.

Doug Lyon agreed that they have come in with a proposal that is within the spirit of the ordinance. The problem is that the Board has a legal obligation to follow the rules that have been laid down for application to an area variance, and one of those rules is that the Board must positively find that there is a special condition of the property that makes this development as designed impossible. That's the stumbling block the Board is running into. He said that presuming that the storm water study will demonstrate what they think it will, what common sense suggests it will, a case could be made that the other four conditions (other than 3a) would

be met—Michael Todd’s objection notwithstanding. But he is struggling with the legal responsibility of the Board to find that there is a special condition with the property. He said he does not want the Barnes to spend a lot more money, and then learn that the Board cannot grant the area variance because that criteria has not been met. He emphasized that the Board does not have discretion on that. The law requires the Board to find positively on each of the five criteria.

Bill Green said otherwise, many people in similar situations could simply devise a storm water retention pond and expect a variance. He pointed out that would not be enough to obviate the requirement that the Board find all five criteria exist. He repeated that criteria 3a is the most difficult to find. (As a side bar, Doug Lyon opined that all this may even suggest that that criteria is counter productive—that is, if it prohibits a variance that would allow a plan that would reduce impact on a lake to go forward.) But, he said, as it is, the Board does not have the authority to waive it.

Jerry Barnes said he felt they were coming before the Board because the 50-foot setback is the problem. He said they understood that that is the variance that they were requesting. Michael Todd said they have to look at the whole effect. Doug Lyon agreed. The Board must find that all five criteria exist. One of those is that there is a special condition of the property that would hinder the development as designed from going forward any other way. Just the fact that the development as designed goes over the 50-foot line is not a special condition.

Courtland Cross asked if the fact that the house predates the ordinance comes into play. The Board agreed that it cannot allow something that would make a non-conforming use more nonconforming without a variance. (And again, the variance requires that all five criteria exist.)

Doug Lyon agreed that lake quality is of utmost importance, and he pointed out that the fact that there were no abutters present to protest this variance, indicated that they, too, feel that is important. Bill Green agreed with Doug Lyon that, although lake quality is of utmost importance, the Board must find all five criteria—and should give the applicants an idea of its position on those at this hearing.

Doug Lyon suggested the Barnes withdraw the application, and have some conversation with architects or engineers to see if there are aspects of the property that meet that criteria.

Michael Todd cautioned that even if a special condition is found, there might not be unanimous agreement on criteria five either. Jerry Barnes agreed, tonight’s discussion has not even gotten to #5 yet. He expressed concern that if they resolve one problem, they not return to the Board only to find another problem. He said he would like to leave with something more definite. Bill Green said perhaps a different way of looking at it is that unless there is a good argument that there is a special condition with the property, # 4 and 5 are probably moot.

Jerry Barnes asked who would be best to work with to find something for 3a. Bill Green said a special condition is not something that can be manufactured. It is either there with the property or not. He gave some ideas of special conditions that the Board has found in the past.

Jerry Barnes expressed concern about the fact that they do have an approved plan indicates that there is no physical condition of the property that says they can't do it. He said he is not sure what he's looking for in that case. He would think that that question has already been answered. Michael Todd pointed out that when applicants brought the original plan before the Board, that request did not require that it (the Board) do this kind of analysis. Bill Green agreed that approval of that original plan does not mean that a special condition of the property does not exist.

Peter Stanley said if the plan is denied, applicants may not present it again in a slightly different configuration. That's why Doug Lyon suggested withdrawal.

Jerry Barnes referred to a variance to the property line setback that had been granted to a neighbor. He questioned whether a special condition existed there. Peter Stanley explained that that was a different situation. In that case, the mistake was made by a public official who did not realize that the lot was in two different zones, and the more stringent requirement applied. An after the fact approval was granted.

Jerry Barnes agreed to withdraw the application for the time being.

#### Other business

The minutes of June 16 were approved.

The meeting adjourned at 8:30 p.m.

Respectfully submitted,

Sarah A. Denz  
Recording Secretary