

TOWN OF NEW LONDON
ZONING BOARD OF ADJUSTMENT
DECEMBER 12, 2005

PRESENT: Larry Ballin (Chairman), Russ Cooper, Cheryl Devoe, Bill Green, Brian Prescott.

PUBLIC HEARING

In accordance with Article XXI §E of the New London Zoning Ordinance, Bristol Sweet & Associates representing Richard Putnam et al, appealed the October 11, 2005 decision of the New London Planning Board which requires applicants to apply the 100-foot protective buffer to all of the wetlands delineated on applicant's property, per the site specific delineation required by Article XIII §G of the New London Zoning Ordinance. The property is located on Soo-Nipi Road, in the R-2 district, Tax Map 136, Lot 9.

Larry Ballin opened the public hearing at 7:30 p.m., called the roll, read the Notice of Hearing as posted, and announced that the hearing would be recorded.

Applicant's Presentation

Doug Sweet described the property's location on Soo-Nipi Road, about a half mile from Route 103A, its proposed subdivision into three lots, and the history of the question being brought before the ZBA tonight. In September 2004, applicants roughed out the wetlands on the property according to the New London Streams and Wetlands Protection map dated March 13, 2001. That map is a composite of data from the National Wetlands Inventory map, plus additions made by the New London Conservation Commission. On October 14, 2004, as required by Article XIII, §G of the New London zoning ordinance, a *site specific* delineation of the wetlands on this property was done by wetlands scientist Greg Howard. That site specific delineation shows all the jurisdictional wetlands on the property including both that along the stream at the lower end of the property which the applicants feel do fall under the ordinance requiring buffer, and two additional sections of jurisdictional wetlands projecting north on the property (called for the sake of discussion "finger" and "bump") which applicants feel do not fall under that requirement for the buffer for reasons which will be explicated during this hearing. In April 2005, Bristol Sweet & Associates did the survey work on the property.

They then met with New London Town Planner Ken McWilliams in order to clarify the requirement for the 100-foot buffer, and were told that the Town is seeking a 100-foot buffer from the edge of "other significant wetlands" (Art. XIII §G-c) shown on the New London Streams and Wetlands Protection map, but not necessarily from the edge of the tributary streams running into the other significant wetlands. Ken McWilliams suggested they review this with the New London Conservation Commission. On August 17, the Conservation Commission agreed that the edge of the "other significant wetlands" had been correctly identified and that the 100-foot buffer should be applied to that one, but not necessarily around the other jurisdictional wetlands—the "finger" and "bump".

Applicants presented the plan for subdivision to the Planning Board at a preliminary on September 13 and at a public hearing on October 11. He emphasized that as of this date, they had not defined the precise building envelopes on the three proposed lots. On that second date—October 11, the New London Planning Board voted to require the 100-foot buffer to all the jurisdictional wetlands on the property—that is both the wetland along the lower stream (which applicants agree do require the 100-foot buffer per the ordinance) and the "finger" and "bump" of wetlands which were also identified during the site specific wetland survey done by Greg Howard (but which applicants do not feel meet the classification of wetland which the ordinance intends to protect with the 100-foot buffer). The applicants are here tonight to appeal that decision. They feel that the intent of the map and ordinance is not to buffer all the wetlands in Town. The map identifies what the Conservation Commission felt important to protect, those wetlands identified as having a higher value.

Larry Ballin clarified on the map to where those 100-foot buffers from the finger and bump would extend, noting that pursuant to the long extensive finger of wetland projecting north, the buffer would actually extend over the road.

Wetlands scientist Greg Howard clarified that all jurisdictional wetlands which in this case would include the finger and bump, will require state and town permitting for subsurface systems, waste disposal, etc., during the subdivision process, but do not all necessarily require the protective buffer as referred to in the New London Zoning Ordinance XIII, Section G-c. That article states that those wetlands in town which are to be protected by natural buffers are delineated on the New London Streams and Wetlands Protection Map approved by voters on March 13, 2001, and that map is a compilation of data from National Wetland Inventory (including information from County Soils Mapping) and input from the New London Conservation Commission. He said that it is meant to identify within all the jurisdictional wetlands, that smaller group of wetland complexes which are of higher value, and which merit protection over and above the state and town septic disposal permitting requirements. He opined that the buffer requirement is not intended to be applied to all the wetlands in town.

He said that in this particular case, the land gently slopes toward the brook, but higher up on the property, the finger and bump—though they are jurisdictional wetlands, act and function differently than those lower on the property directly along the stream there. The wetland along the lower stream which applicants agree should be buffered, consists of alluvial soil, are semi-forested with needle-leaved trees, and are seasonally flooded. That classification is consistent with that referenced by the National Wetlands Inventory, upon which New London's map is based. On the other hand, the “finger” and “bump” wetlands which applicants do not feel require the extra buffering protection, are composed largely of glacial till, are semi-permanent, forested wetlands, largely of broad leaved deciduous plants, and are not subject to flooding. He reiterated that they would be subject to state and town set back requirements for septic systems, but they do not fall within the group identified by the town's map as requiring the additional protection.

Pierre Bedard offered his opinion that the ordinance requiring a buffer refers to those wetlands identified as the most important wetland complexes in the community, not to all the wetlands in town.

In response to question from Russ Cooper, Greg Howard confirmed applicant's position that the Streams and Wetlands map is meant to be a general starting point. The Town and State require that applicants go a step beyond that with the site specific, on-ground delineation of wetlands; specifically, the State requires the wetlands scientist to delineate any wetland that is 100-square feet or larger. Russ Cooper then asked if during the site specific analysis of wetlands on this property, the “finger” and “bump” were identified as jurisdictional wetlands. Greg Howard said yes—in that jurisdictional wetlands are those which are inundated for fourteen consecutive days during the growing season, and which are dominated by hydrophytic vegetation. Again, the finger and bump would require permitting and setbacks for subsurface systems.

Larry Ballin asked if there is a map showing all the wetlands in New London. Greg Howard said he has not seen one, and Karen Ebel said she was not sure either. She said definitely all the wetlands in town are not shown on the map referenced in the ordinance.

Cheryl Devoe pointed out that when the ordinance talks about buffers for the town's wetlands, it doesn't specify what type of wetlands need to be buffered. Greg Howard said he thinks it does. The Streams and Wetlands Protection Map includes those indicated by the NWI plus some additions made by the New London Conservation Commission. If it were meant to include all wetlands, there would be no point in having that map. Cheryl Devoe said there is nothing in the ordinance which would indicate exclusion of the finger and bump. Greg Howard said the NWI map describes wetlands which are similar to those along the brook at the lower end of the property, but not similar to those in the finger and bump. Cheryl Devoe asked if there are any wetlands in town which require the buffer and which are not shown on this map. Karen Ebel said the Stream and Wetland Protection Map shows wetland complexes associated with streams identified for buffering. She added that New London also has identified prime wetlands for additional protection. Those are the Cricentis Bog, Low Plain and Goose Hole.

Bill Green asked about differences in sensitivity and importance of wetlands. Greg Howard pointed out again that the wetlands which applicants have identified on the map as directly associated with the stream and which should be buffered, are of alluvial soils, forested with evergreens, and are seasonally flooded—all as indicated in the NWI. The

bump and finger include mostly glacial till dominated soils, and are deciduous-forested wetlands which are more common (than bogs for example which are extremely rare), and dynamic, that is subject to changes.

Planning Board Chairman Karen Ebel referred to Town Counsel Bart Mayer's December 5 response to her questions regarding the Planning Board's interpretation of Article XIII, Section G of the New London zoning ordinance. She made the following points:

- o Applicants concede that the "finger" and bump" of wetlands on the property do meet the definition of wetland.
- o The New London Streams and Wetland Protection Map which was approved by voters on March 13, 2001 is cited in Article XIII, §G of the New London Ordinance as a starting point. She noted its 1-1200 ratio. It provides a general starting point.
- o The regulation requires the applicant to do a site specific analysis of wetland.
- o Going from the general map then to the site specific, the bump and finger have been identified as meeting the definition and meriting buffer protection.
- o While the Conservation Commission in making its additions to the map, was analyzing the relative merits of wetlands, the task before the Planning Board on October 11, and before the Zoning Board at this hearing, is to make a statutory interpretation of the ordinance.
- o She pointed out that the converse may also be true, that is, it may occasionally be the case that in proceeding from the general map to the site specific analysis, no wetland or a smaller wetland may be found on the property than indicated on the large map, in which case, the applicant would object to being held to the 100-foot buffer.
- o She also noted that applicants can apply for a special exception to reduce the required buffer around the finger and bump. That would give the zoning board opportunity to further analyze the relative merits of those two areas of wetland.

Bill Green asked if any wetland in town would require the 100-foot buffer. Karen Ebel said only those associated with identified streams. She said there are quite a few smaller streams which have not been mapped.

Larry Ballin asked if they are only talking about wetlands associated with streams, and not recognizing different quality of wetlands. Karen Ebel reiterated that they are not discussing tonight the relative merits of buffering for the one or the other, but the interpretation of the ordinance.

Dale Conly is the Conservation Commission's representative to the Planning Board. He informed the Zoning Board that the Conservation Commission members are not wetland specialists, and that there was serious discussion regarding this proposal. The Commission is concerned with setting precedent, but also with reasonableness. The ordinance does require an applicant to show where the wetlands are, and the town has voted on that ordinance. The Planning Board feels a responsibility to back it up, and protect the town's resources; specifically those wetlands associated with streams which lead to the lakes.

Brian Prescott asked to clarify the Conservation Commission's position on this ... earlier in this hearing, Doug Sweet said that the Conservation Commission had agreed with the plan. Doug Sweet confirmed that that was what he said, and Dale Conly concurred, though he said the Conservation Commission did have some controversy over it.

Doug Sweet said the ordinance is based on the National Inventory of Wetlands, and the area delineated on their application for buffering meets that inventory's identification.

Russ Cooper pointed out that the ordinance requires that wetlands on a given property be further delineated by a specialist, and Karen Ebel pointed out that when a word is capitalized in an ordinance (for example, the word "Wetland" in XIII, G, second paragraph: "The boundary of a Wetland on a specific site must be delineated by a qualified professional acceptable to the New Hampshire Wetland Board.") that means that the definition of the word must be referred to. The finger and bump meet the definition.

Greg Howard said that based on the NWI's classification of types, the applicants are able to make a distinction (between types of wetlands on this property). He said that the Conservation Commission has already done a

screening process, and he asked at what point would the dividing line be drawn (between wetlands requiring the buffer, and wetlands which don't).

Karen Ebel emphasized that this is as a matter of statutory interpretation. The ordinance refers you back to the definition. She noted that Town Counsel begins his response by referring to that definition. The ordinance states that an applicant starts with the map, but what is actually required to be buffered is based on the site specific analysis. Any other interpretation would be too arbitrary and would not be supported in court. Town Counsel Bart Mayer concurs with the Planning Board's interpretation. She said that if you find (decide) anything other than that, you're making an arbitrary decision. She said that whether people like that interpretation or not, it is a matter of interpretation of the law. She conceded that the ordinance could be tweaked.

Planning Board member Sue Andrews referred to applicant's indicating that these are all wetlands (per their site specific), but then saying they are two different types of wetlands. She said the ordinance does not allow one to differentiate between different types. She conceded that that is perhaps a flaw in the ordinance which should be addressed. Right now the ordinance says that any jurisdictional wetland needs to be buffered. Larry Ballin asked if they are saying that any wetlands need to be buffered. Karen Ebel and Sue Andrews said if they are on the map. You look at the map, then do the site specific which shows you the jurisdictional wetland—how it lies on the ground. That is what you have to buffer. You cannot differentiate between types, according to the current wording of the ordinance.

Pierre Bedard said the ordinance refers to the "most important Wetland complexes in the community." He opined that the ordinance is trying to differentiate among wetland types. There is a definition of wetlands, but this ordinance seems to be saying, "the most important." Larry Ballin asked what the Planning Board meant when it used the term, "most important." Sue Andrews said she was Chair of the Conservation Commission when the streams mapping was done. They looked at the most important complexes in the town. That is why there are streams which are not on the map. The ordinance is not about specific wetlands, but about the important wetland complexes in the town.

Larry Ballin asked to confirm that they are saying that there are some streams that aren't even buffered, but are suggesting that this little finger which is of a different classification of wetland than the actual stream of flowing water, is more important, and should be buffered? Karen Ebel and Sue Andrews confirmed that, saying that is because it is associated with one of the most important streams in town. Larry Ballin asked if it were not the case that any running stream is associated with a wetland at some point. He noted that the water has to go somewhere. Sue Andrew and Karen Ebel pointed out that they are not all mapped. Larry Ballin asked what is meant by "associated" in the ordinance. Sue Andrews suggested that in this case, the finger must have a trickle that comes down into it (the stream), but that does not show on the map. She said there is a stopping point (for the buffering requirement). Larry Ballin asked if there is running water in the finger all the time? Sue Andrews and Karen Ebel said no, but it is a jurisdictional wetland. Larry Ballin asked if they meant adjacent to a jurisdictional wetland. Karen Ebel and Sue Andrews said, no, it is a jurisdictional wetland. Greg Howard clarified that when he uses the terms "wetland" and "jurisdictional wetland" he means the same thing. Karen Ebel said it (the finger) is a wetland under the ordinance, and Sue Andrews said it is associated with an important stream. Pierre Bedard said that many of those have associated tributaries that aren't connected. He said applicants are trying to understand where the ordinance allows the cut off point. That's the dilemma facing applicants tonight.

Larry Ballin noted that no abutters were in attendance at this hearing. He asked if there were any further comments or questions.

Hearing none, Brian Prescott moved to close the public hearing and enter deliberations. Russ Cooper seconded. No further discussion. Motion unanimously approved.

Deliberations

Russ Cooper said it seems that the Planning Board has defined what is appropriate in this case. The boundaries have been defined by the site specific analysis required by the ordinance. He noted the Planning Board's suggestion that applicants can seek a special exception. He recommended the ZBA uphold what the Planning Board has decided.

Brian Prescott said he felt that both arguments are valid. He agreed that there is a weakness in the ordinance as it is currently worded. He expressed concern even about the special exception process requiring the zoning board to decide which should be buffered and which should not. He does not agree that all types of wetlands should be treated equally in the ordinance, but at this point in time, they are. He said that certainly for why the board is here tonight, he agrees with the Planning Board's interpretation of the ordinance.

Bill Green concurred with that.

Russ Cooper moved to deny the applicant's appeal, and to uphold the Planning Board's October 11 decision to require the 100-foot buffer around all the wetlands flagged on the property by Wetlands Scientist Greg Howard during the site specific delineation. Motion seconded and unanimously approved.

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PUBLIC HEARING

Paul and Joanne Lazdowski requested a variance to the terms of Article XX §B-3-b of the New London Zoning Ordinance in order to replace an existing non-conforming boat house. The property is located at 40 Moyahs Lane in the R-2 district, Tax Map 103, Lot 015.

Larry Ballin opened the public hearing at 8:30 p.m., called the roll, read the Notice of Hearing as posted, and announced that the hearing would be recorded.

Applicant's Presentation

Paul Lazdowski said they would like to replace the deteriorating and unsafe boat house on this property with one of exactly the same dimensions. The original plan which called for removal and replacement of the existing foundation was not acceptable to the Conservation Commission. They presented a second plan to that Commission on November 16, which calls for removing the stone foundation on three sides only, and replacing that with a skeleton of steel beam into which pressure treated wood will be fitted. The flooring will be replaced with crushed stone. There will be no concrete. The clapboard exterior will be similar to what is there now, and will begin at the ground level. The roof will be the same pitch as current. All the work will be done on dry land. The Conservation Commission did approve this second plan.

Abutters Bill and Katie Clough attended the hearing to indicate support for the proposal. Bill Clough did note that there is an intermittent stream next to the building, and Paul Lazdowski agreed, saying that this work will be done during its dry season. Also, he added that a turbidity curtain will be placed to protect the lake during work.

Hearing no further comments or questions, Brian Prescott moved to close the public hearing and enter deliberations. Larry Ballin seconded. No further discussion. Motion unanimously approved.

Deliberations

Bill Green asked why this would require a variance. Russ Cooper pointed out that it is currently a non-conforming structure.

Larry Ballin reviewed the five criteria which must be met in order for a variance to be granted. The board found that:

1. The proposal for replacing this deteriorating boathouse will not diminish surrounding property values. The board did hear from abutters who support the proposal.
2. The replacement will benefit the public interest, both for esthetic and safety reasons.
3. The variance will allow substantial justice to be done.
4. The plan to replace this boat house with one of the same dimensions and exterior appearance, but with improved foundation, materials, and working method (including turbidity curtain) is acceptable to the Conservation Commission, and is in keeping with the spirit of the ordinance.
5. Some question was raised regarding whether or not hardship would ensue from denial of the ordinance. Board members agreed that denying a variance allowing applicant to replace the unsafe deteriorating structure would result in hardship to this owner.

Russ Cooper moved to grant the variance. Cheryl Devoe seconded. There was no further discussion. Motion unanimously approved.

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The November 7th minutes were approved as drafted.

Meeting adjourned at 8:50 p.m.

Respectfully submitted,

S.A. Denz
Recording Secretary