

**TOWN OF NEW LONDON  
ZONING BOARD OF ADJUSTMENT  
SEPTEMBER 26, 2005**

**PRESENT:** Larry Ballin (Chairman), Cheryl Devoe, Randy Foose, Bill Green, Brian Prescott.

**PUBLIC HEARING**

**Susan McLeod's request for an Equitable Waiver of Dimensional Requirement, in accordance with Article XXI §H-1 of the New London Zoning Ordinance, to allow for less than the required fifty-foot front yard setback.**

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

Pam Perkins represented the owner, and explained that the house with garage was built in 1969, and the addition to the garage received a building permit for its current location in 1989. At that time, the (increased) garage was described as being 45-feet from the edge of the road, but the building permit was approved by the then-Board of Selectmen. She explained that Susan McLeod inherited the house from her mother, Suzanne Filkins, long-time librarian at Tracy Memorial Library. Ms. McLeod is currently renting the house to John Calderwood. Mr. Calderwood is preparing to purchase the house, and has indication from his lender that the present situation with the setback must be resolved with a "No Action" letter from the Town of New London. At this news, they re-measured the setback and found that the garage is actually 39-feet from the road.

In the interest of full disclosure, Randy Foose said that he and his wife sold that house to the Filkins.

Larry Ballin opened the floor to questions and comments.

Abutter Jane Norman said they (the Normans) have no objections to the Board's granting this EWDR.

Don Filkins pointed out that it is important to resolve this, for the current as well as for any future owners.

Zoning Administrator Peter Stanley said this violation has been in place for over ten years so the first two criteria for granting an EWDR are not relevant. He said the Town has not received any complaints regarding it, nor has it been reported as a violation. He noted that granting the EWDR would not make it a legal non-conforming use. There can be no continued building within that fifty-foot setback.

Doug Peel representing Mr. Calderwood, said the lender is looking for a "No Action" letter from the Town. Peter Stanley said that could be written. He and Mr. Peel will get together on that.

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

Deliberations

Bill Green said this meets all the criteria for granting an Equitable Waiver of Dimensional Requirement (specifically, it does not constitute a public or private nuisance, nor diminish the value of other property, or interfere with or adversely affect any present or permitted future uses of any property), and Cheryl Devoe agreed.

Brian Prescott moved to grant this Equitable Waiver of Dimensional Requirement. Cheryl Devoe seconded. No further discussion. Motion unanimously approved.

## **PUBLIC HEARING**

### **Robert Ewing's request for a special exception in accordance with Article XIII, §E-1, in order to cross a wetland located on lot 96-15, Main Street, with an extended drive accessing his abutting lot.**

Larry Ballin opened the public hearing at 7:45 p.m., called the roll, read the Notice of Hearing as posted, and announced that the hearing would be recorded.

#### Applicant's Presentation

Peter Schiess, representing the owner, explained that this crossing will impact about 500 square feet of an unmapped wetland. The plan is to cross that wetland at its narrowest point. He noted that actually, the access off Main Street which they intend to use as the beginning of this extended driveway does have drainage swales on either side of it, and it is those swales which have created this wetland. The access is gravel, and will remain so, and is intended only for use by the one residence Mr. Ewing is building on the abutting lot.

In response to Larry Ballin's question, he said he has submitted to the State of NH DES, an application for a Minimum Impact Expedited Permit, but has not received that back yet. In conversation with representatives from DES, they indicated that there is no reason to deny it. He added also that the New London Conservation Commission has signed off on this.

#### Larry Ballin opened the floor for questions and comments.

Abutters Michelle and John Holton, and Bill Gundy did not dispute ownership of the access which is going to be extended, but did question the status of it, noting that in his letter of application, the applicant specifically refers to their plan as being "to extend an existing driveway." Michelle Holton produced copies of deeds from the three properties that are bordered by this access, in which the access is referred to as a "fifty-foot right-of-way" and is named "Colby Lane." She said that it was the intention of the original owner of this land, Susan Colgate Cleveland, that this be a walking path for the public. It has always been a gravel right-of-way between the stone walls. At one time, Peter Messer used it as a cow path. She said a process must be followed for creation of a driveway.

Larry Ballin said the base paperwork that the Zoning Board uses is the official application form. On that, the word "existing" does not appear. Michelle Holton asked if that is a typo. She went on to suggest that this hearing is predicated on that being an existing driveway, and it is not. Bill Gundy said it really is not a driveway in the legal sense, but has been described in the deeds as a right of way for a long time.

Larry Ballin explained that the purpose of this hearing is to address the wetland crossing. The status of the access itself is between the Town, State, and the owner.

ZBA members noted that the owner has enough frontage for a driveway, and Peter Schiess said they understand they will have to get a driveway permit from NH DOT.

Bill Green asked if this is part of the subdivision. Peter Stanley said this is land left over from the Bolger subdivision. Robert Ewing owns both lots in question. Peter Schiess explained that Mr. Ewing now has access to the back lot via a driveway through the middle of the front lot, which greatly diminishes the value of that lot. He would like to use this gravel access which borders the boundary of the front lot instead.

Michelle Holton said that using this as a driveway would result in severe drainage issues. She added that right now, there is no application before DOT for an anticipated driveway there.

John Holton expressed concern that if this is approved tonight, that would be a "leg up" for future expansion of the lane to a road. Who's to say this will not become a loop road in the future?

Bill Green asked to clarify what the Holtons' and Mr. Gundy's argument is.

Michelle Holton said their argument is that there is no existing driveway there now. She said the Board is only here tonight to address a wetland crossing by the extension of the existing driveway, and no driveway exists there. If the Board grants the requested wetland crossing, it would be assuming there is an existing driveway. The Board cannot ignore the wording of the applicant's letter.

Peter Schiess said this was clearly designed as a gravel path between stone walls, with drainage swales on either side. He conceded that perhaps he misspoke when he referred to it as an existing driveway.

Bill Green pointed out that the Board is not being asked tonight for a driveway access.

John Holton said addressing the issue of the wetland crossing is putting the cart before the horse. The abutting house lot already has a driveway to the lot in question. Why can't the owner continue to use that? Will that continue to be used as a driveway?

Larry Ballin said the Board cannot address potential future uses, but assumes all work in the future will be done legally.

Abutter James Lightfoot asked if there is a map delineating the wetlands on the property. He reported observing 40 red flags across the property last week, and he asked if a hydrology report will be forthcoming. He said at the time the Planning Board was considering the Bolger subdivision, the abutters expressed grave concern about the abundance of wetland in that area, and eventually did go to court. Ultimately, it was not considered to be wetland, but his contention is that it is very very wet back there, and he feels this should be further considered.

Peter Schiess said the wetlands have been mapped and flagged and in the plans for at least six weeks. The plan does show the proposed driveway. He did agree that the property does have a lot of wetland on it, in areas other than where the proposed driveway is. James Lightfoot said if this is ever black topped, it will certainly impact those other parts of the property. Peter Schiess said the owner has no intention of blacktopping or using it for anything other than a gravel driveway access to his lot. James Lightfoot said he feels the Board is being blind. A lot of water runs off Main Street down through this property.

Abutter Dolores Bausch asked why the existing driveway—the one shown on the building permit application, cannot continue to be used. Peter Schiess said that is from the 2001 subdivision plan. It is an easement that cuts the front lot in half. Mr. Ewing now owns all around that, and does not want to bisect that lot. All he wants to do is access his house on the lot behind it.

Robert Bausch asked if the required setbacks from wetlands have been met. Peter Stanley said there are no setbacks required for unmapped wetlands. Applicants simply cannot go over it for anything other than a crossing. The Soil Conservation Service and DES must approve the crossing.

Michelle Holton requested that the Board delay its decision until the status of the access is straightened out.

James Lightfoot asked if this is a buildable or unbuildable lot. Peter Stanley said it is a nearly 100-acre lot of record, and could be subdivided subject to subdivision regulations.

Michelle Holton repeated that driveways require a process. This is not an existing driveway.

Pete Schiess repeated that he understands that he will have to go to DOT for a driveway permit. Larry Ballin and Bill Green suggested that the Board could approve this, pending receipt of the DES wetlands permit, and the DOT driveway permit. Peter Schiess disagreed, saying that the ZBA can grant the special exception for a wetland crossing, pending receipt of the DES wetland approval. The DOT driveway permit is not relevant to this request. John Holton repeated that that would be putting the cart before the horse. The Board ought to require DOT approval first, so it knows it's a possibility to have a driveway there. Larry Ballin reiterated that there is plenty of frontage on Main Street for a driveway.

He noted that DES is looking at this, and the New London Conservation Commission has signed off on it. Michelle Holton asked if the Conservation Commission has visited the property. It is not certain that they did.

Bill Gundy said that the Board hasn't seen anything demonstrating that this is a driveway, or anything demonstrating that it is not. Peter Schiess said they are just asking for a wetland crossing tonight.

Bill Bausch asked if this will set precedent. Both Larry Ballin and Randy Foose said not at all, this would not be a blanket approval for the entire property, but just for this one wetland crossing. Michelle Holton said, but the wetland crossing is folded into this being an existing driveway, and it is not.

Peter Stanley said it has been the plan all along to use this access as a driveway to the back lot. The applicant received approval to cross the middle of the front lot in order to build his house. At this point in time, Mr. Ewing owns both lots, including the lane, and there is no legal restriction for where he can put his driveway.

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

#### Deliberations

Larry Ballin said he appreciates the concern of the neighbors, but the request before the Board at this hearing is pretty straightforward, and he sees no reason to deny it.

Cheryl Devoe asked about the word "existing." Larry Ballin said the owner can access his back lot from any point on his property. The Board is simply looking at the wetland crossing.

Cheryl Devoe noted the applicant plans to cross the wetland at its narrowest point, and she is inclined to grant the special exception.

Randy Foose agreed, adding that it has received Conservation Commission endorsement. He suggested that the Board approve the special exception for the wetland crossing, but not embark upon a slippery slope of validating the driveway. Rather, he suggested the Board remain silent on the question of whether the gravel access there is a right of way or an existing driveway.

Brain Prescott agreed. The Board's job is to approve the wetland crossing, not how the applicant gets to it.

Larry Ballin moved to approve the special exception allowing this wetland crossing, pending approval from DES. He noted that the Conservation Commission has approved this, and that the Zoning Board cannot speak on the question of the driveway permit. Cheryl Devoe seconded the motion. There was no further discussion, and the motion was unanimously approved.

#### **PUBLIC HEARING**

**Michael Todd's appeal of the August 1, 2005 decision by the Board of Selectmen, concerning his property located at 159 Old Main Street. The appeal is submitted in accordance with Article XXI, §F of the New London Zoning Ordinance.**

Larry Ballin opened this public hearing at 8:35 p.m., called the roll, read the Notice of Hearing as posted, and announced that the hearing would be recorded.

#### Applicant's Presentation

Michael Todd referred the Board to the materials provided in his application packet including:

- The appeal application.
- Copies of:

- February 11, 2005 letter from Town Administrator to Michael Todd regarding the question of residency.
- Michael Todd's February 14, 2005 response.
- July 1, 2005 letter from abutters to Board of Selectmen referring to the free standing support for electric meters that had been placed in front of the residence.
- The July 22 confirmation of Mr. Todd's August 1 meeting with the Selectmen.
- Minutes of the August 1 Select Board meeting.
- August 9 notification to Mr. Todd of the Selectmen's decision that:
  - The board supporting the electric meters in front of his home does meet the definition of structure in the New London Zoning Ordinance, and therefore, per Article XXV, §3-a, a building permit is required.
  - The board appears to be in violation of the setback stipulated in Article V, §C-1, and therefore if it remains in that location, would also need a variance.
  - The board alters the character and appearance of the principal dwelling unit as a single family residence in violation of Article II, §18, c-1 and c-2.
- August 26, 2005 Notice of Violation from Town of New London to Michael Todd.
- August 29, 2005 letter from Patricia M. Panciocco of Wiggin & Nourie P.A. stating that that office will represent Michael Todd in the administrative appeal of the Selectmen's decision.

At this hearing, applicant Michael Todd submitted for the record, a letter from abutter Willy Jeromin stating that he (Jeromin) has no objections to the installation of the meter panel.

Michael Todd informed the Board that, in accordance with Article II, §18-b, he has received a permit for an accessory dwelling unit located at his property at 159 Old Main Street. Subsequent to receipt of that permit, and during the process of remodeling the historic cape, it was determined that the then-location of the electric meter under the gable was no longer adequate, safe, or acceptable to PSNH. Also, for the accessory unit, an additional (making a total of two) meters would be required. He pointed out that that left only two options: to locate the meters on the front of the historic cape, or to locate them on a separate board. He pointed out that the first option would have been unsightly, visible from the street, and would have required the trimming of limbs of a catalpa tree which stands in the yard, and perhaps is the only remaining catalpa in Town. He added that the remodeling has included replacement of the picket fence in front of the house, and therefore the free standing board supporting the two electric meters is not visible from the street now.

The question is: does this board supporting the electric meters qualify as a structure? He referred to the definition of structure on p. 32 of the Zoning Ordinance which offers examples of items which the definition includes, and examples of items which would be excluded. Meter panels are not included on either list. He pointed out that the inclusions include the phrase "other accessory structures and the example of that is "dish antennas or satellite earth stations that are over 3 feet in diameter." He said that would imply that satellite dishes under 3-feet would be excluded from the definition, and he pointed out that his meter panel is well under three-feet in size. The panel is incidental and supportive of the main dwelling unit, and is in keeping with the property's rural appeal. It is secondary to the main dwelling unit, and it is hidden from the street.

He referred to case law, and submitted that the Zoning Board can not look beyond the words of the ordinance, and will not add words. The Board should consider the intent of the acting body, and he referred to the preamble of the zoning ordinance that states the intent is: "preserving the Town's rural charm." His solution of not putting the meters on the front of the historic cape, but rather separate and hidden behind the picket fence, is not inconsistent with this intent.

He submitted photographs of the residence dated 2002, and more recent ones showing his remodeling and the location of the meter panel behind the picket fence.

He requested that the Zoning Board reverse the August 1 decision of the Selectmen, and find that the electric meter panel is not a structure and does not alter the appearance of the main residence.

Larry Ballin opened the floor to questions and comments.

Abutter Betsy Horn said she understands that this is an inexpensive way to install the electric meters, because the house is being turned into an apartment house. She said this electric meter panel is a structure, and though located behind the fence, it is ugly, close to the road, and vulnerable to snow ploughs.

Electrician Gary Zuger installed the panel, and said he would like to dispel the myth that this is a less expensive way to install meters. In addition to its original cost, the owner is now responsible for the utility from the board to the house. He added that PSNH does not permit boxes or enclosures around meters, and does not like to have meters on the backs of houses. PSNH requires that a meter panel be located no less than ten feet from a utility pole, and PSNH approved this location. PSNH does have a right-of-way there. He asked how a 3'x5'x<sup>3</sup>/<sub>4</sub>" piece of plywood can be considered a structure.

Abutter Eric Shultz said he thinks the question of whether this is a structure or not is silly. If the Board insists it be taken down, the meters will have to be placed on the front of this beautiful antique cape. He noted the damage caused to the old meters during the ice storm. He added that if Michael Todd had known he needed a permit for this, he would have gotten one. This has all come up after the fact.

Betsy Horn said that Michael Todd knows the ordinance, and the Selectmen immediately knew this is a structure. She said it's the principal. Everyone else has had to follow the ordinance. She said when she was building her house, she wanted to put three entrances in, but was not allowed to.

Brian Prescott agreed that there was no intention on the part of the applicant to avoid getting a permit if he'd thought one were required. He agreed that the meter panels are unsightly, and said this is a brand new issue that the Town will have to deal with.

Peter Stanley said the Town put this definition of structure into the ordinance at Town Meeting in 2003. He referred to Article XXI, §F stating that to grant this appeal, "the (Zoning) Board must apply the strict letter of the law." In arriving at their August 1 decision, the Selectmen did just that. They found that this is a structure. Mr. Todd can have it, but it requires a building permit, and it must meet the setback requirement.

Larry Ballin asked if telephone poles would therefore be considered structures under the new definition. Peter said, technically, yes. He agreed that the definition in the ordinance needs some tinkering.

He said the Zoning Board is dealing tonight with the question of whether or not the Board of Selectmen made an accurate interpretation of the law. Michael Todd said the Zoning Board must look at the intent of the legislative body.

Gary Zuger said the Town cannot override the utility company. He repeated that this panel is in a PSNH right-of-way, and he discredited the suggestion that the snow plough may hit it.

Bill Green asked Peter Stanley if the reason for the Selectmen's decision is that unless it is specifically excluded (in that written definition), it must be included. Peter Stanley said yes, that's the nature of zoning in New Hampshire. Under the definition, this is a structure. Right now, it does not have a building permit, and does not meet the setback requirement.

Cheryl Devoe asked if the Town will be seeing an influx of these variances in the future. Peter Stanley said existing ones predate the new definition of structure.

Larry Ballin asked if the Town allows essential services. Peter Stanley said per Article V, essential services are permitted in all districts, and he referred to the definition of Essential Services in Article II, which excepts Buildings. Gary Zuger asked if electricity is not considered an essential service. Peter Stanley said yes, but not with buildings.

Regarding the question of its location, and whether or not it is in the setback, question was raised about whether the property owner owns to the center line of the road, or to the edge of the right of way. Peter Stanley said the Town uses the edge of the right of way as the boundary; that is what the owner is taxed on.

Michael Todd reiterated that this is not on the list of items included in the definition of structure, and the list of inclusions has only one relevant example—that of satellite dishes, and only if they are greater than three feet in diameter. Peter Stanley said that is not given as an example but as a specific inclusion. Michael Todd asked if dish antenna would be allowed if they are smaller than three feet. Peter Stanley said yes.

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

### Deliberations

Bill Green said the issue is, Is this a structure? The definition could be clearer. Is something included if it is not spelled out? Peter Stanley said anything constructed or erected on the ground is a structure.

Bill Green said this seems more similar to a fence, and that falls under the list of exclusions. Looking at the photographs, Cheryl Devoe agreed, and pointed out that the meter panel appears to be incorporated into the fence, and fences are excluded as structures in the definition.

Randy Foose said he is inclined to focus on the Selectmen's decision. The Board is here tonight to uphold, or not, their August 1 decision. He said they (the Selectmen) deliberated this, and he said he supports their decision.

Brian Prescott said he feels the Board of Selectmen made the correct decision based on the information they had in the ordinance. Michael Todd said the Zoning Board is the ultimate decider of the interpretation of the zoning ordinance. Peter Stanley said the Zoning Board and the Board of Selectmen have the same authority (in interpreting the zoning ordinance).

Brian Prescott said he thinks this is a structure—it is not a fence—and that proper channels should be taken.

Larry Ballin agreed that this is not a fence, it is a structure. He said that the wording of the ordinance is poor, but as it is written, the Zoning Board has no choice but to uphold the August 1 decision of the Selectmen. He added that he feels the Town is opening a floodgate by pursuing this.

Brian Prescott asked if anyone can build these. Gary Zuger said he doubts it. Anything for electrical equipment would have to meet PSNH approval.

Randy Foose moved to sustain the August 1, 2005 decision of the Board of Selectmen. Brian Prescott seconded. There was no further discussion, and the vote was two (Randy Foose, Brian Prescott) to sustain the Selectmen's decision, and two (Cheryl Devoe, Bill Green) to grant the applicant's appeal. Chair Larry Ballin broke the tie by voting to uphold the Selectmen's August 1 decision.

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Meeting adjourned at 9:30 p.m.

Respectfully submitted,

S.A. Denz  
Recording Secretary