

**Town of New London  
Zoning Board of Adjustments  
July 20, 2009**

**Present:** Laurie DiClerico, Bill Green (Chairman), Courtland Cross, Douglas Lyon, Michael Todd

Also present: Peter Stanley

Chair Green called the hearing to order at 7:30pm. by announcing that the hearing had been properly noticed in the InterTown Record, and on the Post Office bulletin board.

**SPECIAL EXCEPTION**

**Brenda Homan  
30 Maple Street  
New London, NH 03257**

**Tax Map: 129 Lot: 003**

**PURPOSE OF REQUESTED WAIVER:**

Area Variance to the terms of Article II, Section 16 of the New London Zoning Ordinance in order to **not** be required to install a 4-foot-high fence around a residential swimming pool.

Chair Green introduced Brenda Homan and asked her to explain her request to the ZBA.

Ms. Homan explained that they have almost 30 acres on a dead-end road, and in 2004 they installed an in-ground pool. She distributed a sketch of the pool to the board members. She noted that they have had the pool for six years and due to the size of the property, did not feel it was necessary to have it fenced. Ms. Homan explained that the pool is very close to the house, they are surrounded about 90% by stone walls, and that no one should be walking around the area near the pool. She also indicated that there were 14 abutters to her property, all but one of whom were contacted about the lack of fence. None of the abutters had any objections to her not having her pool fenced. In attendance at the meeting were two abutters, Mr. and Mrs. Bill Tye, who stated that they did not have any concern with Ms. Homan's pool not being fenced. Chair Green added that he had received a phone call from one of Ms. Homan's abutters, Mr. and Mrs. Leech, who also stated their comfort with there being no fence around her pool. Peter Stanley said that there were no questions or problems from the town.

Chair Green asked Ms. Homan to review her responses of her application for variance with the board.

Ms. Homan shared her statements to support her request of a variance from the provisions of Article 2 Section 16 of the Zoning Ordinance:

1. The proposed use would not diminish surrounding property values because:  
*Not putting a fence around the pool neither increases nor decreases the property values in the area.*
2. Granting the variance would not be contrary to the public interest because:  
*This is a private property (obviously) and "the public" does not have access to the pool.*
3. Denial of the variance would result in unnecessary hardship to the owner because:
  - a) The following special conditions of the property make an area variance necessary in order to allow the development as designed:  
*The pool is on a 29++ acre property and not in a subdivision-type location and where the safety of "uncontrolled" access by small children is not an issue.*
  - b) The same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden because:  
*Applicant filled in n/a here because **not** building a fence would not cause a financial burden.*
4. Granting the variance would do substantial justice because:  
*It simply does not (should not) apply due to our property size, location of pool and neighborhood.*

5. The use is not contrary to the spirit of the ordinance because:  
*The property is clearly private (and also marked by a "Private Drive" sign) surrounded by stone walls and access would be difficult for a child.*

Chair Green asked the board members for their thoughts on the issue at hand.

Doug Lyon asked about the building of the pool and the provision that a fence was promised as a condition of getting the building permit. He was concerned that the fencing portion of the plan had never been constructed.

Mr. Todd asked if it would be possible to review the property folder, as there was something in the folder that had caught his eye earlier that he would like to discuss. Mr. Stanley went to retrieve the folder.

Courtland Cross asked Mr. Todd a question regarding liability of the town should a child somehow find their way into the pool. Mr. Todd said that in a hypothetical situation, the plaintiff's attorney would sue every legitimate party, including those who may or may not have relaxed the standards to allow the absence of fencing around the pool. There could be no question that the pool presents a "child nuisance" which is something that presents a hazard to a child, which they are not able to understand or avoid. Mr. Todd remarked that even in the absence of small children in the neighborhood, he was not sure it eclipses the conditions of the requirement.

After reviewing the property folder, Mr. Todd noted that in the deed there is a 25' right-of-way that there that gives people a right to walk across her property. Ms. Homan was not aware of this right of way and neither she nor Mr. Todd could pinpoint where it was located. Mr. Todd added that part of her current use assessment requires that she keep the land open and mowed, which she has. In summary, Mr. Todd concluded that there is a public access on her land, no fences, and a wide open field that would make access to her pool fairly easy. He said that there is a chance that people could go onto her land and so there exists the potential for someone to wander into the pool. Mr. Todd felt that approving the variance would not be a wise thing to do. He asked Ms. Homan if she was aware that a right-of-way existed on her property. Ms. Homan said that she had not reviewed the deed prior to the meeting, but if that is what is stated in the deed, she would agree that, yes, a right-of-way existed on her property.

Chair Green moved to discuss and Laurie DiClerico made a motion to discuss. Cortland Cross seconded the motion.

Mr. Todd asked if the land was posted as "No Trespassing." Ms. Homan said that the sign says "Private Drive."

Chair Green said that he had gone through the property himself. He found the property to be quite a large parcel and noted that where the pool was located and shielded by house and barn, there were approximately 70-80 feet from the stone wall. In his opinion, he found it to be quite secluded. He said that he had not looked at the deed and was unaware of the right-of-way.

Chair Green wished to go through each of the applicant's responses again and have the board members comment on their reactions to them:

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

Mr. Cross said that he had trouble thinking about the potential of a wayward child wandering into the pool. He said he would feel heavily conscience stricken if a young child got into a pool that was not fenced and drown because of the variance being granted. He said he believed that it may result in a family not buying a piece of property in the area because of the concern for this potential hazard.

Mr. Lyon said he didn't have any evidence on property values being affected one way or another.

Ms. DiClerico was not sure it would affect the property values, and said that property values were not the major concern with regards to this issue.

Mr. Todd said that having an "attractive nuisance" on the property would decrease the property value. The surrounding property that would be in close proximity to an attractive nuisance would also see a decrease in their property values.

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

Mr. Lyon felt concerned that the ZBA had to decide where the line is where a public hazard remains or doesn't. He said he would be afraid that this would set precedence for the future and would open it up to the ability to change the ordinance. Mr. Lyon felt that the ordinance was put into place for the safety of the public interest. He felt that granting the variance would be contrary to the public interest.

Mr. Cross said that he would hate to be part of a decision that may result in some sort of tragedy. He believed that the fence requirements are made to keep the public interest in mind and doesn't feel compelled to let it go.

Chair Green said that this variance would not be hard to deny if it was involved in a neighborhood setting with a lot of people around. He noted that the pressure would be on the shoulders of the property owners and their liability. Because of the features of the property and it being so rural, there is a possibility that something could happen out there, but he wasn't sure that it was likely.

Ms. DiClerico said that the purpose of the ordinance is to promote safety and general welfare of the public. Just because the property is large it doesn't mean that something wouldn't happen. She said that she was worried about potential liability.

Mr. Todd agreed with what the rest of the board said. He reminded the board that part of their job is to enforce what has been written in the ordinance and there is no latitude given to them to make changes dependent on size or features of a property.

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

### **a.) The following special conditions of the property make an area variance necessary in order to allow the development as designed.**

Ms. DiClerico did not feel that not developing the fence would fit within the ordinance.

Mr. Todd explained that the hardship imposed is shared equally by all property owners. Homes with swimming pools all have a hardship of having to install a fence.

Mr. Lyon said that it is his understanding that their legal obligation is to review the special conditions of the property. He noted that the pool is allowable with a fence, the permit was given with the understanding that a fence would be built, and the criteria was not met.

Mr. Cross agreed with Mr. Lyon. He didn't believe that any hardship would come from building the fence.

### **3b. The same benefit cannot be achieved by some other reasonably feasible method that would not impose an undue financial burden because:**

Chair Green said this is an example where the requirement is backwards because they are trying NOT to create something. There really was no appropriate response to this question by the applicant.

Mr. Stanley suggested that the Homans may decide to install a hard, retractable cover on the pool. He said something like that would meet the criteria, although that is not what is being proposed. He said it is a worthy option and such a thing exists. He also suggested installing a sheep fence far enough away from the pool as to not obstruct the view, and they would still be complying with the ordinance. Mr. Cross asked how far from the water the fence has to be. Mr. Stanley noted that there is no stated distance, but that it just has to be enclosed by a fence at least 4' high.

## **4. Granting the variance would do substantial justice because:**

Mr. Todd did not think that granting the variance fits into the criteria. He said substantial justice does not allow the pool owner to be allowed **not** to have a fence. Mr. Green said to keep in mind that "the zoning restriction as applied interferes with the land-owners reasonable use of the property considering the unique setting of the property and its environment," and "No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restrictions on the property."

Chair Green said it is a unique setting because of the size and rural nature, but also the setting and the distance from nearby abutters. The likely-hood with neighbors that far away is not likely but is possible.

Mr. Todd interjected that the special conditions of the property that may allow for a variance are mitigated by the fact that the property is open with no fencing.

Mr. Stanley noted that the pool is not visible from the road. Only the pool furniture is visible.

Ms. DiClerico said that she did not think the public would be done justice if the variance was granted.

Mr. Lyon said the requirement of the ordinance was hard and fast. He admitted to the fact that he keeps coming back to the fact that the petitioner agreed to the fence upon receiving the building permit.

Mr. Cross said that if the board grants the variance, he is inviting others who put up a pool to argue about putting up a fence.

**5. The use is not contrary to the spirit to the ordinance because:**

Mr. Cross stated that as he said above, it is contrary to the spirit of the zoning ordinance. He hasn't heard anything about putting the fence up as a hard ship. He said that he has a big problem with the safety issue, no matter how remote it may be.

Mr. Lyon said that he felt sympathetic for the petitioner because of the large parcel of land, but feels that the ordinance is hard and fast and the is there to promote safety for the community.

Ms. DiClerico agreed with Mr. Lyon's remarks, as did Mr. Todd.

Chair Green moved to vote on the variance request. Mr. Lyon made a motion to vote and Mr. Cross seconded the motion.

**IT WAS MOVED (Michael Todd) AND SECONDED (Doug Lyon) that the variance requested from the provisions of Article 2, Section 16 of the Zoning Ordinance to allow Brenda Homan of 30 Maple Lane be denied, and require applicant to comply with the ordinance as originally written.  
THE MOTION WAS APPROVED UNANIMOUSLY**

Mr. Lyon expressed his sympathy with regards to the situation and hoped that she would take into consideration some of the suggestions brought forth by Peter Stanley in order to fulfill the requirement of the ordinance.

**SPECIAL EXCEPTION**

**John Souliotis  
394 Main Street  
New London, NH 03257**

**Tax Map: 084 Lot: 001**

**PURPOSE OF REQUESTED WAIVER:**

Variance to the terms of Article VII, section B, 1 of the New London Zoning Ordinance. Applicant seeks the variance in order to construct a handicap ramp on the existing building, with less than the required front yard setback, since the new structure is closer to the street than neighboring properties.

Chair Green introduced John Souliotis and Michael Chiarella, representing J&F Realty, and asked them to explain their request to the ZBA.

Mr. Souliotis admitted that he did not think of getting a variance to put a step in after he had just received permission from the Planning Board to create a new doorway in his building. He said that it was his plan to change the aesthetics of the ramp to make it more appealing. He said that if they were able to make it aesthetically pleasing,

they'd like to keep the ramp there. Chair Green noted that the walkway is in violation of the front yard setback which, Peter Stanley defined as being at least 30 feet from the right of way or the property line of the neighboring properties. Chair Green noted that approximately one year ago when this issue was reviewed by the ZBA, there were two choices that existed as entrance points to the building. One was where the ramp is on the front of the building, and the other was on the side of the building. Putting a ramp on the side of the building, Mr. Stanley explained would eliminate some of the sidewalk, and could impact some of the available parking. He went on to say that a landscaped ramp, where the earth would have been raised up to meet the doorway, would have been an option, as this type of ramp would not have required a variance and would not be considered a structure. This ramp was built over a year ago and Mr. Souliotis said that the only problem they see with the ramp is the aesthetics. He explained that the landscaping approach would not work because they would have to take the garden out. Mr. Souliotis said that what would be added to the ramp would be some lattice work and some ornamental items on the top of the rails.

Mr. Lyon asked for someone to refresh his memory on how the ramp got there in the first place. Mr. Stanley said that the original permit was to put a door in and no ramp. The ramp was constructed without a building permit. He explained that the other businesses in the building have steps that were either built in to the original building, or that were constructed. Chair Green added that part of their thinking was that there would be steps added to get into the building.

Mr. Todd said that the argument that Mr. Souliotis was making in this case was that the because there were preexisting non conforming steps on the opposite side of the building, that it was OK to build the ramp even though it was nonconforming to the area variance of the zoning ordinance . Mr. Souliotis agreed to this and said that he didn't realize that he couldn't put an entrance in when he had a permit to put the door in. Mr. Todd said that it was not convincing to him that the developer partitioned his building in the best way possible, and that there could have been a better way to create a handicapped exit. Mr. Sauliotis said that they did go to the Planning Board to get approval for the partitioning of the building. Mr. Stanley said that the Planning Board waived the requirement for a full site plan review. They understood that another business would be in there and a doorway was discussed, but they never addressed the issue on how people would enter the building.

Mr. Lyon asked if the need for a variation for the proposed ramp was because it came out further than any other part of the building, including the steps that were currently at that site. Mr. Stanley asked to leave the meeting to review the site and take some measurements of the ramp and steps with relation to the pavement. He left the meeting at this time.

Mr. Souliotis commented that the elderly people have expressed a great fondness of the ramp.

Mr. Chiarella indicated that if one looks at the whole neighboring area, there are many things that are similarly built up and so this ramp does not look out of the ordinary. Mr. Lyon said that the ordinance is very specific about what the criteria are and they can't make a decision outside of the criteria. Mr. Todd said that they are challenged to follow the ordinance and it isn't justifiable to change the ordinance just because something similar had been done earlier as a preexisting nonconforming use.

When Mr. Stanley returned, he explained that the building was 24 feet back from the inside edge of the paved sidewalk and 28 feet from the edge of the actual pavement. The right of way to the property is somewhere within that area. He said that it was at most 28 feet from edge of pavement. No part of it is legal as far as the 30 feet setback requirement is concerned. Mr. Stanley noted that the steps at one entrance are pressure treated and stick out 3 feet, 8 inches, and the other steps come out 4 feet, 7 inches. He added that the pressure-treated steps do not comply with their building codes, so were most likely built without oversight. He noted that Granite, stone or paved walkways are considered landscaped and not structures, however, concrete would be considered a structure.

Chair Green asked the board to look at this issue from another angle. He suggested imagining that Mr. Souliotis had just bought the building and was seeking a variance to put the ramp in with the same design that he was currently suggesting. What then, would the board say? Chair Green shared his view that there were some other possible options that may be suggested to Mr. Souliotis: 1. Create a man-made, landscaped ramp, or 2. incorporate the access of both stores within the inside of the building. He indicated that without the ramp, it is still possible to design an entrance into the store.

Mr. Lyon said that the argument being brought to the board is that there is no viable alternative, which is not the case. He explained that there is an alternative, that being a landscaped version of the ramp. Mr. Cross added that a year ago there was an alternative given to the developers and they continued to construct the ramp anyway.

Chair Green asked for a motion to discuss. Mr. Lyon moved a motion to discuss and Mr. Cross seconded the motion.

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

Mr. Cross said that if the board allows this variance, others would feel they could do the same thing. He said he did not feel that the appearance of the ramp would benefit others or increase property values. Chair Green said that this would probably not set a precedent, as each case would need to be identical in nature. Mr. Lyon and Ms. DiClerico agreed that there was no evidence that there would or wouldn't be a decrease in property value should the ramp remain.

**2. Granting the variance would not be contrary to the public interest because:**

Mr. Todd said that the ramp was not a benefit if it didn't comply with the ordinance. Mr. Lyon, Ms. DiClerico, and Mr. Cross believed that the ramp was a benefit to the public.

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

**a) The following special conditions of the property make an area variance necessary in order to allow the development as designed.**

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

Ms. DiClerico and Mr. Todd felt that there were some other reasonable methods that could be used. Mr. Lyon said that he was not convinced that the area variance is necessary to allow for a ramp. He said that the same benefit could be obtained by another feasible option, which is landscaping. Chair Green asked if the cost of the landscaped method would bring about undue financial burden.

Chair Green said he didn't have a problem with the ramp as long as it would look better than it does currently. He said he felt that a ramp is a huge benefit over steps due to the age ranges of the people who would be using it, but doesn't feel it is the only alternative. Mr. Souliotis said that even if they made a landscaped ramp, they would need some sort of railing. Chair Green said that this was true and that a railing would probably be considered a structure. Mr. Stanley interjected that a railing would not be considered a structure. He said that he is currently working on updating the definition of "structure" within the ordinance so that landscaping, railings, and fences would not be included in that category. Currently, it has been the practice of the zoning board not to consider such things to be structures, but that is not the way it is currently specified in the ordinance. He said he is hoping to make this more clearly defined.

Mr. Lyon asked if Mr. Souliotis could attach a railing directly onto the building. Mr. Stanley said that it would be OK as long as it was within the drip-line. He also suggested that a fence with a railing on top of it could be used, as a fence is not considered a structure and does not require a building permit. The board agreed that there were other options rather than the sort of ramp that was there currently. Mr. Stanley also indicated that the expense associated with a landscaped project was an issue, but that he knew of some other options and people who could give a more competitive estimate.

Mr. Chiarella asked what the difference was between the ramp that is there already and a landscaped ramp. Mr. Stanley explained that once they build a ramp, it is possible that they may want to cover it to prohibit snow from falling on it. Then perhaps they would want to enclose it, thus moving the whole building 4 feet, 7 inches closer to the road.

**4. Granting this variance would do substantial justice because:**

Mr. Cross said that there are alternative ways to achieve the result. Granting the variance would imply that there were no other options. The entire board agreed with Mr. Cross's remark.

**5. The use is not contrary to the spirit of the ordinance because:**

Mr. Todd said that the structure goes against the ordinance. Ms. DiClerico agreed with Mr. Todd.

Mr. Lyon said that the structure specifically goes against the ordinance. Mr. Cross added that the ordinance is in place to restrict infringement upon setbacks from the road, and this structure goes against the ordinance.

Chair Green asked for a motion.

**IT WAS MOVED (Michael Todd) AND SECONDED (Doug Lyon) to deny the application for an area variance for J&F Realty on 394 Main Street. THE MOTION WAS APPROVED UNANIMOUSLY.**

Mr. Green asked for a motion to approve the minutes from May 11<sup>th</sup>, since there were no amendments suggested by the board members.

**IT WAS MOVED (Lauria DiClerico) AND SECONDED (Doug Lyon) to approve the minutes from May 11, 2009 as circulated. THE MOTION WAS APPROVED UNANIMOUSLY.**

The meeting was adjourned at 9:15pm

Respectfully submitted,

Kristy Heath, Recording Secretary  
New London Planning Board