

**TOWN OF NEW LONDON  
ZONING BOARD OF ADJUSTMENT  
SEPTEMBER 19, 2005**

**PRESENT:** Larry Ballin (Chairman), Russ Cooper, Cheryl Devoe and alternates Laurie DiClerico, and Caroline Newkirk

**Public Hearing: Mill Stream Structures, Inc. for Michael and Anita Gelcius requesting a Special Exception to the terms of Article XIII, Section E (1) of the New London Zoning Ordinance in order to cross wetlands to connect to town sewer on property located at Fairway Lane in the ARR zone, Tax Map 124-010-000.**

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

Applicant's Presentation

Douglas O'Clair of Mill Stream Structures, Inc. represented the Gelcius's per their authorization letter. He explained that town sewer comes across the end of this property and the Gelcius's wanted to tie into it rather than have to find a location on their property for a private septic system. They will have a private well but want to be able to attach to town sewer. There is a high water drainage wetland area on the property that they will need to cross in order to make the connection. They need to breach the ditch, remove material, put in the line and then replace the ditch material after the connection. They will use silt fencing and hay bales for erosion control during construction. The Conservation Commission has reviewed their plans and given their blessing. They have applied to the State for their wetlands permit and they expect confirmation soon.

Zoning Administrator Peter Stanley said the Town has no problem with the request, especially since the Conservation Commission has given their approval. He went on to state that due to the proximity to wetlands, connecting to the public sewer is better environmentally than installing a private septic system.

The three abutters present reviewed the plans and had no objections.

Hearing no further comments or questions, Russ Cooper moved to close the public hearing and enter deliberations. Laurie DiClerico seconded. No further discussion. Motion unanimously approved.

Deliberations

Russ Cooper stated he feels this request is appropriate for a Special Exception with minimal impact and the fact that a public sewer is better for the ecology.

Russ Cooper moved to approve the Special Exception. Laurie DiClerico seconded. There was no further discussion. Motion unanimously approved.

**Public Hearing: David and Lynn Annicchiarico requesting a Variance as provided by Article V, Section C of the New London Zoning Regulations for a shed that was constructed with less than the required side yard setback on property located on Bunker Road in the R-1 zone, Tax Map 076-025-000.**

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

Applicant's Presentation

Mr. Annicchiarico stated that they had been storing their lawn mower, gas and other equipment under their house on Bunker Road along Pleasant Lake but had moisture problems so wanted to erect a shed on their property across the street. Mrs. Annicchiarico had seen sheds made at the county prison and ordered an 8' x 8' shed. She never thought that a building permit was necessary since it was not being built on site but was built at the prison. After it was installed on the site, the Zoning Administrator informed them that they were in violation and would need to obtain

an after-the-fact-building permit. They applied for the building permit, and it was denied by the Board of Selectmen as it did not meet the required side-yard setback which requires an aggregate minimum width of 50' with a minimum of 20' from any one side yard. They were referred to the Zoning Board for a variance.

They were before the Zoning Board this evening to seek the required variance. They explained that there is no spot where they could actually locate the shed due to the narrowness of the lot. This is also true of their house lot across the street.

Russ Cooper moved to close the public hearing and enter deliberations. Laurie DiClerico seconded. No further discussion. Motion unanimously approved.

#### Deliberations

The Chairman gave the Annicchiaricos a copy of the five findings of fact.

1. They discussed whether granting this variance would result in a diminution of value of surrounding properties. Larry Ballin stated that a variance would run with the property forever and the next owner might come back and request something that would impact the property in a greater way. The property presently serves as septic for two properties across the street, the Annicchiaricos and their neighbor. Cheryl Devoe stated that there should not be a diminution of property value as there are already a lot of non-conforming lots right in the area. Mrs. Annicchiarico stated that there have always been issues with property lines between neighbors on the lakeside lots and that they were more concerned with the unsafe storage of lawn mowers under their home and the combustibility of gas storage there. If there were a problem, they would prefer to lose a little shed than their home and lives.

They went on to state that they previously had received a variance for their property for a porch with restrictions that it could never be enclosed and asked if stipulations could be placed on the shed in a similar fashion.

Zoning Administrator Peter Stanley stated that the Zoning Board can impose reasonable conditions to prevent improper expansions on nonconforming uses per RSA 674 33. Jessie Levine stated that if they did annex the lots that would eliminate the non-conformity issue and might reduce their property tax burden. She gave them Ken McWilliams' name to contact to begin the process of annexation. The property owners were not averse to merging the two lots into one lot.

A motion was made by Russ Cooper to grant the Variance for the shed with the stipulation that the two lots are annexed into one. Cheryl Devoe seconded. This was unanimously approved.

Russ Cooper and Laurie DiClerico approved the minutes of July 25, 2005 with one amendment. On Page 4, #3, 4<sup>th</sup> word - the word "hardship" should be changed to "Variance".

**Public Hearing: Susan Hankin-Birke, Esq. representing John and Joan Hughes for a Variance as provided by Article XVI, Section C.2 and Article XXV, Section A,3,a of the New London Zoning Regulations. They wish to seek a variance to allow for the construction of a deck (after the fact) and a fence within the 50' setback from the shore of Messer Pond. The deck was constructed in the spring of 2004 without an approved building permit. The applicant also seeks a Variance to the terms of Article XXV, Section A,3,a which requires a building permit prior to the construction of any structure on property located at 63 White Pine Lane, in the R-2 zone, Tax Map 105-008-000.**

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

#### Applicant's Presentation:

Susan Hankin-Birke distributed a memorandum and attachments to the Zoning Board and asked those present to look at the map of the property showing the location of the fence and the wooden deck in question. She also

distributed photographs of portions of the fence and of the deck. Ms. Hankin-Birke's presentation followed the outline of the memo, copy attached. The fence is 54' from the shoreline in one corner but only 38' from the other. She claimed it was hard to give an accurate measurement due to blueberry bushes that grow at the water's edge. She stated that the Hughes were seeking a Variance of 12 to 15' from the shoreline to be allowed to keep the fence, which was in place when her clients purchased the property. She expressed safety issues for the Hughes' daughter who is blind and has a Seeing Eye dog. The dog, Douglas, needs the fenced in area to be let off his leash because while on his leash he is "working". She also stated that with such an expanse and the irregularities of the shoreline, there are safety issues for children and pets alike. The previous owner constructed the fence in 2002. The fence extends approximately 65' along the lakeside of the house and appears to have been placed so that it did not disturb much of the forested area of the lakeshore property. The gate in the fence is closest to the 54' measurement.

Also in violation of the shoreland regulation is a wooden platform that was built 12' from the shoreland by the Hughes' son-in-law in 2004 (while the Hughes were out of the country). It is 20 x 16' (320 square feet) in size and rests on concrete blocks over an existing rocky spot. He built it as a place for Karen Hughes and her fiancé Darryl (who is also blind) to be safely near the lake. Ms. Hankin-Birke's memo stated that since the platform is temporary in nature and not affixed to the land or any building, it did not occur to the Hughes that a building permit was required. She explained that the platform is a safer spot for both Karen and Darryl to sit than to have chairs sitting in the sand which might not be as flat an area and could possibly erode the surrounding area.

Town Administrator Jessie Levine explained that when the Zoning Administrator discovered that this deck and fence existed he had spoken to the Hughes' daughter and son-in-law. Mr. Stanley stated this evening that he had also contacted the Hughes by phone and explained that they would need to apply for an "after-the-fact" building permit. He also explained how it would be denied and they would then be referred to the Zoning Board to seek a Variance. The Hughes were also notified by certified mail on June 16, 2005 by Jessie Levine in which she stated that they were in violation for not having a building permit. The Hughes chose not to remove the deck or file for a building permit but instead wanted to go before the Zoning Board. Mr. Hughes denied ever discussing this with Peter Stanley.

Ms. Hankin-Birke stated that she would have assumed that if you were applying to the Zoning Board, you didn't need to apply for a building permit as well. Both Peter Stanley and Jessie Levine informed her that per the zoning ordinance, nothing could be constructed without a building permit, and it was the proper channels to follow in New London. Ms. Hankin-Birke stated that she did not want to debate this with someone from the Town and that is why she and her clients had come to the ZBA to seek a variance. She went on to state that she did not look at the zoning ordinance to see if this would be a building or not but instead came before the ZBA to see if a platform could be approved for use by blind people.

There ensued a discussion about the need to seek a variance to Article XXV. Larry Ballin stated that he did not believe that the Zoning Board could grant a variance from enforcement provisions of the Zoning Ordinance and suggested that the applicants withdraw their request. Ms. Levine stated that it was proper for the ZBA to consider any variation from the Zoning Ordinance, including the enforcement provisions. Ms. Hankin-Birke stated that she had only added this to her application at the suggestion of Land Use Coordinator Amy Rankins but that she was perfectly willing to withdraw it. She went on to say that if the Board of Selectmen levied fines for the Hughes' violations, they would come back to the ZBA. After additional discussion, Ms. Levine suggested that the issue of the building permit be discussed after the hearing on the other variance applications. Ms. Hankin-Birke went on to state that they clearly understood that they had a violation due to what the Zoning Administrator had told them so would just deal with Article XVI, C2 this evening; a variance for the fence and the wooden platform.

Larry Ballin said that the Board had received two letters from abutters, Robert and Lorraine Anderson and Dick and Roddy Denise. Both stated that they had no objections to the variance to maintain the fence and platform.

Ms. Hankin-Birke distributed pictures of both the fence and deck area and expressed how unobtrusive both are due to dense vegetation around both.

Ms. Hankin-Birke began her review of the five findings of fact as outlined in her memo.

1. She did not believe there would be a diminution of surrounding property values because the fence blends well into the natural environment and has been in existence for over three years. The platform was put in place to make it safer for Karen and Darryl to safely spend time near the water with extended family. No vegetation was disturbed when the platform was installed and it is barely visible from Messer Pond. The Hughes have also done additional planting to screen the deck.

Russ Cooper replied that the fence could be moved closer to the house which would remove the need for that variance. Larry Ballin stated that if the fence were moved it wouldn't look substantially different. He went on to state that he has done a lot of fencing over the years and at most they would need to move 5 or 6 fence posts. He reminded people that the shoreland overlay district ordinance is to protect the environment in the 50' setback. Dogs and kids in the fenced in area, which falls within the 50' setback, are disturbing vegetation. Mr. Hughes stated that in moving the fence, they would have to deal with an entire line of trees and with tree roots as well. Ms. Hankin-Birke felt they would be disturbing more than they would be helping by relocating the fence. Russ replied that he would like to focus on the ordinance rather than whether they can have the fence. He went on to state that the need for the fence is not the issue, the issue is where the fence is located.

2. Granting the variance is not contrary to the public interest: Ms. Hankin-Birke's memo stated that "public interest in this instance involved the preservation of the shore area for aesthetic and environmental reasons. The fence as located and installed is barely visible to the public from Messer Pond. The trees and shrubs are not disturbed by the presence of the fence. The fenced area will protect pets and small children from the water. Similarly, the platform is barely visible to the public from Messer Pond. Underneath the platform is a rocky area that appears to have been formerly used to burn brush. The platform minimizes erosion and impact which might otherwise occur with the use of the shore front area."

Jessie Levine stated that the argument that this is not contrary to public interest is wrong in that the public interest is to protect the lakes and natural shoreland. In fact, the Hughes have argued in favor of their private interest and not the public interest. She said that if safety is a concern there should be railings on the dock that protrudes out into the water and that there are no railings on the wooden platform either. She went on to state that the zoning ordinance would have allowed the Hughes to build a 4' walkway with railings and seats that could go down to the lake and still be in compliance. Instead the Hughes are asking for a variance for something that is not allowed. Ms. Levine said that the Hughes have argued that the use of chairs on the shoreline could cause erosion; however, while chairs are an allowed use, construction and disturbance of any kind are not allowed and are contrary to the spirit of the ordinance.

Peter Stanley said that the platform could not be ecologically better as no vegetation could grow under it; it is a impervious surface and as such is more likely to cause erosion. Ms. Hankin-Birke said that adding railings would be offensive and actually creates more of an eyesore. Mr. Hughes stated that Darryl uses a long white cane and railings would not help him navigate the area. He is usually aided by Karen and her dog so a four-foot walkway would not be wide enough for them to easily navigate the area. When asked by Larry Ballin whether the Hughes have considered the railing idea they said that it is not something they want to do. The platform gives Karen, Darryl, and the dog, as well as other family members, a place to congregate and enjoy the lake together.

3. Denial of the variance would result in unnecessary hardship to the owner: Per NH RSA 674:33 (V) the ZBA can grant a variance without finding a hardship arising from the condition of the land when reasonable accommodations are necessary to allow a person or persons with a recognized physical disability to reside in or regularly use the premises provided that: (a) any variance granted under this paragraph shall be in harmony with the general purpose and intent of the zoning ordinance and (b) In granting any variance pursuant to this paragraph, the zoning board of adjustment may provide, in a finding included in the variance, that the variance shall survive only so long as the particular person has a continuing need to use the premises.

Jessie Levine stated that she agreed that the hardship requirement should be waived in this case, but she did not believe that the platform was in harmony with the zoning ordinance as the shoreland ordinance states that there shall be no land disturbance whatsoever within the 50' buffer and that all structures must be set back a

minimum of 10 feet from the 50 foot vegetative buffer to accommodate land disturbance resulting from such activities. None of that took place here. Ms. Levine went on to state that Ms. Hankin-Birke made the argument that the platform was built for safety reasons but a dock with railings around it would be much safer and is an allowed use in the shoreland overlay district. The dock over the water is six feet wide and 30 feet long.

Mr. Hughes stated that when they walk down to the dock together with the dog, they cannot traverse the dock, it is not wide enough. He also stated that the dock is used by their other children and grandchildren and would not leave room on the dock for the dog, Karen and Darryl too. They feel the platform allows Karen and Darryl to get closer to the lake but still be safe. It is very important because their daughter is totally blind but wants to also be independent. She tries to experience life as much as possible and being on a narrow dock with railings is not the answer. Peter Stanley pointed out that there is 1000 sq. ft of decking around the lakeside of the house as well as a patio and screened area all out of the 50' setback from the water where the family can enjoy the lake. He went on to state the Hughes have also created a path to the lake by putting bark mulch along a 3' path leading down to the platform and lake. Larry Ballin asked Peter Stanley whether the 4' path that is allowed could be as circuitous as they wanted and he was told yes, that a pathway is more desirable than a 20' x 16' deck within the regulations. Larry stated the deck could always be removed when the property was sold.

The remaining two findings of fact, 4 and 5, were also reviewed by Ms. Hankin-Birke per her memo.

Russ Cooper made a motion to enter deliberations. Cheryl Devoe seconded. No further discussion. Motion unanimously approved.

Russ Cooper dealt with the fence first in stating that the argument of safety that was used is not relevant to this discussion. He questioned whether moving it would cause more harm to the environment. Cheryl Devoe stated that she could not make a decision on this idea as she did not have enough information on moving the fence because the Hughes have not explored this issue. Caroline Newkirk stated a person could be very creative with fencing and still be aesthetically pleasing while allowing them to meet the restrictions of the ordinance. Russ Cooper suggested the fence could stay but if and when it fails must be moved back to be compliant. Larry Ballin stated that moving fence posts is not that difficult and the idea of moving it when it fails has merit. There is certainly a lot of room where the fence could be moved so any repair would have to comply with the regulations at that time.

Larry Ballin went on to state that he was having a difficult time finding issues that would keep the deck but at the same time the way the RSAs are written, there is the opportunity for a compromise if the Hughes remove the deck when the hardship condition is no longer necessary. Russ stated that a 16' x 20' deck is a large deck – more than for just two people and a dog. It is already there and could be removed when the property is sold but at issue is still that it is within the 50' setback from the lake. Russ asked if the Hughes would be averse to cutting the deck in half? The Hughes stated that the only time it is ever used is when Karen, Darryl and the dog are there. At that time other family members enjoy being on the deck visiting with Karen and Darryl.

Jessie Levine stated that RSA 674:33 V does give the ZBA the opportunity to allow the deck to be removed, but the application still has to meet the other requirements for a variance, including meeting the intent of the ordinance. The Board is not considering the other four findings of fact. She can see where the hardship issue is removed by the statute but there are four other facts before the Board as well as the restrictions of the shoreland overlay ordinance and that construction was done without a permit. She also did not believe that the platform was in harmony with the ordinance as required by RSA 674:33 V. Ms. Hankin-Birke replied that she believes that there is no diminution of value in that the ground underneath the platform was rock, burned ash, and uneven stumps of trees – it was an eyesore that way and is now far more aesthetically pleasing.

At this point the audio tape ran out and the hearing was no longer being recorded.

Peter Stanley stated that he has no doubt that everyone on the lake would enjoy a platform like the Hughes have built but that if everyone on the lake had such a platform, then it would certainly create erosion and that is why building is not allowed within the 50' setback. He also pointed out that there had been a fire pit on the platform, which is also a violation and which added to the need for a larger platform. The Hughes said that the fire pit has

been removed. Jessie Levine stated that granting a variance is contrary to public interest as it is the intent of the ordinance to protect the waterfront. Larry Ballin did not feel the deck would have any effect on water quality.

Susan stated that she believes there is a lot of animosity by Peter Stanley and the Town toward her clients because there is a pre-existing dispute between them. She went on to state that the period of time for input has passed and she objects to the Town Administrator adding her opinion to the Zoning Board's deliberations. Larry Ballin rebutted that the ZBA is very well educated regarding the issue at hand and could determine which testimony was relevant and which to ignore. Ms. Hankin-Birke stated that the issue being raised by Mr. Stanley had no relevance to what is before the Board.

Russ Cooper questioned that if the Board was to require the deck to be cut in half, what would be the Hughes reply? The Hughes stated again that the deck is used only when Karen and Darryl are visiting as a place for the family to gather. There is no table or chairs regularly on the deck and only brought there when the family is gathering on it. An 8' x 10' deck would be very small but could be done if required. Mrs. Hughes was concerned that cutting the deck in half would expose the tree stumps and unlevel ground below the deck and would be hard to traverse. Russ Cooper said that if the idea is to allow the handicapped children to have a place to enjoy the lake then half the size could handle it.

Laurie DiClerico pointed out that the shoreland overlay district ordinance clearly points out that no construction or disturbance at all is allowed within 50 feet of the shoreline. Russ Cooper said that he is trying to find a compromise. At present the deck is for all the family not just the two handicapped people and the dog. It is a family gathering area. Half the size of the present deck would still allow the intended purpose of the deck – a safe place for the handicapped people to enjoy the lake. Mrs. Hughes again expressed her concern about the location of the rocks and the stumps if the deck size was cut in half.

A motion was made by Russ Cooper to (a) allow the Hughes to keep the fence as is until replacement or repair was required. At that point the fence will be moved to comply with the regulations in place at the time of repair or replacement and (b) have a 160 sq. ft. deck and remove the deck entirely at the time of sale or transfer of property or when the handicapped use is no longer needed. No one seconded his motion.

Laurie DiClerico stated that she believes that granting the variance is still contrary to the spirit of the ordinance and is contrary to public interest. She asked for clarification on "reasonable use" of property. Jessie Levine stated that reasonable use relates to the hardship requirement, and she feels the hardship issue is waived per RSA 674:33 (V). She added that the Board still needs to consider the other four criteria, which they aren't doing.

Larry Ballin reminded the Hughes that they would still need a building permit for the deck and for any future construction or alteration of the deck.

Laurie DiClerico made a new motion that to (a) approve the variance for the fence with the condition that it be moved into compliance with the regulations in place at the point the fence needs repair or replacing and (b) deny the variance for the deck. No one seconded her motion.

Cheryl Devoe stated that she did not like the idea of having to remove the platform at the time of "transfer" of the property because it could possibly be transferred within the family and they could still conceivably have the need for the handicapped use. She asked that the work "transfer" be removed from Russ's motion.

Therefore a motion was made by Russ Cooper to (a) allow the Hughes to keep the fence as is until replacement or repair is required. At that point the fence will be moved to comply with the regulations in place at the time of repair or replacement and (b) the Hughes may have a 160. Sq. ft. platform no closer to the lake than the present platform which must be removed entirely at the time of sale of property and upon good faith of the homeowner when the handicapped use is no longer required by the family. Cheryl Devoe seconded the motion. Caroline Newkirk, Russ Cooper and Cheryl Devoe voted in favor of the motion and Laurie DiClerico voted against this motion. Therefore, the motion passed.

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The meeting adjourned at 10:10 PM.

Respectfully submitted,

Carolyn E. Fraley, Clerk