



TOWN OF  
NEW LONDON, NEW HAMPSHIRE

375 MAIN STREET • NEW LONDON, NH 03257 • WWW.NL-NH.COM

**ZONING BOARD OF ADJUSTMENT (ZBA)  
MEETING MINUTES  
Tuesday, March 19, 2019  
6:30 PM**

**MEMBERS PRESENT:** W. Michael Todd, Katharine Fischer, Ann Bedard, Heidi Lauridsen (Alt), Frank Anzalone, Stan Bright, Bruce Hudson (Alt)

**MEMBERS EXCUSED:** Douglas W. Lyon

**STAFF PRESENT:** Nicole Gage, Zoning Administrator

**OTHERS PRESENT:** Jeremy Bonin, Kim Bonin, Steve Ensign, Carol Foss, Pat Kocher, Jim Lewis, Tim Condon, Scott Steffey, Alan Kozlowski, Michael Chiarella, Susan Chiarella, John Muller, Sally Kozlowski, Rod Koran, Pam Perkins, Bo Quackenbos

1. **Call to Order** – Michael Todd called the meeting to order at 6:30 pm. Doug Lyon is absent tonight so Michael Todd will chair the meeting. Stan Bright will be a voting member tonight.

2. **Roll Call** – Michael Todd called the roll.

3. **Review Minutes of February 19, 2019 and March 5, 2019**

**IT WAS MOVED (Michael Todd) AND SECONDED (Heidi Lauridsen) to approve the minutes of the February 19, 2019 meeting. THE MOTION WAS APPROVED UNANIMOUSLY**

**IT WAS MOVED (Katherine Fischer) AND SECONDED (Ann Bedard) to approve the minutes of the March 5, 2019 meeting. THE MOTION WAS APPROVED UNANIMOUSLY**

4. **Case #ZBA19-02 – Appeal of Administrative Decision**

**PUBLIC HEARING**

**Parcel ID 033-008-000, 18 Camp Sunapee Road**

**Zoned R2 w/ Shore Land Overlay**

**Jeremy Bonin, Bonin Architects, Applicant / Ton-Ko-Lah LLC, Owner.**

Pertaining to an appeal of a decision made by a town official alleging that their interpretation of the New London Zoning Ordinance is in some way in error, such that: the applicant was advised “*Article XX Section B.5.b.ii requires that a voluntary tear down of a building, or relocation, would require that the new structure be built to conform with zoning.*” The specific zoning regulation(s) involved in the appeal include the following: Article XX, Section B.5.b.ii of the zoning ordinance.

Jeremy Bonin is presenting on behalf of the property owners. This case will be heard *de novo*. Mr. Bonin clarified a mis-citation on his part. Building permit number 13-122A was not straddling the 50 foot buffer and he misread that from the Conservation Commission minutes. Mr. Bonin stated that tracing the history of these articles is difficult as both language and locations change within our ordinance. Most evident is the move of the language of article 16 to article XX suggested by Lucie

St. John, Zoning Administrator at that time, codified by the Planning Board and enacted by town warrant in 2015.

Mr. Bonin stated RSA 675.5 provides a process for an aggrieved party to appeal a decision of an officer or department of the municipality. Specifically they are seeking reversal of the interpretation by the zoning administrator pertaining to article XX section B.5.b.ii through this appeal. This section pertains to the voluntary replacement of a home straddling the 50 foot waterfront buffer. The Zoning Administrator's interpretation is a voluntary replacement requires complete compliance with the ordinance. The Zoning Administrator's interpretation is in conflict with the *de facto* policy established over the past six years at a minimum. Chair Todd corrected this to state "the alleged" *de facto* policy. Mr. Bonin has provided the Board with examples of building permits granted for several years without request for a variance. These projects all straddle the 50 foot waterfront buffer. He has provided a permit granted by the current zoning administrator only last year that didn't require a variance which is for a project straddling the 50 foot waterfront buffer. He provided a case heard by this Board in which it was unanimously agreed that a variance for this very article was not required. He provided documentation illustrating the general consensus among the Town Administrator, the Zoning Administrator, the Town Planner and this Board that there is ambiguity not only in this specific section but with the article in its entirety. Mr. Bonin cited several emails and notices of decisions that prove the article is confusing and should be addressed by the Planning Board.

Mr. Bonin stated that given the ambiguity and the inconsistent manner applied to other applicants, it is clear there has been an "administrative gloss" with regard to the interpretation of this article. Chair Todd again stated "alleged administrative gloss". (An "administrative gloss" is a statutory construction used by the courts where a policy is applied so often it becomes the demonstrated intent of the regulating authority, in the absence of legislative intent to the contrary.) Mr. Bonin stated there is no just reason this appeal should be denied given such clear evidence of ambiguity and the historical consistency in its interpretation. Most significantly, this Board has already ruled on the applicability of these sections in an identical case and found the variance to not be required. Mr. Bonin is asking that the Board appeal the decision and stand by the alleged *de facto* policy established over many years by both the previous Zoning Administrators and the Board.

Chair Todd asked Mr. Bonin if he agreed that the drafting of corrections to the zoning ordinance is the responsibility of the Planning Board. Mr. Bonin stated he does agree. Mr. Todd asked Mr. Bonin if he was the current chair of the Planning Board? Mr. Bonin responded he was not the current chair of the Board, but still sat on it.

Steven Ensign asked why there was a change from before. He asked if approvals have occurred previously, what caused this not to be interpreted to be within the guidelines. Chair Todd stated that with regard to decisions made by the Board, the doctrine of *res judicata* (meaning the matter has been decided before) does not apply to our decisions in the same manner as in the courts of law. Each application is judged upon its own by the Zoning Administrator and Town Counsel. In this instance they have chosen to decide this in a particular way and the applicant has taken exception to it. Petitioners here are alleging that the same treatment has occurred before and therefore a precedent has been duly set.

Steven Root stated the ordinance was reorganized in 2015 and asked if the issue was clearer in the earlier version of the ordinance or did it not make a difference? Chair Todd stated a challenge they face is that previously a spreadsheet was maintained that tracked all of the decisions the Board reached and cross referenced all the articles under which decisions were made. This spreadsheet has not been kept up to date. Mr. Bonin stated the Town warrant article asked that sections J and K be deleted and moved to article XX at the suggestion of Lucie St. John.

Ann Bedard disputed that the properties are identical as Mr. Bonin suggested. All wetlands, setbacks and shore lines are different on each lot. She finds it hard to believe that the Planning Board has allowed it to stay that ambiguous and open to interpretation. Frank Anzalone responded that the Planning Board members are volunteers and this takes a lot of time. This is one of the items the Planning Board is planning to address this year. Mr. Bonin clarified that what he meant about them being identical is in reference to the ordinance. They are either straddling the 50 foot waterfront buffer or they aren't. He has worked on two projects in the past two years that were not required to come before this Board for a variance and both were granted permits. Both were straddling the waterfront buffer. Mr. Bonin stated he is not proposing to do anything that has not been done in the past. He has cited five projects where this has been done within the 50 foot waterfront buffer.

**IT WAS MOVED (Michael Todd) AND SECONDED (Frank Anzalone) to DISCUSS. THE MOTION WAS APPROVED UNANIMOUSLY.**

Katharine Fischer stated that it should be subject to a request for a variance and should be considered by the Board. Chair Todd stated there is no dispute that this straddles the waterfront buffer. The primary objective is the preservation and health of the lakes and streams. Frank Anzalone stated it meets all the rest of the requirements so it's just the straddle portion that doesn't comply. Chair Todd stated with respect to *de facto* policy, in order for that to be present there has to be three factors:

1. Alleged ambiguity in the relevant portion of the ordinance
2. Consistent demonstrated decisions showing this part of the ordinance has been dealt with in a particular manner consistently
3. Absence of legislative action showing a contrary intent to the *de facto* policy

We've already heard testimony that the ZBA has tried to amend the elements and have shown that people are aware of it and have tried to bring it to the Planning Board to make it clearer.

Chair Todd stated that he can't sustain a finding that all three of these objectives have been met sufficient to admit that a *de facto* policy exists. He can't find that there is a *de facto* policy and he cannot find that an "administrative gloss" has been placed on a particular section of the ordinance by the conduct of the Zoning Administrator, ZBA, and the Planning Board. He is inclined to make a motion to support and agree with the finding of the Zoning Administrator on this matter.

**A MOTION WAS MADE (Ann Bedard) and SECONDED (Stan Bright) to DENY the appeal ZBA19-02 and REAFFIRM the administrative decision for which the appeal was sought. The appeal fails with a vote of 4-1. THE MOTION CARRIES, THE APPEAL FAILS.**

#### **5. Case #ZBA19-03 – Variance**

##### **PUBLIC HEARING**

**Parcel ID 033-008-000, 18 Camp Sunapee Road**

**Zoned R2 w/ Shore Land Overlay**

**Jeremy Bonin, Bonin Architects, Applicant / Ton-Ko-Lah LLC, Owner.**

*A Variance is requested from the Provisions of Article XVI, C.2 and Article XX, Section B.5.b.ii of the zoning ordinance to permit the reconstruction and expansion of an existing nonconforming home straddling the waterfront buffer.*

Since the administrative appeal failed, the remedy on behalf of Mr. Bonin's clients is to seek a variance.

Mr. Bonin stated the proposed reconstruction within the buffer is no larger in footprint and no taller than the existing home. The proposed expansion is conforming to all regulations and does not further increase any non-conformity and the interpretation of the Zoning Administrator is something we are all familiar with so he won't review that again. He asked the Board that the variance requirement for article XX be found unnecessary as this matter has been before this Board and ruled upon previously. In September, 2015 the New London Zoning Board determined variances were not required from sections J1 and J2 of Article XX. He also asked the Board to rule that a variance would not be required for article XVI, C.2 as that section defines permitted uses within the shore land overlay district of which single family is outlined. Also, the home predates the enactment of zoning and the requirement of a variance from this section would obviate the definition of a legal non-conforming structure. The reason he is asking is related to the example he gave from the decision of September, 2015 located at Forest Acres Road. In the notice of decision it was stated that a variance was not required from article XVI, J1 and J2. This is a previous example of a case from not long ago that came before this Board.

Chair Todd noted that a previous example does not indicate precedent. He stated that what is important is that instead of focusing on prior decisions made, he should go forward on the merits of this particular case.

Fuss and O'Neil did a complete site survey and a soil analysis on this site. None of the proposed work is in any of the wetlands. Frank Anzalone commented that there are basically two choices. The house can be built where the footprint is now where it is already disturbed or he can set it back and build into the wetlands. The wetlands are really what protect our lakes. Mr. Bonin stated the area they are allowed to build in, excluding the setback for the lake and the wetlands is actually smaller than the footprint of the house that is there. The new house will be less non-conforming. This property is unique with regards to the hardship criteria due to the special characteristics and topography. A typical conforming lot will provide 60% of buildable area. With this lot, due to wetlands and all the setbacks, only 7.3% of the area of the lot is buildable.

With regards to XVI, C.2 this is for use. Nicole Gage clarified that the variance is not asking to vary from the requirements to do erosion control. She also wanted clarification about what part of the waterfront buffer will be disturbed during construction activity. There is normally ten feet given to allow for construction activity. Will they need more than that for this project? Mr. Bonin stated no, and they are following a previous decision that placed three conditions on a variance granted. These three conditions were : (1) the proposed building will not exceed existing height within the buffer, (2) temporary disturbance will be limited to within 5 feet of the existing footprint and (3) excavation will occur within the existing footprint within the buffer. Chair Todd would like to note this and impose these conditions in this decision, were the variance approved.

Mr. Bonin reviewed the five criteria:

Not Contrary to public interest - granting this variance in no way threatens the public health, safety or welfare nor does it unduly or to a marked degree conflict with the primary zoning objectives of our ordinance or further increase a non-conformity.

The Spirit of the Ordinance is Observed - granting the variance is not injurious to the public or private rights of others and does not alter the essential character of the neighborhood. The spirit of any zoning ordinance is to not further increase any non-conformity, of which they are not doing. The intent is to have it be a residence that is replacing a residence.

Substantial Justice is Done - Granting this variance does not cause harm to the general public that outweighs the benefit to the applicant. No harm is done to the general public in use of the lake and no harm is apparent to the private rights of any direct abutter.

Values of Surround Properties - The values of the surrounding properties are not diminished. Granting this request increases the value of the property as a garage and a new house are positive attributes contributing to the assessed and market values of the property.

Unnecessary Hardship - This lot is burdened by the limited buildable area compared to abutting properties in the neighborhood. The application of these provisions does not advance the purpose of the ordinance in any fair or substantial manner. The proposed use is a reasonable one as a residence and a garage are both uses permitted in the R2 district under article V sections A.1 and A7, single family dwelling and accessory building respectively.

It was noted that there is also a garage and a cottage on the property.

Frank Anzalone asked about erosion control at the existing house for runoff from the roof. Mr. Bonin stated there currently is none but there will be on the new project. Mr. Anzalone feels a condition should be that they should meet shore land approval. This provision will minimize the impact on the groundwater of the new construction. The ordinance was written to protect the lake and the water quality needs to be protected.

Ann Bedard asked about the square footage. Mr. Bonin didn't have those dimensions. Frank Anzalone agrees that the dimensions are required. Mr. Bonin stated he can provide this. In the old house there were 3 bedrooms and the new house will have 4 bedrooms. The septic system will be replaced. Ms. Bedard stated a condition should be placed regarding future footprint expansion.

Carol Foss asked about the impervious surfaces. The new house is proposed to have 16.6% of impervious surface which is well below the 20% thresh hold for New London.

**A MOTION WAS MADE (Frank Anzalone) and SECONDED (Katharine Fischer) to DISCUSS. THE MOTION WAS APPROVED UNANIMOUSLY.**

Mr. Anzalone stated if the Board chose to grant the variance, the Board can control the amount of impact on the area.

**A MOTION WAS MADE (Frank Anzalone) and SECONDED (Stan Bright) to approve the variance with the following conditions:**

- 1. The proposed building does not exceed the existing height within the buffer.**
- 2. The temporary disturbance is limited to within five feet of the existing footprint within the buffer.**
- 3. Excavation will occur from within the existing footprint within the buffer.**
- 4. There will be no further expansion within the 50 foot buffer without Zoning Board approval.**
- 5. All the required permits will be obtained from DES.**
- 6. Prior to obtaining a building permit being issued, a site plan will be submitted to the Zoning Administrator indicating the shortest distance from the footprint of the house to the shoreline and overall dimensions of the entire house will be included.**
- 7. The decision and site plan will be filed with the Merrimack County of Deeds.**

**THE MOTION WAS APPROVED UNANIMOUSLY 5-0**

**6. Case #ZBA19-05 - Appeal of Administrative Decision**

**PUBLIC HEARING**

**Parcel ID 091-022-000, 112 Herrick Cove Lane**

**Zoned R2 with Shore Land Overlay**

**Scott Steffey, Applicant / Scott W. Steffey Living Trust, Owner.** Pertaining to an appeal of a decision made by a town official alleging that their interpretation of the New London Zoning Ordinance is in some way in error, such that: a Building Permit was denied *“for not conforming with Article XX, Section B.5.b.ii which requires that a replacement or relocation of a non-conforming structure only be permitted if the building or structure is brought into compliance with all of the standards of the zoning ordinance, including the aspect that makes the existing Building or Structure Nonconforming. To come into compliance, the proposal must meet all setbacks, including the 50-foot Waterfront Buffer outlined in Article XVI, Section E.2;”* and whereas the proposal should be permitted as an Alteration. The specific zoning regulation(s) involved in the appeal include the following: Article XX, Sections B.1, B.2, B.3 & B.5.b.ii of the zoning ordinance.

Scott Steffey of 112 Herrick Cove attended the meeting. Mr. Steffey stated that on the advice of his land use counsel, he would like to ask that the information provided in the first appealed case tonight be enveloped into his case as the cases are similar. Chair Todd informed him that they failed to find a finding of *de facto* policy in that case. Chair Todd was suggested that this be presented as a new case.

Mr. Steffey stated that they moved forward with the application late in 2018. As they were getting guidance from the Town on how best to proceed, there was discussion about whether it should be filed as a voluntary remove and replace or as an alteration. It was decided to file it as an alteration. In doing this, they submitted plans and committed to keep 75-80% of the wall structure that currently exists in the end product. This would be sufficient to meet any standard that they could ascertain with regards to alteration. Chair Todd wanted clarification because what he was reading in the application is that 75-80% of the existing wall would be removed. Mr. Steffey clarified that what they said was the 75-80% of the walls would be maintained and used in the permanent structure. From his standpoint, he wants the builder to comply with the rules and regulations but also create the safest worksite. If that requires disassembling or dismantling things that would be up to them. If there is a requirement of structure staying in place as a condition for the permit they would be happy to meet that.

Frank Anzalone asked him what his plans were for the house. Is it being torn down? Mr. Steffey responded that walls are being maintained but they are being moved back three feet. They would be disassembled and reassembled. Mr. Anzalone clarified that the plan is to pick it up and move it. Mr. Steffey replied that the state is changing the calculation for the reference line and that requires a three foot movement. It would be less non-conforming. Mr. Anzalone stated whether he is saving walls or not, it doesn't matter. He is taking it down and building a new house even if he's using used lumber. Mr. Steffey stated the definition of alter includes any change or alteration in the footprint so it anticipates a movement of footprint. Basically he is taking down a house, saving some walls and moving it back. Mr. Steffey doesn't understand how dismantle or disassemble is synonymous with demolish. Mr. Anzalone asked why he doesn't just renovate it. Mr. Steffey stated he would like to put in a foundation and in order to do that this is what the State came back with as a requirement. Chair Todd commented that the State is presuming that you have to demolish it to get that done. If the Board agrees with the Zoning Administrator's previous decision in this case, the remedy would be to ask for a variance.

Chair Todd stated he is not inclined, based on the evidence before him, to say the Zoning Administrator made an error. Ann Bedard agrees the only way the ZBA can help him is if he comes back for a variance.

Alan Kozlowski lives next door to this property. He understands it is difficult to take this shell of a building and disassemble and move it but he would like the Board to make sure that what is being proposed is actually what happens.

**A MOTION WAS MADE (Frank Anzalone) and SECONDED (Stan Bright) to DISCUSS. THE MOTION WAS APPROVED UNANIMOUSLY.**

Chair Todd stated they have two choices. They can deny his appeal and state the Zoning Administrator was correct in her decision. If the applicant still wishes to proceed with the improvement of his property as presented, he may request a Variance.

**A MOTION WAS MADE (Michael Todd) and SECONDED (Stan Bright) to DENY the appeal and uphold the Administrative Decision. The appeal fails with a vote of 4-1. THE MOTION CARRIES, THE APPEAL FAILS.**

**7. Other Business**

The next meeting will be held on April 2, 2019.

**8. Motion to Adjourn**

**A MOTION WAS MADE (Michael Todd) and SECONDED (Frank Anzalone) to adjourn the meeting. THE MOTION WAS APPROVED UNANIMOUSLY.**

The meeting was adjourned at 8:53pm.

Respectfully submitted,

Trina Dawson  
Recording Secretary  
Town of New London